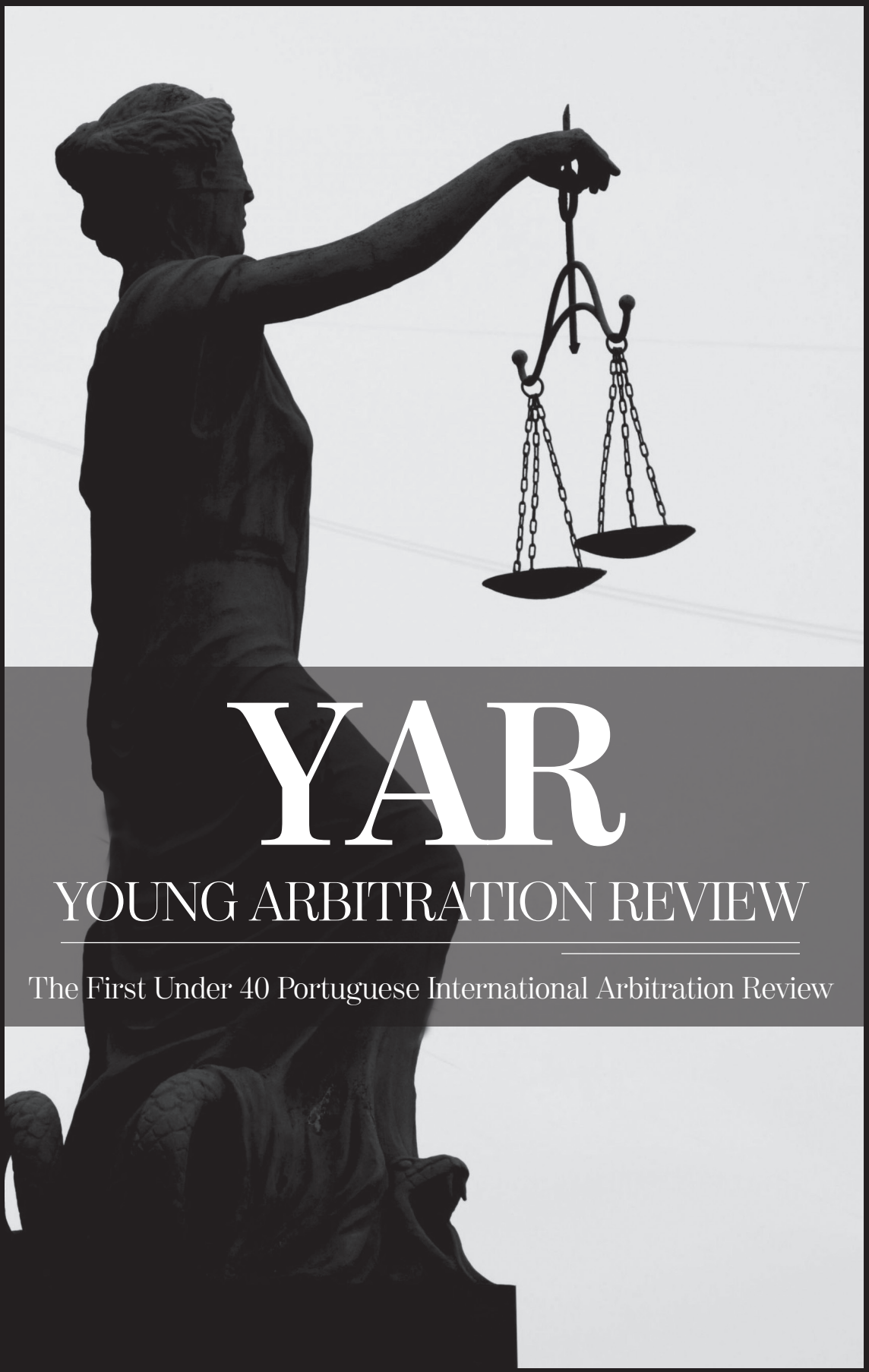


YAR

YOUNG ARBITRATION REVIEW

The First Under 40 Portuguese International Arbitration Review

YAR

YOUNG ARBITRATION REVIEW

EDITION 0 • JANUARY 2011

SUBSCRIPTIONS

To subscribe to YAR – Young Arbitration Review, please contact young.arbitration review@gmail.com

Subscriptions until February, 10 2011 shall be reduced to the promotional price of € 150

Annual subscription: € 200

[EDITORIAL]

We are delighted to present the First Edition of YAR, The Young Arbitration Review, a new publication dedicated to international arbitration's matters & trends analyzed through the eyes of young practitioners and lawyers with expertise and interest in arbitration.

YAR is the first International Arbitration Review in Portugal, written in English, by Lawyers from several jurisdictions and spread worldwide. Aimed at the development of arbitration as an alternative method for dispute resolution, YAR is meant to be a unique tool for arbitration players to be informed and aware of the developments of arbitration from an international perspective.

In this first Edition, we are honoured to host and share the insightful view of an expert in international arbitration, partner at a leading US law firm and based in London, on constancy and change in international arbitration.

One shall then go through the recent developments of arbitration in Portugal, notably regarding the existing project for a complete new arbitration Statute, as well as a view on the power of interim measures ordered by Portuguese Arbitral Tribunals. Moreover, one shall proceed to the winds of change in the Spanish Arbitration Act, which will then lead us to an analysis on the Italian perspective on arbitration within company law disputes. Furthermore, one will have the opportunity to understand how the revision of international arbitral awards operates in Switzerland. Finally, we move into the recent trends in Florida with the adoption of the UNCITRAL Model Law.

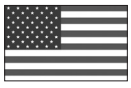
We hope you appreciate the First Edition of YAR.

January 10, 2011
Pedro Sousa Uva and Gonçalo Malheiro

[ARTICLES]

CONSTANCY AND CHANGE IN INTERNATIONAL ARBITRATION

By Steven P. Finizio



This first edition of Young Arbitration Review arrives from Lisbon at a time when interest in international arbitration is flourishing. That interest has brought with it an explosion of courses, conferences, seminars, books, journals, list serves, podcasts and blogs dedicated to observing, discussing -- and best of all arguing about -- the practice of international arbitration. Despite that chorus of voices – or rather because of it – there is no doubt that YAR and those who participate in creating it can and will change international arbitration, and will inevitably be changed as lawyers because of their interest in international arbitration. That is because international arbitration is a rarity among legal practices in being directly and immediately influenced by the ongoing dialogue among those who participate in it – those parties who have made the choice to adopt it to resolve their disputes, those lawyers (and, it must not be forgotten, other professionals) who act as counsel and arbitrators, and those who administer it and study it.

This dialogue crosses many borders and involves many voices. One of YAR's particular appeals is that it includes younger voices from a jurisdiction – Portugal – that has not been heard loudly in the existing international discussion. At the same time, as the backgrounds of those who have contributed to this first edition and the subjects they address demonstrate, YAR is founded with an understanding that international arbitration at its best involves an opportunity for lawyers from one jurisdiction to listen to and draw upon the experiences of those from other jurisdictions while adding their own experiences and views to the conversation.

My colleague Gary Born begins his masterful treatise on international arbitration with a fascinating survey of the historical roots of arbitration, which he traces to antiquity (and to Greek and Egyptian mythology). He shows that something very much like what we recognize today as international arbitration – both state-to-state and commercial arbitration -- was used thousands of years B.C., throughout the ancient world, from Kirkuk to Athens to Rome, and has a rich history in Europe, Asia, the Middle East and Africa. He describes how arbitration remained common in Europe throughout the Middle Ages, survived judicial and legislative hostility in England, France and the United States in the 18th and 19th centuries, while remaining vital in other parts of Europe, and has been embraced in the late 19th and 20th centuries in European and Anglo-American jurisdictions. He also describes the distrust of arbitration that developed in parts of Asia, Africa, the Middle East and Latin America more recently, which we have seen reversed in the last decades.

In tracing this history, Born observes that certain key attributes remain remarkably constant and enduring – procedural flexibility, informality, an essentially adversarial process presented through counsel/agents, an adjudicative procedure with decisions based on the evidence and legal submissions of the parties, the institution of party-nominated co-arbitrators, and continuing efforts to devise procedures that will be fair, efficient and expeditious – as well as a belief that arbitration is more likely than litigation to produce sensible results and to facilitate settlement.

That its most basic qualities have remained so constant for so long might seem to contradict my suggestion that YAR can change arbitration. But it is because of arbitration's flexibility and its informality -- and its need to be responsive to its users' demands that it remain efficient, expeditious while also fair -- that arbitration neces-

sarily evolves and changes. And because those who are concerned about arbitration and participate in it are able to put into action new ideas – almost entirely unencumbered and unconstrained by legislators or rule-makers – innovation can have a remarkable immediacy.

International arbitration is susceptible to change in great part because it is a creature of compromise. This necessarily means compromise among participants coming from different places: international arbitration by its very nature is a collision between (usually very smart and always very motivated) parties from different legal systems and with different experiences, expectations and sensibilities. It therefore requires participants to confront (and sometimes to participate in despite their own objections) procedures that reflect these diverse views.

Many of the developments that have enabled arbitration to flourish in recent years as a practice area result from compromise among different approaches to dispute resolution found in different legal systems. This is seen in the oft-praised (and sometimes questioned) "harmonization" of international arbitration practice and procedures. Harmonization is reflected in any number of influential developments, including various institutional rules, UNCITRAL's model law and its arbitration rules, the work of the IBA, including the recently revised Rules on the Taking of Evidence in International Arbitration, and the notable (and perhaps regrettable) explosion in protocols and guidelines, including those already established (e.g., the IBA Guidelines on Conflicts of Interest, the Chartered Institute of Arbitrators Protocol for E-Disclosure, the CEDR Rules for the Facilitation of Settlement in International Arbitration to name just a few of many) and those that are currently subject to great amounts of discussion (e.g., various proposals for transnational codes of ethics).

Of course, as with any compromise, in this process, vibrant differences get reduced to generalizations (for example, overly simplistic divisions into "common law" versus "civil law") and there is a natural dissatisfaction with the balance reached (as can be seen in complaints that the IBA Rules on the Taking of Evidence are tilted to a common law approach rather than a civil law one). While it is healthy to question whether the right balance has been struck, there also should be no doubt that these "harmonized" approaches reflect real compromises and that international arbitration does not closely resemble litigation practice and procedure in the courts of any jurisdiction in the world today. Notable commentators, including William Park, Gabrielle Kaufmann-Kohler and Lord Mustill, among others, have provided thoughtful discussions of the development of what Mustill has called the "unwritten procedural code of international arbitration."

The recognition of certain common (best?) (useful?) practices in international arbitration allows participants to speak of this thing – "international arbitration" – as something identifiable and to do so with some shared sense of what it is, and how it should best proceed. This is transmitted through conferences, seminars, updates, practitioner's guides, journals, commentaries, blogs, referred to by Kaufmann-Kohler (and others) as a "global community of knowledge," and creates a point of commonality shared by those engaged regularly in international arbitration and an entry point available to those who become involved in it. This creates the opportunity for the cross-border dialogue that YAR has now joined.

The informality and flexibility that has remained essential to arbitration since antiquity means that that there is constant need for compromise in another basic way: international arbitration rules (and national laws regulating arbitration) are drafted so as to provide a procedural framework, rather than comprehensive prescriptive rules. Each new case therefore stands alone and requires agreements to be reached among the international collection of participants in that specific case – the parties, the lawyers, the arbitrators (and, at least in some cases, the administrators and the experts). These compromises must be reached in an adversarial context where parties and their representatives are focused on gaining advantage -- on winning -- not on the development of global practices or norms. The sense of some shared understanding of what international arbitration is helps facilitates dialogue and compromise in this process.

But it is critical that these shared understandings and systematic compromises do not become limitations -- boilerplate templates imposed thoughtlessly and repeatedly -- choking away the informality and flexibility of arbitration. How to be take advantage of the possibilities inherent in that flexibility should be considered afresh in the very particular context of each new case. As early as possible and throughout the proceedings, the arbitrators and counsel should assess the specific requirements of the case before them, and the best possible solutions for that case. Everyone involved in a case should feel obligated to ask "why" in this particular case, and to consider the legitimate expectations of the parties to that case. Some asserted "common" practice recognized among a professionalized group of repeat participants should not obscure who "owns" a case. Particularly in the context of international commercial arbitration, it should not be forgotten that the proceeding is a creature of another very deliberate compromise – an express agreement between commercial parties to settle a dispute through a broadly defined and flexible process called arbitration.

Ultimately, "international arbitration" and its practice exists as many individual cases. This is true no matter whether we can convincingly identify common principles or best practices. Parties and their representatives bring to each case their own expectations as to how their own dispute should be resolved, and parties generally should be free to propose particular approaches as they best see fit, without being unduly constrained by some current general understanding of common or best practice among those of us who focus our professional attention on international arbitration. And the reality is that as more and more parties from around the world begin to engage regularly in international arbitration their expectations and voices will change the process in individual cases and therefore, inevitably and appropriately, influence arbitration practice more generally – and this is true whether these parties are from South Korea, Brazil, Portugal or Texas.

That is why it is worrying to hear experienced arbitration lawyers categorically reject certain procedures or techniques as outside the norms of international arbitration or as harmful to international arbitration. That is not to say that any process a party demands should be accepted (or that an excessive concern for due process over efficiency is not a vice), or to ignore the wisdom gained from experience as reflected in commonly accepted practices. (This certainly is not a call for U.S. style depositions as a regular feature in international arbitration.) But those who engage in international arbitration, whether as counsel or arbitrators, must be alive to the wide range of procedural options that can be employed in dispute resolution, and open to their possibilities, no matter how unfamiliar or contrary to the practice in that person's home jurisdiction.

Indeed, arbitrators and counsel should pay attention to the

advantages and disadvantages of "foreign" procedural tools so that if they choose (or are compelled) to employ one of those tools in a case, they do so effectively and efficiently. (And, yes, this includes understanding the implications of metadata and other issues related to electronically stored information.) This is part of flexibility – and it is how change happens -- and it cannot be avoided by those who want to engage in international arbitration today or see it move forward.

International arbitration will only continue to exist as a meaningful practice if its users believe (as they have for centuries) that it continues to lead to sensible outcomes in cross-border disputes more reliably and efficiently than litigation in national courts. This means that, for international arbitration to survive and to thrive, those who are interested in it have to constantly strive for ways to respond to any inefficiencies that emerge, while also maintaining the principle of fairness. The requires a constant and very real process of re-consideration.

There also is a pressure for innovation that is accelerated by our ever shrinking and ever competitive professional world. This is a world in which concerns, criticisms, disappointments and failures are aired globally and not just among lawyers, but among the more experienced and sophisticated companies who choose (for now) to use international arbitration. This also is a world in which, in a matter of any few months, a self-identified community meets for conferences in Rio de Janeiro, Seoul, Singapore, Mauritius, Moscow, and Vancouver (the list goes on and on), and where news and commentary about developments is digested, digitalized and delivered around the world to the computers of thousands of interested participants almost instantly. Today, as I sit at my desk in London, I have received updates from competitors, colleagues, friends and strangers about – among many other things – the implementation of the new arbitration law in Vietnam, a district court decision in New York on the standard for setting aside an arbitral award, the ICC's consideration of an English court decision about discrimination in the selection of arbitrators, and a Swedish Supreme Court decision about the meaning of the place of arbitration.

At the moment, there are any number of issues that are receiving particular attention in the community that concerns itself with international arbitration. There is serious ongoing concern about the time and costs frequently associated with international arbitration. There are repeated complaints about the supposed "Americanization" of arbitral procedures and, in particular, about the perceived growth in the scope of document disclosure and risks relating to "e-discovery." There are questions about the need for greater transparency in investor-state proceedings particularly but also in commercial arbitration. Whether all of these problems are real and how they are best addressed can be and is being debated. There should be no doubt, however, that "international arbitration" has the capacity to and does change. Some change is institutional and can be relatively slow (as compromise by committee usually is). But international arbitration also is capable of changing rapidly and organically, and such change often comes through ideas from individuals implemented in individual cases.

There are a number of examples of procedural innovations championed by individuals that have quickly been adopted as regular features in international practice or, to borrow Jan Paulsson's phase, that have become part of the intellectual property of those exposed to them. To name just a few well-known examples: Alan Redfern, who practices in London, has given international arbitration the Redfern Schedule, which is now ubiquitous in document disclosure disputes; Wolfgang Peter, who practices in Geneva, has championed witness conferencing (or "hot-tubbing") which is now a regular feature at many hearings; Karl-Heinz Bockstiegel, who teaches in Cologne, uses a method of controlling time at hearings that has been widely followed; Lucy Reed, who practices in New York, has recently advocated for arbitrators to schedule pre-hearing meetings of the tribunal to review the file and prepare together; and Klaus Sachs, who practices in Munich, received great attention in 2010 for his proposal at the ICCA Conference for a protocol for parties to jointly appoint experts. None of these ideas exists in any law or rule. The first three, however, have been adopted for use in arbitrations around the world in a relatively short period, and the latter two should quickly be influential – and all because of merit, not because of any legislative or judicial fiat.

These ideas have been influential in part because of their straightforward practicality. They also are influential because, while they may draw upon existing practices in a particular jurisdiction, they have not been adopted wholesale from any national legal system. They also all have invariably and undoubtedly been improved by their individual champion's exposure to the compromised and international aspects of international arbitration. This brings me back to where I started – the promise that YAR can change international arbitration and international arbitration can change those who participate in YAR.

In the pages that follow, young lawyers from around the world have come together to discuss topics that should be of interest to anyone interested in international arbitration: in two articles, Portuguese lawyers draw on comparative and model law examples to address both the specific and practical issue of whether an arbitral tribunal in Portugal has the authority to issue interim measures and to call more broadly for a new arbitration law in Portugal; a Spanish lawyer describes experience under Spain's recently enacted arbitration law, adapted from the UNCITRAL Model Law, and proposals that have been made for amending it; an Italian lawyer identifies lessons from recent Italian legislation regulating the use of arbitration clauses in articles of incorporation; a Swiss lawyer explains an important recent decision by the Swiss Federal Supreme Court which addressed fundamental aspects of the relationship between courts and arbitral tribunals, and held that a court (rather than the arbitral tribunal which issued the award) was the appropriate authority for deciding whether to revise the award; and, in the guise of reporting on Florida's adoption of the UNCITRAL Model Law, two American lawyers discuss what draws international parties to choose a particular place of arbitration and how one place (Miami) is promoting itself as an international arbitration venue. These articles and the views of these lawyers should matter to those in Portugal who want to know about, participate in and develop international arbitration there and to those of us who want to know about international arbitration in Portugal, and anywhere in the world.

Those of us lucky enough to be engaged with international arbitration today should celebrate the launch of YAR. We should celebrate the challenges that new and young voices from diverse backgrounds offer to us. And we should celebrate the promise that they offer in answer to international arbitration's constant and enduring call for responsiveness and innovation.

Steven P. Finizio
London, December 2010

A NEW ARBITRATION STATUTE FOR PORTUGAL?

By Pedro Sousa Uva

The call for a new arbitration statute in Portugal is no longer an effortless idea in the head of the Portuguese arbitration community. It is indeed a fact: Portugal needs a more modern law on voluntary arbitration. If the current panorama remains the same, the new Arbitration Statute will be greatly inspired on the UNCITRAL Model Law (Model Law).

Over the last few months, a second[1] legislation bill has been subject to larger debate within practitioners, arbitrators, professors and lawyers. It has been widely recognized that the Arbitration Statute in force (LAV)[2] is not entirely following the trends of international arbitration in certain aspects nor is it addressing many of the aspects that are understood as needed to be regulated in an arbitration statute. The new legislation bill, as it is currently drafted, appears to be a more complete and sophisticated law than the current one. It is inspired not only on the Model Law but also by different jurisdictions, notably Spain, Germany, Switzerland and France.

The following proposals in the legislation bill are many and cover several aspects. We shall consider some of them below:

Regarding the criteria for arbitrability, it is understood that the actual Arbitration Statute (LAV) needs some degree of review. The legislative bill approaches, in that sense, partially Swiss Law[3] and mainly German Law[4] as inspiring jurisdictions. It suggests that the actual prevailing criteria of *disposable rights*[5] should change into one where disputes are arbitrable whenever related to interests of economic interest (*natureza patrimonial*[6]) or of disputes that, despite not having such economic interest, parties may nevertheless conclude a settlement on the issue in dispute[7].

Moreover, as to the duties[8] of the arbitrator itself, the new legislative bill includes, on one hand, a clear reference to independence and impartiality of the arbitrators as indispensable requisites to perform their jurisdictional duties . It also regulates the respective procedure for removal of arbitrators that do not comply with such duties. On the other hand, it includes express references to the liability of arbitrators notably that they are not liable for damages emerging from the awards they render, except for those cases where judicial magistrates would be[9]. Within liability for the rendered awards, the arbitrator's liability has effect only inter partes, this is, only the parties may file a lawsuit against the arbitrators in fault, not the Portuguese State, thus meaning that the parties are not entitled to be compensated by the Portuguese State for an arbitrator

misfault, but only by the arbitrators themselves[10].

Concerning the principle of kompetenz-kompetenz, the legislative bill establishes that the arbitral tribunal is now competent to decide on its own jurisdiction regarding a State Court before which a suit on the merits was filled (the so called negative effect of kompetenz-kompetenz). This means, inter alia, that when faced with an arbitration agreement, a State Court should declare itself incompetent if a lawsuit is pending with the same parties, same claim and same grounds for such claim, or if a lawsuit is not yet pending, in case the dispute is included as a dispute to be resolved by arbitration under the arbitration agreement.

Additionally, the legislation bill regulates in detail important aspects related to interim measures[11] , something which simply is not referred to in the Arbitration Statute (LAV) in force and, therefore, has been something dealt within jurisprudence. With the new legislation bill, one finds a definition of interim measures[12] for purposes of arbitration, its goal and requisites for ordering an interim measure by a tribunal, as well as it regulates preliminary orders and recognition or enforcement of interim measures , respective grounds for their refusal[13] and interim measures ordered by State Courts[14].

Several other matters are now referred to and regulated in detail in the new legislative bill, notably regarding the confidentiality of the information obtained and documentation presented during the arbitration, the intervention of third parties and certain rules regarding the appeal and challenges of the arbitral award.

Regarding the appeal of the award, it is worth mentioning that the current Arbitration Statute admits such possibility in national arbitrations if parties have not expressly excluded such right in the arbitration agreement. Thus, it remains possible nowadays for national arbitrations to appeal an award before the court of Appeal - save if parties have granted the power to decide according to equity - at the place of arbitration in case parties have not expressly excluded the right to appeal[15].

Now, the legislative bill, if approved, will turn the exception into the rule and establish that the award is final and binding and therefore, not subject to appeal, unless the parties expressly referred to such possibility in the arbitration agreement[16]. This proposed change follows the trend of the majority of arbitration statutes.

For now, the discussion on the merits and remaining imperfections of the legislation bill remains open. Let us hope that for next Christmas arbitration players will already be working with a new Arbitration Statute, if in fact, the latter reveals to be more advantageous than the current one.

Lisbon, December 2010

1. The first legislative bill was sent back for revision on certain aspects.
2. Portuguese Law on Voluntary Arbitration is regulated by Law no. 31/86 of 29 August 1986, as amended by Decree-Law no. 38/2003 of 8 March 2003.
3. Article 177 of Swiss Private International Law (1990): "1. Any dispute involving property may be the subject-matter of an arbitration" (…);
4. Section 1030 of German Arbitration Law (ZPO): "(1) Any claim involving an economic interest can be the subject of an arbitration agreement. An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to conclude a settlement on the issue in dispute."
5. Save for those which have been exclusively submitted by a special act to court or to compulsory national arbitration, as per article 1.1 LAV.
6. Article 1.1 of the legislative bill.
7. Article 1.2 of the legislative bill.
8. Article 9.3 of the legislative bill.
9. Article 9.4 of the legislative bill.
10. Comment 31 of article 9.5 of the Commented legislative bill available at the website of Associação Portuguesa de Arbitragem - http://arbitragem.pt/projectos/lav/lav-anotada210509.pdf
11. Article 20 of the legislative bill.
12. Article 27 of the legislative bill.
13. Article 28 of the legislative bill.
14. Article 29 of the legislative bill.
15. Article 29, 1 and 2 of LAV.
16. Article 39, 4 of the legislative bill.

INTERIM MEASURES

By Gonçalo Malheiro

I. This article will focus on one particular point related to the question of jurisdiction and the concurrent powers of State Courts and Arbitral Tribunals, in Portugal, to grant an interim measure.

In fact, the current Portuguese Statute omits any provision in that respect. However, the legislative bill of a new arbitration statute, prepared by Associação Portuguesa de Arbitragem (entity appointed by the Portuguese government) sets out a special proceeding regarding interim measures granted by Tribunals. This legislative bill is still in discussion and can not be considered as the definitive version. On the other hand, the Regulation of the Arbitration Court of the Portuguese Chamber of Commerce also has a special provision regarding interim measures which justifies a special mention in this article.

In this article, we will analyse how Portuguese Courts deal with this matter and how these new provisions provided by Associação Portuguesa de Arbitragem and by the Portuguese Chamber of Commerce represent a revolutionary step for this particular issue.

Firstly, we will make a short reference to the different types of interim measures applied by Courts and Tribunals in Portugal. This reference to the different types of interim measures is done by comparing them with international regulations in order to allow an easier understanding for the readers not familiarized with Portuguese Statute.

II. The importance of interim measures in any given dispute is clear, be it before a State Court or before a Tribunal. In many cases the interim measure is the only way to guarantee that the final decision will be effective, because, as an example, there is a risk that the debtor will not pay the debt and that his assets will be dissipated. Thus the creditor may have to request the seizure of such assets to facilitate the payment of the credit.

Two main types of provisional or conservatory measures can be distinguished:

1) Measures to prevent irreparable harm and promote stabilization of the relationship between the parties.

As per the case mentioned above, we may provide the examples of a request for the seizure of goods (in this case, as we will see bellow, it is controversial if a Tribunal may grant an attachment order or freeze the assets of the opposite party); the request for one party to provide security or the request for an authorization to sell perishable goods without delay.

2) Measures for the preservation of evidence.

This case can be exemplified by article 145 of the French New Code of Civil Procedure, under which the Court can order "statutory investigative measures at the request of any interested person, in ex parte or emergency proceedings". In French jurisprudence, it is generally accepted that an arbitration agreement does not prevent the application of this article (except when the Tribunal was already constituted). Furthermore, the English Arbitration Act states in its article 38 (4) that the Tribunal may order the inspection, photographing, preservation, custody or detention of the property or that samples should be taken from, or any observation be made of the property.

Under article 27 of the Model Law, the Tribunal or a party (with the approval of the Tribunal) may request from the competent Court assistance in taking evidence. The English Arbitration Act has a similar provision, in its article 43 it is stated that a party may use the same Court procedures as those available in relation to legal proceedings to secure the attendance of a witness before the Tribunal in order to give oral testimony, to produce documents or other material evidence. In general, any Tribunal can grant such interim measures because it is understood that they are directly related to the subject matter in dispute and are requested in order to guarantee an effective and fair

decision on the dispute.

This classification of interim measures is, of course, very general and can take different forms.

III. Portuguese Statute no. 31/86, 29th August, omits any reference to interim measures. This has opened the door to several interpretations by Courts, practitioners and statute professors regarding the possibility of interim measures being granted by Tribunals.

Initially, there was a tendency followed by Portuguese Courts not to accept that an interim measure could be granted by a Tribunal. However, in the last years, this perspective has changed and the Courts are opened to consider a different role for the Tribunals. This change is also explained by the growing importance of arbitration which is reflected in the increase in the number of practitioners and in the number of arbitrations in Portugal, as well as in the development of studies and academic works in this area of statute.

Nowadays, despite the omission of the Portuguese Statute in such regard, it is generally accepted that a Tribunal may grant an interim measure, except when the interim measure is related to the attachment of assets. In this case, the Portuguese Courts have stated that this attachment is related with the use of coercive powers and therefore such attachment is considered to be part of the enforcement proceedings, which falls within the exclusive jurisdiction of State Courts.

The Portuguese Courts have concluded that whenever a freezing order is related to the coercive character of the measure, the Tribunal is prevented from granting such interim measures and the parties in dispute are forced to file a separate proceeding in the State Court even when the Tribunal is already formed and an arbitration proceeding is pending.

It should be noted that this represents an important evolution from when Portuguese Courts started ruling on this type of disputes. It was their understanding that in all cases Tribunals were prevented to grant an interim measure and they should refer the case to a State Court.

Confirming this progress in how an interim measure may be granted by a Tribunal, the new legislative bill of the Arbitration Statute (which has been prepared by the Portuguese entity Associação Portuguesa de Arbitragem, but is still under discussion and waiting for a final approval by the government) provides a detailed regime for its application.

In this legislative bill, it is stated that unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, after hearing the other party, grant an interim measure.

The legislative bill establishes the different types of interim measures: a) To maintain or restore the status quo pending determination of the dispute; b) To take action that would prevent or refrain from taking action that is likely to cause harm or prejudice the arbitral process itself; c) To provide means of preserving assets out of which a subsequent award may be satisfied and d) To preserve evidence that may be relevant and material to the resolution of the dispute.

Furthermore, the legislative bill defines the requirements for granting interim measures, which are basically two: (i) A serious probability that the right invoked by the requesting party exists and (ii) a sufficiently founded fear that it will be harmed.

This new legislative bill represents a unique step regarding the rules for appplying interim measures, especially by contrast with the current statute, which omits any reference to the application of interim measures.

A last word on the rules of arbitration of the Portuguese Chamber of Commerce and Industry, the main Portuguese arbitration centre, which offers a complete set of arbitration services. In these rules, it is provided that unless otherwise agreed by the parties, a Tribunal may grant interim measures (article 4th).

A preliminary order shall expire after twenty days from the date on which it was issued by the Tribunal. However, the Tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice thereof and had an opportunity to present its position about it.

Regarding the recognition and enforcement of interim measures, it is stated that an interim measure issued by a Tribunal shall be binding to the parties and may be enforced upon application to the competent Court. The Court where recognition or enforcement is sought may order the requesting party to provide appropriate security if the Tribunal has not already made a determination with respect to that matter or when such decision is necessary to protect the rights of third parties.

Finally, regarding interim measures granted by a Court, it is stated that Courts have the same power of issuing interim measures in relation to arbitration proceedings, irrespective of the place where they occur, in the same terms as in the proceedings which are submitted to Courts. In this case, Courts shall exercise such power in accordance with their own procedures, taking into consideration the specific features of international arbitration.

This new legislative bill represents a unique step regarding the regulation of application of interim measures, especially by contrast with the current statute, which omits any reference to the application of interim measures.

A last word on the rules of arbitration of the Portuguese Chamber of Commerce and Industry, which is the main Portuguese arbitration Institution, which offers a complete set of arbitration services. In these rules, it is provided that unless otherwise agreed by the parties, a Tribunal may grant interim measures (article 4th).

To conclude with, both the recent rulings of Portuguese Courts and the main arbitration rules applicable in Portugal show a new orientation whereby Tribunals are effectively granting interim measures.

WINDS OF CHANGE IN SPANISH ARBITRATION ACT

By Alfonso Maristany

In March 2004, the Spanish Arbitration Act (Ley 60/2003, de 23 de diciembre, de Arbitraje) entered into force. This Act entailed the implementation of the guidelines set forth by the 1985 UNCITRAL arbitration Model Law for the first time in Spain. The country left behind 16 years of an autonomous Arbitration Act and, taking advantage of the international experience in many countries since the publication of the 1985 UNCITRAL Model Law, enacted an Arbitration Act that has proven to be a boost for arbitration in Spain. The Spanish Arbitration Act regulates arbitrations having seat in Spain, whether they are national or international. According to the Act, an arbitration is international in three cases: (i) if in the moment of the conclusion of the arbitration agreement, the parties had their domiciles in different States, (ii) if the seat of the arbitration, the place of performance of the obligation in dispute or the place with which the obligation to be performed has a closest relation is not the country where the parties have their domiciles and (iii) if the dispute is related to international trade.

The regulation of national and international arbitration is basically the same. Only some exceptions apply to international arbitration. It could be thus said that a major implementation of the UNCITRAL Model Law has taken place in Spain with the current Spanish Arbitration Act. Only six years after, however, the Spanish Ministry of Justice has already proposed the first major amendments to the Act. They focus on very substantial aspects of the Act such as the competent courts for giving support to arbitration (in appointment of arbitrators and challenge and enforcement of awards), arbitration exceptions in judicial proceedings, the role of the arbitration institutions, impartiality and independence of arbitrators, arbitration in equity, dissenting opinions, motivation of awards, *extra petita* awards, violation of national public order and, finally, proceedings for challenging of awards.

Preliminary as the project still is, predictions as to what will be the final content of the amendments –if there is any- approved by the Parliament, would be mere hypotheses. A brief outline of some of the projected amendments could be, nonetheless, of the interest of those who envisage working in an arbitration having seat or somehow related to Spain.

This brief article is thus aimed at giving a summary of the most relevant projected changes in the Spanish Arbitration Act. Amendments aimed only at internal Spanish civil procedure (such as the competent courts for giving support to arbitrations, the arbitration exceptions and the award challenging procedure) will not be dealt with.

First of all, as far as the arbitration institutions are concerned, it is proposed that they are requested to guarantee the transparency and independence of the arbitrators they appoint. Up to now, arbitration institutions are only liable for any damage caused by bad faith, reckless disregard of their duties or willful misconduct on their part. This is why the measure is likely to find strong opposition among the vast majority of arbitration institutions, who will probably not be willing to guarantee more than their best efforts regarding the independence of the arbirators appointed. In addition to that, both arbitrators and arbitration institutions (on behalf of the arbitrators they appoint) will be obliged to contract a civil liability insurance policy.

Secondly, an amendment as to nationality of arbitrators has been proposed. The current Act establishes that, unless there is an agreement by the parties on the contrary, nationality of arbitrators cannot be a restriction for being appointed as arbitrator. This reference to nationality is purported to be withdrawn from the revised Act. It can be inferred from this that nationality of arbitrators could become a valid ground for not being appointed to act as arbitrator in Spain even when the parties have agreed on this possibililty.

Another proposed amendment is aimed at the professional qualification of arbitrators. The proposal is that, in national arbitrations that are to be resolved by three arbitrators, one of them will necessary have to be a qualified lawyer. Under the current wording of the Act, one of the arbitrators must always be a qualified lawyer, but the parties are free to exclude this requirement. The amendment, however, will make the requirement mandatory. It is aimed basically at guaranteeing that, in complex and high demanding arbitrations, some basic legal standards will always be taken into consideration in the proceedings and in the award.

As per arbitration in equity, a major amendment is projected. It will only be allowed provided that the parties have expressly agreed on this and the arbitration is international.

The need for an express agreement by the parties was already provided by the current wording of the Act (in the same way it is provided for by the UNCITRAL Model Law), but the prohibition of national arbitration based in equity will for sure be questioned. The reason given by the Justice Ministry for such amendment is that the resolution of national disputes in equity should be preferably left to mediation, an ADR system on which there is also a recent project of law.

As far as the award is concerned, relevant amendments have been projected as well. Should the amendment be approved, arbitrators will no longer have the possibility of adding dissenting opinions to the awards and the parties will not be entitled to agree that arbitrators will not have to sate reasons in their award.

And last but not least, the threshold of violation of public policy of a ground for setting aside awards is definitely lowered. The current wording of the Act merely refers to the award being in conflict with public policy. The proposed amendment consists of adding the requirement that the violation is manifest.

To conclude, very relevant amendments are on their way and reactions are expected among arbitration practitioners, judges, scholars and most of the professionals involved in the arbitration guild.

Alfonso Maristany

THE ROLE OF ARBITRATION IN COMPANY LAW DISPUTES

The Italian Perspective • By Pietro Ferrario

I. Introduction

The law no. 5 of 17th January 2003 has introduced, in the Italian legal system, specific rules with regard to arbitration proceedings involving companies.

The purpose of the above mentioned law was to provide ad hoc rules for all the disputes involving corporations, including those before Courts and those dealt with by mediation/conciliation.

Thus, scope and subject matter of law no. 5/2003 were broader than the mere introduction of specific arbitration rules.

However, the provisions regarding Court proceedings and mediation/conciliation were repealed, namely, by law no. 69/2009 and law no. 28/2010. The only part of the law still in force is the one dealing with arbitration.

This article aims to analyze and give an overview of the specific provisions regarding arbitration.

II. Articles of Incorporation and Arbitration Clauses

The provisions concerning arbitration are contained in four articles and, specifically, from art. 34 to art. 37.

Article 34 provides the companies' right (except for listed corporations), to include an arbitration clause in their articles of incorporation by which some or all the disputes, arising between company members or between members and the company, will be decided by arbitrators.

In order to submit controversies to arbitrators, it is necessary that the issues in dispute are represented by rights which can be the subject of a compromise and that are connected with the corporation relationship[1].

The arbitration clause has to provide the number of arbitrators and mechanism for their appointment. In this regard, it is important to underline that the clause has to identify a third party, not belonging to the company, who has the power to appoint all the arbitrators in case the mechanism provided for by the clause is not complied with. If the clause does not include such indication it is deemed null.

Furthermore, the law establishes that in case the above mentioned third party fails to appoint the arbitrators, these will be appointed by the Chief of the Court of the place where the company has its registered office.

The arbitration clause provided for by articles of incorporation is binding for both the company and the partners, including those whose partnership is the subject matter of the dispute.

Amendments of articles of incorporation, aimed to set or cancel the arbitration clause, have to be approved by a number of members representing at least the 2/3 of company's capital or shares. The dissenting or absent members are entitled to withdraw from the corporation within 90 days from the date of the above mentioned company's resolution.

III. Mandatory Procedural Rules

In general, arbitration proceedings involving companies find their regulation in the Italian Code of Civil Procedure (CCP).

In this regard, it is important to note that law no. 5/03 identifies some mandatory rules, notably third party joinder or intervention, interim measures and challenge of the award.

As to third party joinder/intervention, art. 35 provides that voluntarily interventions of third parties (art. 105 CCP) and joinders of company members requested by one of the party to the proceeding (art. 106 CCP) or ordered by the judge (art. 107 CCP) are allowed not later than the first hearing.

Paragraph 5 of art. 35 deals, instead, with interim and conservatory measures and states that, even if parties submit a dispute to arbitrators, they still have the right to apply before any judicial authority competent to issue the above mentioned measures.

However, the above mentioned provision specifies that, if the dispute concerns the validity of company's resolutions, arbitrators always have the authority to suspend the resolution in dispute and

1. Disputes involving a prosecutor are not capable of being settled by arbitration.

this decision can not be challenged. With regard to the award, art. 35 provides that it can always be challenged pursuant to article 829, first paragraph and article 831 CCP.

The first provision lists the grounds for the annulment of the award, such as: the invalidity of the arbitration agreement, failure to comply with the CCP rules concerning the appointment of arbitrators or in case the appointed arbitrators are under some incapacity, in case the award deals with a difference not contemplated by or not falling within the terms of the arbitration agreements, etc.

Art. 831, instead, allows the application to arbitration proceedings of other two means of challenge that are provided for by the Italian Code of Civil Procedure in relation to Court's decisions[2].

Furthermore, art. 35 contains the following principles:

i) the request for arbitration submitted by or against the company has to be deposited with the Companies' Register of the place where the company has its registered office;

ii) the award is binding for the company;

iii) first paragraph of art. 819 is not applicable. According to this provision arbitrators have the power to settle those preliminary issues that are relevant to decide the merits of the dispute, even if they regard matters that are not capable of settlement by arbitration. Furthermore, this article provides that the decision on such preliminary issues is not final unless otherwise provided by the law.

IV. Decision ex aequo et bono

Art. 36 of the law here analyzed provides that, even if the parties gave the tribunal the power to decide ex aequo et bono or to issue a not challengeable award, arbitrators have the duty to decide according to the law applicable in the specific case, by issuing a challengeable award in the following circumstances:

i) In case, in order to settle the dispute, arbitrators dealt with issues that are not capable to be settled by arbitration;

ii) In case the subject matter of the dispute is represented by the validity of company's resolutions.

V. Disputes concerning the management and administration of a company

Art. 37 is the last provision included in law no.5/03 and it regulates arbitration proceedings involving company management.

In particular, this provision, which is an example of a multi-tier clause, deals with disputes concerning the management and administration of limited liabilities companies and general partnerships.

As a matter of fact, art. 37 identifies three possible steps in order to resolve such disputes:

1) Decision by a third party;

2) Decision by a board;

3) Challenge of the decision pursuant to art. 1349, second paragraph of the Italian Civil Code.

Before analyzing these three steps in more detail, it is important to underline that art. 37 is not a mandatory provision, therefore, companies do not have to follow the multi-tier mechanism here provided in order to settle disputes arising out of the companies' management. The non-mandatory nature of this article also results, as it will be shown below, from the wording of the provision.

As regards the first step, art. 37, provides that articles of association of limited liability companies and general partnerships can include clauses by which differences or disputes between company's managers in relation to the administration of the corporation, are settled by one or more third parties.

As said before, the same articles of association can also provide a second step in the dispute resolution process. As a matter of fact, according to art. 37 in case parties are not satisfied with the decision issued by the third party/ies (first step), they can challenge it before a specific board. The procedure to be followed before the board and the timing for its decision are established directly in the articles of association, therefore, there are no standard or predetermined rules to comply with.

It also possible to give the third party/ies or board the power to issue binding determinations in relation to those issues that are linked to the subject matter of the dispute.

Finally, art. 37 provides a third step: the possibility to challenge, pursuant to art. 1349, second paragraph of the Italian Civil Code, the decision issued by the third party/ies (in case the article of association does not provide the second step before the board) or by the board. Art. 1349 indeed allows parties to a contract to give a third party the power to determine the performance that has to be carried out by one of the parties. More specifically, the second paragraph of this article provides that the third party's determination can be challenged only if the bad faith of the decision maker is proven.

VI. Conclusion

As said before, the purpose of law no. 5/2003 was to provide specific rules for judicial and arbitral proceedings, as well mediation/conciliation, involving corporations.

In particular, with regard to arbitration rules (that are the only ones still in force), there is one important issue that is worth addressing: the freedom of parties to choose to submit their disputes to an arbitral tribunal or a court.

As it was previously shown, the above mentioned law gives companies the right to include an arbitration clause in their articles of incorporation.

However, by giving this power to companies, the law undermines the freedom of future members of those companies to choose to go to Court instead of arbitration.

As a matter of fact, prospective company members will be forced to accept an arbitration clause, that they perhaps did not want, merely because the content of the articles of incorporation had already been established by previous members.

Furthermore, one must bear in mind that, in order to cancel the arbitration clause included in an article of incorporation, the consent of as many company members as those representing at least the 2/3 of company's capital or shares is necessary.

Pietro Ferrario

2. The so called "revocazione" (art. 395 CCP) and "opposizione di terzo" (art. 404 CCP).

REVISION OF INTERNATIONAL ARBITRAL AWARDS IN SWITZERLAND

By Sabine Nyvlt

1. Introduction

Revision is an extraordinary remedy in which a State court or tribunal is asked to reconsider a decision it has previously rendered. In Switzerland, the revision of domestic arbitral awards is expressly provided by the Concordat in Arts. 41 to 43[1]. However, the 12th Chapter of the SPILA[2], which is dedicated to international arbitration, does not contain any provisions regarding the revision of international arbitral awards. Nevertheless, the prevailing and long-standing doctrine regards this not as an intentional gap in the law but rather an oversight, which has to be filled by the court[3]. In its decision DFT 118 II 199 in 1992, the Swiss Federal Tribunal filled this gap, as shall later be examined. This has since been confirmed in DFT 122 III 92 and in several unpublished judgments[4].

2. Swiss law

2.1 Grounds for revision

The admissibility of a revision requires the invocation of the grounds for revision. In the above mentioned decision, the Swiss Federal Tribunal held that some provisions of the previous Swiss Judicial Organization Act regarding the revision of judicial decisions were applicable by analogy to international arbitral awards rendered in Switzerland[5]. The former Art. 137 of the Swiss Judicial Organization Act has since been replaced by Art. 123 of the Swiss Federal Tribunal Act[6]. The revision of an arbitral award rendered under Arts. 176 et seq. of the SPILA is only possible, if based on the grounds specified in Art. 123 al. 1 and 123 al. 2 a. of the Swiss Federal Tribunal Act[7]. More precisely, Art. 123 al. 1 of the Swiss Federal Tribunal Act states that a revision can be claimed if criminal proceedings establish that the judgment or the award was influenced to the detriment of the applicant by a crime or a felony. Art. 123 al. 2 a. of the Swiss Federal Tribunal Act provides that a revision can be claimed if the applicant has subsequently learnt of new and important facts or finds persuasive evidence which it has not been able to invoke in the foregoing proceedings, but existed at the time the award was rendered.

According to Art. 124 al. 1 lit. d. of the Swiss Federal Tribunal Act, the application for a revision has to be submitted within 90 days following the discovery of the ground of revision, but in the earliest case, after the notification of the decision[8].

2.2 Revisable decisions

Decisions which are binding upon the arbitral tribunal can be subject to a request for revision[9]. The requirement that they be binding means that the decisions must therefore have legal force. Hence, full final awards as well as partial final awards fall squarely into that category. Whilst preliminary and interim awards are also capable of revision, procedural orders cannot be subject to a request for revision[10].

2.3 Competent authority

According to Swiss procedural law, revision decisions are normally reconsidered by the same authority which originally rendered the decision. However, with regard to international arbitration the

Swiss Federal Tribunal held in the same decision 118 II 199, under cons. 3 that it was the competent authority in Switzerland to determine applications for revision of international arbitral awards. It is important to note that the competence of the Swiss Federal Tribunal does not include rendering a new award. If the request is granted by the Swiss Federal Tribunal, the award is annulled and the case remitted to the arbitrators. They then get the instruction to restrict the scope of the procedure by making a new examination of certain allegations in light of the newly discovered evicence[11].

The option of entrusting the revision of arbitral awards to a state authority, in particular to the Swiss Federal Tribunal, is due to obvious practical considerations. As the Swiss Federal Tribunal says, 'in certain circumstances, the initial arbitral tribunal may no longer be appealed to, since its members are either already dead, unattainable or simply refuse to take up the case again'[12]. It is true that in the field of institutional arbitration, it is possible to contact the institution, which is a permanent organ. This is however not the case for ad hoc arbitration. Yet, the Swiss Federal Tribunal had to adopt a practicable solution for all arbitration cases in which the agreed seat would be in Switzerland. It follows that the decision of the Swiss Federal Tribunal to assign itself as the competent authority was the only conceivable solution[13]. Moreover the Federal Tribunal wanted to take into account the concept in the Concordat[14], which stipulates that the judicial authorities are competent to determine the request of arbitral awards revisions.

However, the decision of the Swiss Federal Tribunal with regard to its competence is controversial; authors such as Müller are of the view that, 'no fundamental reasons are apparent, why the former arbitral tribunal or even a newly constituted arbitral tribunal should not be able to decide about the request for a revision'. This view is particularly pertinent if an arbitral tribunal is constituted according to the rules of a permanent arbitral institution[15], since a request for revision can be dealt by the institution itself. According to certain authors, the parties can contractually name the arbitral tribunal as the competent authority to revise the award instead of the Swiss Federal Tribunal[16]. However the counterargument is that Swiss arbitration law determines in a mandatory manner the powers of the arbitrators and those of the courts and that in addition, a revision of the award by the arbitrators themselves would change its nature. The revision is an extraordinary action and must not be dissociated from the setting aside procedure which is mandatorily attributed to the Swiss Federal Tribunal by the SPILA in Art. 190 and 191[17].

The solution adopted by the Swiss Federal Tribunal takes into account the intention of the legislature to limit further possibilities of appeal against arbitral awards, since a decision of the arbitral tribunal regarding the request of revision could again be appealed to the Federal Court[18]. Moreover, if the ground of revision were to be based on bribery of the arbitrators, it would not make sense for those same arbitrators to deal with the request of revision.

3. Comparative approach with France

In France, revision has also been reintroduced in international arbitration disputes through case law. The Cour de Cassation held that 'the revision of an award rendered in France in an international arbitration matter must exceptionally be admitted in cases of fraud when the arbitral tribunal remains constituted after the award has been rendered or can be reconstituted again'[19]. The Swiss System is preferable in two ways: Firstly, under French case law, the only ground for revision is fraud, and this is very restricted; secondly, the arbitral tribunal must still be constituted or reconstituted, which could be a problem if the revision of a final award is requested a long time after it has been rendered[20].

4. Conclusion

The solution of the Swiss Federal Tribunal has to be supported. It is indeed a decision that has been well thought out since it maintains the integrity of the legal system by considering established procedural principles. However, parties should have the option to contractually agree that the arbitral tribunal itself should have competence to determine requests of revision of arbitral awards, considering that arbitration is ultimately a dispute resolution procedure dictated by the parties' contractual intentions.

Sabine Nyvlt

1. The Concordat dated 27th March 1969; http://www.zrk.ch/dms/dokument/dokument_datei_id_28_rnd1564.pdf.
2. Switzerland's Federal Code on Private International Law (SPILA) dated 18th December 1987, non-official translation http://www.umbricht.ch/pdf/SwissPIL.pdf.
3. Prof. Dr. Christopher MÜLLER [hereafter: MÜLLER], in: SchiedsVZ 2007, p.64 et seqq., here at p. 66 and with further references at footnote 9.
4. Idem.
5. DFT 118 II 199, cons. 4.
6. DFT 134 III 286, cons. 2.1.
7. BERGER Bernhard/KELLERHALS Franz [hereafter: BERGER/KELLERHALS], Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, 2006, No. 1785 et seqq., here at No. 1788 et seq.
8. DFT 134 III 286, cons. 2.1.
9. DFT 122 III 492, cons. 1b aa-bb; DFT 4P.237/2005, cons. 3.2.
10. BERGER/KELLERHALS, No. 1798.
11. POUDRET Jean-François/BESSON Sébastian [hereafter: POUDRET/BESSON], Comparative Law of International Arbitration, 2007/1, No. 843 et seqq., here at No. 845.
12. DFT 118 II 199, cons. 3; in its late decision 122 III 492, 493 the Swiss Federal Tribunal clarifies that the argument regarding the impossibility to reconstruct the arbitral tribunal 'was only one of the various components of the argumentation', whose 'central one is the analogy with the solution in the Concordat'.
13. KAUFMANN-KOHLER Gabrielle/RIGOZZI Antonio [hereafter: KAUFMANN-KOHLER/RIGOZZI], Arbitrage international, Droit et pratique à la lumière de la LDIP, 2006, No. 849 et seqq., here at No. 853.
14. Art. 42 of the Concordat.
15. MÜLLER, p. 67.
16. BERGER/KELLERHALS, No. 1802; RIGOZZI Antonio/ SCHÖLL Michael [hereafter: RIGOZZI/SCHÖLL], Die Revision von Schiedssprüchen nach dem 12. Kapitel des IPRG, Bibliothek zur Zeitschrift für Schweizerisches Recht, Beiheft 37, 2002, p. 18 et seq.; KAUFMANN-KOHLER/RIGOZZI, No. 855; MÜLLER, p. 67; for a contrasting view, see alternatively POUDRET/BESSON, Droit comparé de l'arbitrage international, Zürich/Basel/Genf/Paris/Brüssel 2002, p. 835 et seq.
17. POUDRET/BESSON No. 845.
18. BERGER/KELLERHALS, No. 1787.
19. Cour de Cassation (1re Chambre civil), Fougerolle v Procofrance, dated 25th May 1992, Rev. Arb. 1993 p. 91 et seqq. = JDI 1992, p. 974.
20. POUDRET/BESSON No. 846.

FLORIDA ADOPTS UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION TO FURTHER BOLSTER MIAMI'S ABILITY TO COMPETE AS A VIABLE SEAT

By Adam Gutin* & Brittney C. Keck*

Speaking at a May 5th meeting of the Miami International Arbitration Society (MIAS), Jan Paulsson, a renowned international arbitration expert, challenged the society members to compete on behalf of Miami to host the prestigious ICCA Congress in the near future.[1] The challenge came immediately on the heels of the adoption by the Florida legislature of a statute based on the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006.[2] Mr Paulsson's suggestion was a direct reference to the often-asked question—what should we do next to increase Miami's viability as a venue for international arbitration.

Miami offers an interesting case of a city trying to compete with several other urban centers around the world as a preferred venue for international arbitration proceedings. The adoption of the UNCITRAL Model Law is not the first step in this effort, but the latest in a trend developing over the past several decades. Efforts can be traced back to at least the early 1980s when several prominent members of the Miami business and legal community attempted to launch an international arbitration institute called the International Center of Florida.[3] The institute would only last a few years, later to merge with the World Trade Center of Florida and take on a different purpose, but international commercial arbitration in Miami has continued to steadily gain steam. For example, as of the ICC's most recently published statistical report, Miami was the seat of more arbitrations than any other United States city, with the exception of New York.[4] Among other things, Miami-based practitioners are seeking to exploit their competitive advantage to draw arbitrations from Latin America and the Caribbean, based on geographical location and a high number of trained practitioners of Latin American and Caribbean descent, fluent in both English and Spanish.[5]

In adopting the Model Law based legislation, Florida became the seventh U.S. state to do so, joining California, Connecticut, Illinois, Louisiana, Texas and Oregon.[6] The Model Law became effective July 1, 2010.[7] Its passage was the direct result of a concerted effort by members of the International Law Section of the Florida Bar, many of whom are also members of MIAS.[8] The goal of the adoption of the Model Law was to create comfort among parties and their counsel in selecting Miami as a forum for international arbitration.[9] Touting pro-business interests, the bill steadily gained bipartisan support and successfully navigated its way through the Florida legislature.[10]

Notwithstanding the recent legislative victory, Miami's progress has not been without obstacles. In response to the case of The Florida Bar v. Rapoport[11] in 2003, members of the Florida legal community pushed for strict rules governing the unauthorized practice of law.[12] The case involved an out-of-state lawyer soliciting clients in Florida to represent them in securities arbitration cases held in Florida.[13] Rapoport claimed that the Federal Arbitration Act ("FAA") preempted Florida law and that he was authorized to solicit and act for parties in federal securities matters under the FAA.[14] The Florida Supreme Court held against Rapoport and found him to have engaged in

the unauthorized practice of law.[15] On the heels of Rapoport, the Florida Bar sought to implement amendments to the Florida Rules of Professional Conduct making it very difficult for attorneys unlicensed in Florida to represent clients in arbitrations in the state.[16] Realizing the potentially devastating effect this change in rules could have on the practice of international arbitration in Miami, many international practitioners fought over several years for a carve-out so that foreign attorneys could represent parties in international arbitrations.[17] Consequently, the revised rules implemented stricter requirements for out-of-state counsel representing parties in domestic arbitrations, but do provide an exception for counsel representing their parties in international arbitrations.[18]

The question arises whether the adoption of the Model Law upgrades Miami's appeal all that much. After all, there are plenty of other countries that have adopted the Model Law that are not at the top of the arbitration venue lists (e.g., Bulgaria, Cambodia, etc.).[19] However, as Mr. Eduardo Palmer,[20] the Miami-based attorney at the helm of the push to adopt the UNCITRAL Model Law has stated: "[t]his is a multi-faceted mosaic that [is being pieced] together to continue to build on Miami's reputation as a leading city to conduct international arbitration proceedings."[21]

The "mosaic" Mr. Palmer speaks of is a combination of the adopted laws discussed above, conferences, an engaged academic community, and of course, a supportive legal community. Since 2003, the ICC has been holding an annual conference, "International Commercial Arbitration in Latin America: The ICC Perspective", in Miami.[22] Similarly, since 2003, the ICDR has been holding an annual International Arbitration Conference in Miami.[23]

In addition, an engaged academic community has benefited from the development of Miami as an international arbitration venue. The law schools at Florida International University and the University of Miami both have interested students, vested in education in international arbitration, based on their participation in the Willem C. Vis moot.[24] Both schools host Vis practice moots in the spring of each year.[25] The Florida International University Vis Practice Moot attracts schools from the United States, Latin America, and Europe, and the University of Miami hosts an annual moot sponsored by the Florida Bar that consists of all the schools in Florida participating in the Vis moot.[26] Also, in addition to the Vis Moot, students from the University of Miami have begun participating in the Madrid Moot, a Spanish language moot focused on international commercial arbitration[27], and Florida International University students have branched into international investment arbitration through the Foreign Direct Investment moot held in Frankfurt.[28] Furthermore, both schools have begun to invest increasing time and effort in cultivating interest in international arbitration. The University of Miami has secured big names in the international arbitration community, such as Jan Paulsson, President of the London Court of Arbitration,[29] and Judith Freedberg, former general counsel to the Permanent Court of Arbitration, to head up the law school's new LLM program in international arbitration.[30] Furthermore, spearheaded by Professors Manuel Gomez and M.C. Mirow,[31] Florida International University has created a Global Studies Initiative seeking to foster dialogue regarding international legal concerns by taking a more grass roots approach, forming partnerships with local

law firms and holding conferences such as the International Arbitration Annual Summit, which occurred in early March and gathered a number of key practitioners, policymakers and scholars from Latin America and the U.S.[32] Moreover, Florida International University has launched a comprehensive empirical study on the use of arbitration in Latin America and is planning a series of other initiatives, both in investment and international commercial arbitration.[33]

As discussed above, as of 2008, ICC statistics reported that Miami is currently behind only New York as an ICC arbitration venue in the United States.[34] Concurrently, the demand for arbitrations where one or both of the parties are from Latin America is drastically increasing.[35] Parties from both Latin America and abroad have long been hesitant to entrust disputes arising from their investments and commercial transactions to local court litigation in Latin America for a variety of reasons.[36] Currently, based on the available statistics, there appears to be a large, untapped market from Latin America and the Caribbean participating in ICC arbitrations that Miami has yet to fully draw upon.[37] Given the combination of this increase in demand for arbitration and the hesitance to entrust disputes to local litigation in South America, coupled with Florida's recent adoption of the Model Law, the Miami legal community is continually positioning itself to better compete as the venue for international arbitrations stemming from places south of the United States.

* Adam Gutin obtained his Juris Doctor from the Florida International University College of Law in May of 2010. He also has a Master of Business Administration, Bachelor of Science in Finance, and a Bachelor of Arts in English from the University of Florida. Adam would like to thank Professor Manuel Gomez, Eduardo Palmer, Burton Landy, Brittney Keck, his family, and friends at the Yar - The Young Arbitration Review for their work on the publication.
* Brittney C. Keck obtained her Juris Doctor from the Florida International University College of Law in May of 2010. She also has a Bachelor of Arts in Political Science from the University of Central Florida. Brittney would also like to thank Professor Manuel Gomez, Eduardo Palmer, Burton Landy, Adam Gutin, her family, and friends at the Yar - The Young Arbitration Review for their work on the publication.

1. For more information on MIAS see http://www.miamiinternationalarbitration.com.
2. 2010 Fla. Laws Ch. 2010-60.
3. Andres Oppenheimer, New Arbitration Institute Isn't First on the Block, THE MIAMI HERALD, Feb. 20, 1984.
4. 2008 Statistical Report, 20 ICC INT'L CT. ARB. BULL. 12 (2009).
5. See Miami International Arbitration Society, Miami: An International Arbitration Center for the Americas and Beyond, http://miamiinternationalarbitration.com/en/miami-as-a-center-for-arbitration.html (last visited June 30, 2010) ("Miami is also a[n international] . . . city with a large workforce of first-class bilingual and multilingual professionals, ... In addition, Miami is a more convenient and far less expensive location to host international arbitration proceedings relating to disputes arising in the Americas").
6. UNCITRAL.org, UNCITRAL Model Law on International Commercial Arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited June 24, 2010).
7. 2010 Fla. Laws Ch. 2010-60.
8. Florida Bar International Law Section, Minutes of the Mid-year Executive Council Meeting, Jan. 16, 2009, http://internationallawsection.org.
9. Julie Kay, Miami ramps up efforts to be the seat of international arbitration, SOUTH FLORIDA BUSINESS JOURNAL, Dec. 4, 2009.
10. See Susannah A. Nesmith, Law would let Florida adopt U.N. arbitration model, Apr. 29, 2010, http://www.dailybusinessreview.com/Web_Blog_Stories/2010/April/U.N._arbitration.html.
11. Florida Bar v. Rapoport, 845 So. 2d 874 (Fla. 2003).
12. http://arias-us.org/index.cfm?a=11.
13. Florida Bar v. Rapoport, 845 So. 2d 874, 875 (Fla. 2003).
14. Florida Bar v. Rapoport, 845 So. 2d 874, 876 (Fla. 2003).
15. Florida Bar v. Rapoport, 845 So. 2d 874, 878 (Fla. 2003).
16. See In re Amendments to the Rules Regulating the Florida Bar and the Florida Rules of Judicial Admin., 907 So. 2d 1138, 1139 (Fla. 2005).
17. See Matthew Haggman, Court Limits Out-Of-State Attorneys, THE MIAMI HERALD, May 13, 2005. Also, for a discussion of how various United States jurisdictions have dealt with the issue of the unauthorized practice of law in regards to arbitration, see David M. Spector & Jessica Romero, Arbitration and The Unauthorized Practice of Law, 13 ARIAS 16-19 (1st Q. 2006).
18. Rules Regulating the Florida Bar, Rule 1.3.11 (d), (e).
19. See UNCITRAL, Status 1985 – UNCITRAL Model Law on International Commercial Arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.
20. Mr. Eduardo Palmer's full biography can be seen at the website of his firm Eduardo Palmer P.A., http://epalmerlaw.com/.
21. Julie Kay, Miami ramps up efforts to be the seat of international arbitration, SOUTH FLORIDA BUSINESS JOURNAL, Dec. 4, 2009.
22. ICC, ICC Conference spotlights arbitration in Latin America, Oct. 19, 2007, http://www.iccwbo.com/id16810/index.html; see also Miami International Arbitration Society, Thriving Infrastructure Geared Toward International Arbitration, http://miamiinternationalarbitration.com/en/miami-as-a-center-for-arbitration/infrastructure.html
23. American Arbitration Association, ICDR, AAA Construction Division to Hold Miami Conference, http://www.adr.org/sp.asp?id=37444.
24. For general information on the moot, see The Annual Willem C. Vis International Commercial Arbitration Moot, http://www.cisg.law.pace.edu/vis.html. For a list of the participants in the moot, including the University of Miami and Florida International University, see Seventeenth Annual Willem C. Vis International Commercial Arbitration Moot 2009-2010 Registered Teams, http://www.cisg.law.pace.edu/cisg/moot/participants17.html#uni.
25. See Florida International University, http://calendar.fiu.edu/main/events/view/2010/02/06/1935; see also M.I.A.S. Blog, http://miamiinternationalarbitration.com/blog/2009/11/florida-bar-vis-pre-moot-call-for-arbitrators/.
26. See Florida International University, http://calendar.fiu.edu/main/events/view/2010/02/06/1935; see also M.I.A.S. Blog, http://miamiinternationalarbitration.com/blog/2009/11/florida-bar-vis-pre-moot-call-for-arbitrators/.
27. MOOTMadrid, http://www.mootmadrid.es/.
28. Foreign Direct Investment International Moot Competition, http://www.fdimoot.org/.
29. For Professor Jan Paulsson's full biography, see University of Miami School of Law, http://www.law.miami.edu/facadmin/jpaulsson.php?op=2.
30. For Director of Professional Programs, Judith Freedberg's full biography, see University of M.iami School of Law, http://www.law.miami.edu/facadmin/admin/jfreedberg.php.
31. For the full biographies of Manuel Gomez and M.C. Mirow, see http://law.lawnet.fiu.edu/index.php?option=com_content&task=view&id=207&Itemid=480.
32. FIU, Global Legal Studies Initiative, http://law.lawnet.fiu.edu/index.php?option=com_content&task=view&id=461&Itemid=838.
33. FIU, Global Legal Studies Initiative, http://law.lawnet.fiu.edu/index.php?option=com_content&task=view&id=461&Itemid=838.
34. 2008 Statistical Report, 20 ICC INT'L CT. ARB. BULL. 7, 12 (2009).
35. See generally Johnathan Hamilton & Michael Roche, Survey of Trends in Latin American Arbitration, INT'L DISPUTES Q. (Summer 2009), available at http://www.whitecase.com/idq/summer_2009_1a/ (discussing the growth of ICC commercial arbitrations in a variety of countries in Latin America); see also, Arnoldo Wald, The Development of Arbitration in the Brazilian Court (2006-2009), ARBITRATION REV. OF THE AMERICAS (2010), available at http://www.globalarbitrationreview.com/reviews/21/sections/79/chapters/819/brazil/ (discussing the increased rate of arbitration growth specifically in Brazil).
36. See generally Nigel Blackaby & Sylvia Noury, International Arbitration in Latin America, LATIN LAWYER REV. (2006), available at http://www.freshfields.com/publications/pdfs/2006/LLReviewArbitration.pdf (describing parties' hesitance to participate in local court litigation in Latin American because of risks including: unfamiliarity with local procedures; partiality; corruption; unenforceability of the judgment outside of the local district; delay; and appeals).
37. See generally 2008 Statistical Report, 20 ICC INT'L CT. ARB. BULL. 7, 12 (2009).

[BIOGRAPHIES]

PEDRO SOUSA UVA

Pedro Sousa Uva is an Associate Lawyer at Abreu Advogados in Lisbon.
He is a graduate from the Portuguese Catholic University of Lisbon Law School and a former scholarship student at the Katolieke Universiteit Leuven, Belgium, where he pursued studies in International Arbitration (2001/2002).
Pedro Sousa Uva has an LL.M in Comparative and International Dispute Resolution of Queen Mary - University of London, School of Law (2008/2009), where he studied International Commercial Arbitration, International Trade and Investment Dispute Settlement and Alternative Dispute Resolution.
He participated in the International Arbitration Group's Intern Program in London at Wilmer Cutler Pickering Hale and Dorr LLP between 2009 and 2010. He is a member of the Portuguese Bar Association, a member of the Alumni & Friends of the School of International Arbitration (AFSIA), University of London. He is a co-founder of AFSIA Portugal (created in June, 30 2010).
His latest publications include "A comparative reflection on challenge of arbitral awards through the lens of the arbitrator's duty of impartiality and independence", published in The American Review of International Arbitration, Volume 20, No. 4, in January 2011 (an updated version of the the Author's LLM Dissertation); Co-Author of the Portuguese Chapter of the International Comparative Legal Guide to International Arbitration 2010 / Portugal – Global Legal Group (GLG) – (Published in August 2010) and "Settlement in International Arbitration: the CEDR Rules", March 19 2010, Executive View, Litigation and Dispute Resolution, Digital Guide 2010, http://www.executiveview.com

GONÇALO MALHEIRO

Gonçalo Malheiro is Junior Partner at PBBR Law Firm and co-head of its Litigation / Arbitration Department. He is a graduate from the Catholic University Law School of Lisbon. He has an LL.M in Queen Mary - University of London, School of Law (2006/2007), where he focused on the following subjects: International Commercial Arbitration, International Commercial Litigation, Alternative Dispute Resolution and International Trade and Investment Dispute Settlement (subject grouping: Commercial and Corporate Law). Gonçalo Malheiro is a member of the Portuguese Bar Association, the Catholic University Alumni Association, the Chartered Institute of Arbitrators and the Alumni & Friends of the School of International Arbitration (AFSIA), University of London. He is a co-founder of AFSIA Portugal (created in June, 30 2010). Gonçalo Malheiro is Chairman of the Young Member Group of the Chartered Institute of Arbitrators.

STEVEN P. FINIZIO

Steven P. Finizio is a partner at Wilmer Cutler Pickering Hale and Dorr LLP, based in London. His practice focuses on international arbitration. In addition to acting as counsel, he sits as an arbitrator and teaches arbitration as an adjunct professor. His most recent publications include A Practical Guide to International Commercial Arbitration: Assessment, Planning and Strategy (Sweet & Maxwell 2010)(with Duncan Speller) and "Discovery in International Arbitration: Frankenstein's Monster in the Digital Age," in The Taking of Evidence in International Commercial Arbitration, German Institution of Arbitration (DIS-Schriftenreihe), Band 26 (Böckstiegel/Berger/Bredow (Hrsg.)) (Carl Heymanns Verlag 2010).

PIETRO FERRARIO

Date and Place of Birth: 7/6/1980, Milan (Italy). Education and Qualifications: Degree in Law from Bocconi University of Milan (2003); Admitted to the Bar Association of Milan (2006); LL.M. in International Business Law, Queen Mary University of London (2007-2008); PhD student at Bocconi University of Milan (2010). Work Experience: Associate Lawyer at "Rucellai & Raffaelli" Law Firm in Milan (2003-2007); Associate Lawyer at "Studio Legale Albanese" Law Firm in Milan (2009); Internship at Wilmer Hale LLP in London (2009-2010); Associate Lawyer at "Perani, Pozzi, Tavella" Law Firm in Milan (2010). Previous Publications: "The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?", Journal of International Arbitration 26(5): 647-673, 2009; "Challenge to Arbitrators: Where a Counsel and an Arbitrator Share the Same Office – The Italian Perspective" Journal of International Arbitration, 2010, Volume 27, Issue 4) pp. 421 – 426;
La disciplina transitoria, in Commentario della legge fallimentare, diretto da C. Cavallini, Egea, Milano, 2010, Vol. III, pp. 1125-1145.

SABINE NYVLT

Sabine Nyvlt is currently working as a Law Clerk at the District Court of Zurich, Switzerland. She is a graduate from University of Fribourg, Switzerland (Master in International and Commercial Law) and studied in 2008/2009 at the Center for Transnational Legal Studies in London, where she pursued studies in International Arbitration. From 2004 to 2009 she worked for different Commercial Law Firms in Zurich, Switzerland.
She participated in the International Arbitration Group's Intern Program at Wilmer Cutler Pickering Hale and Dorr LLP in London (2010).

Alfonso Maristany

Associate lawyer in the commercial litigation and arbitration team in Cuatrecasas, Gonçalves Pereira since 2004. Based in Barcelona. Broadly experienced in corporate and contractual dispute resolution.
LLB (Universidad de Barcelona, 2004). LLM specialized in Comparative and International Dispute Resolution (Queen Mary and Westfield College, London University, 2004); Member of the Barcelona Bar Association, 2004. Member of the Spanish Arbitration Club (Club Español del Arbitraje –CEA-), 2009. Member of the Spanish Committee of the AFSIA (Alumni & Friends of the School of International Arbitration) of the Centre for Commercial Law Studies (Queen Mary and Westfield College, London University). Fluent in English and French.

ADAM GUTIN

Adam Gutin is admitted to practice in Florida and the United States District Court for the Middle District of Florida. He obtained his Juris Doctor from the Florida International University College of Law in May of 2010. He also has a Master of Business Administration, Bachelor of Science in Finance, and a Bachelor of Arts in English from the University of Florida. During law school Adam obtained work experience through internships at the United States District Court for the Middle District of Florida in Orlando, Florida (Jul. 2008 – Aug. 2008); the United States Securities and Exchange Commission in Miami, Florida (Jun. 2009 – Aug. 2009); Wilmer Cutler Pickering Hale and Dorr LLP in London, United Kingdom (Sept. 2009 – Oct. 2009); and the ICC International Court of Arbitration in Paris, France (Nov. 2009 – Dec. 2009). Also, he participated in the Willem C. Vis International Commercial Arbitration Moot and the Foreign Direct Investment Moot. Additionally, he published the article, Melamine-Tainted Milk: An Ongoing Problem for China in the Fall 2010 edition of the International Law Quarterly and has a forthcoming publication discussing the regulation of sovereign wealth funds in the United States in the next edition of the FIU Law Review. Finally, Adam would like to thank Professor Manuel Gomez, Eduardo Palmer, Burton Landy, Brittney Keck, his family, and friends at the YAR – the Young International Arbitration Review for their work on the publication.

BRITTNEY C. KECK

Brittney C. Keck obtained her Juris Doctor from the Florida International University College of Law in May of 2010. She also has a Bachelor of Arts with Honors in Political Science, with a Minor in Italian Language and Culture from the University of Central Florida. During law school Brittney obtained experience through clinical work for both indigent clients and international human rights advocacy groups in the FIU Carlos A. Costa Immigration and Human Rights Clinic (May 2009 – Dec. 2009), and the FIU Education Advocacy Clinic (Aug. 2009 – Dec. 2009). Also, she participated in the Willem C. Vis International Commercial Arbitration Moot and the Foreign Direct Investment Moot. In addition, Brittney speaks English, Spanish, and Italian. Finally, Brittney would also like to thank Professor Manuel Gomez, Eduardo Palmer, Burton Landy, Adam Gutin, her family, and friends at the YAR – the Young International Arbitration Review for their work on the publication.