MINUTES OF AN INTERIM MEETING* OF IFCAI MEMBERS

held at China World Hotel, Beijing

9.30am, 16 May 2004

PRESENT:	Ulf Franke (President)	Stockholm Chamber of Commerce
	Dr M.I.M. Aboul-Enein	CRCICA
	Shotaro Aoto	Japan Shipping Exchange
	Stefano Azzali	Milan Chamber of Arbitration
	Robert Briner	ICC
	Clyde Croft	ACICA
	Diana Droulers	Caracas Chamber of Commerce
	Dair Farrar-Hockley	CIArb
	Tang Houzhi	CIETAC, CMAC, CCPIT
	Pierre Karrer	ASA
	Bohuslav Klein	Arbitration Court, Prague
	Alexander Komarov	Russian Federation Chamber of Commerce
	Milanka Kostadinova	ICSID
	Crenguata Leaua	Court of International Comm. Arb, Romania
	Sergei Lebedev	Maritime Arbitration Commission, Moscow
	Gustaf Möller	Central Chamber of Commerce of Finland
	Masaharu Onuki	Japan Commercial Arbitration Association
	Michael Pryles	ACICA
	Noorashikin Tan Sri Abdul Rahim	Kuala Lumpur Regional Centre
	Bette Shifman	PCA
	William Slate	AAA
	Erik Wilbers	WIPO
	Adrian Winstanley	LCIA
	Warren Wood	Global Center
	Philip Yang	HKIAC
	Abdul Hamid El-Ahdab	Arab Assoc. for International Arb., Lebanon

1. WELCOME

1.1 The President welcomed the IFCAI delegates and thanked CIETAC, and Professor Tang in particular, for their hospitality to all of those who were in Beijing for the IFCAI and ICCA meetings.

1.2 The President explained that it had been decided to take advantage of having so many IFCAI representatives in Beijing for the ICCA conference, to hold this interim meeting of the general membership of IFCAI.

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* This was an interim meeting, not a General Assembly, the next one of which will be convened in Washington in June 2005, on the occasion of the 8th Biennial Conference.

1.3 He proposed that the meeting should deal first with internal IFCAI business, then with an update from Warren Wood on the research programme of the Global Center; and concluding with discussions on the new IBA guidelines on conflicts of interest and on the publication of awards.

2. 8th BIENNIAL CONFERENCE – 2005

2.1 The President confirmed that the date for the 8th IFCAI biennial conference was 3 June 2005, to be preceded, on 2 June 2005, by a General Assembly.

2.2 Milanka Kostadinova confirmed that practical arrangements were well in hand for these events and the meeting expressed its thanks to ICSID for agreeing to host them.

2.3 The President invited members to consider, and to send to him, their proposals for suitable themes for the General Assembly and for the Conference, so that programmes for both could be finalised and circulated in good time.

3. KIEV MEETING

3.1 The President said that IFCAI Council was concerned that no firm date had yet been fixed for the proposed seminar in Kiev, to be hosted by the Ukraine Centre, this October, and that a number of other seminars had now been scheduled for around the same date.

3.2 He said that the Council was of the view, therefore, that, whilst Ukraine was a thriving market for arbitration and a good venue for an IFCAI seminar, Professor Pobirchenko should be asked to consider whether it might be better to re-schedule the Kiev event for a later date, to avoid clashing with competing seminars. The meeting agreed.

4. FINANCES

4.1 Adrian Winstanley reported that IFCAI reserves were standing at US$80,406 as at the beginning of May 2004.

4.2 The President asked members to consider to what use(s) IFCAI funds might be put, as there seemed little point in simply accumulating funds, which IFCAI, as a not-for-profit organisation should be applying for useful purposes.

4.3 Members were invited to let the President have their views on this matter well in advance of the General Assembly in June 2005 in Washington.

5. MEMBERSHIP

5.1 Adrian reminded the meeting of the decision previously taken by the Council, and endorsed by the General Assembly, that members in arrears with

their subscriptions by more than one year should, after final reminders, have their membership cancelled.

5.2 He reported that 38 members were, at the time of this meeting, fully-paid-up, with a further 25 with subscriptions outstanding for the current year only. Reminders would be sent to the latter in due course and those who had still not paid by the end of the year would be subject to the agreed sanction.

5.3 Membership currently stood at 63 institutions, coming from 41 countries.

6. NEWSLETTER

6.1 The President thanked Milanka Kostadinova for her continuing efforts in coordinating and producing another excellent issue of the IFCAI Newsletter; thanks which were echoed by the meeting.

6.2 Milanka thanked all those who had sent in contributions and said that readership of the Newsletter was very much wider than just the member-institutions.

6.3 The President asked members to submit news items from their institutions and/or jurisdictions for the next issue of the Newsletter and to liaise with Milanka on the deadline for doing so.

6.4 The President also encouraged members to submit items of common interest to all IFCAI members for possible publication as the lead article for the front cover of the Newsletter; stressing that lead articles must always be non-partisan.

7. VAT

7.1 Adrian Winstanley reported that he had had only 13 responses to the more-than 60 VAT questionnaires that had been circulated to IFCAI members; a particularly disappointing response given the effort that had gone into preparing so detailed a survey.

7.2 The few answers that had been received served only to confirm an inconsistency of approach from jurisdiction to jurisdiction; generally informed by advice received from the relevant tax authorities. As the focus of the present debate was Europe, the information was even less illuminating, as only three institutions from EU jurisdictions had replied and each of those applied different criteria.

7.3 Robert Briner expressed the view that arbitrators residing in the EU should be treated the same as lawyers, architects and other professionals and should not, therefore, be subject to VAT if there services were rendered outside the EU. The application of VAT to their fees depended, therefore, both on the seat of the arbitration and (possibly) the location of the parties.

7.4 He said that the ruling of the ECJ that arbitrators were always liable to VAT at their domicile produced the absurd situation that European arbitrators sitting, for example in New York, with one Mexican party and one Indian party, were required to levy VAT at the rate applicable in their home jurisdiction.

7.5 Robert reported two recent developments; the first, the codifying of the existing, and diffuse, law, but without changing the substance; the second, a revision of EU VAT law, to be tabled after the EU elections of this year.

7.6 Robert recommended that IFCAI follow events carefully, with a view to lobbying for change with one voice at the appropriate time.

7.7 Robert reminded the meeting that this issue related only to the application of VAT on arbitrators' fees. The institutions' own charges were a matter for local VAT authorities and were a question of national law only. Institutions should be guided accordingly.

8. REPORT FROM THE GLOBAL CENTER

8.1 At the President's invitation, Warren Wood updated the meeting on progress with the research project of which IFCAI had been first informed by Richard Naimark at the meeting of the IFCAI Institutional Section in Paris in November 2002.

8.2 He said that the Center was aiming to provide the widest possible community of arbitrators with a valuable website facility, which would include case-based information and access to a worldwide network of expertise in the field.

8.3 The Center would be publishing annual reports on key developments in the field and its Newsletter would deliver updates on significant developments.

8.4 He called for the participation of IFCAI members and suggested that this might best be achieved by IFCAI members becoming members of the Global Center, whether as individuals or on behalf of their institutions.

8.5 Warren invited all members to contact him personally to consider ways in which they might work with the Center to shape its agenda.

8.6 The President encouraged members to take up Warren's suggestion that they contact him, particularly as 18 months had elapsed since IFCAI members had first been told that they were to play a vital role in the Global Center's empirical research.

8.7 He said that progress would be reviewed at the General Assembly in June 2005.

9. CONFLICTS OF INTEREST

9.1 The President invited comments on the latest draft of the IBA guidelines on conflicts of interest in international arbitration.

9.2 Dr Aboul Enein observed that it was, in any event, too late to lobby for any further changes, as the guidelines were expected to adopted by the Council of the IBA at its meeting on 22 May.

9.3 Dr Aboul Enein went on to comment on various specific provisions of the guidelines, including what he saw as the invariable incompatibility of an arbitrator-turned-mediator reverting to arbitrator status; the need for continuing impartiality when rendering additional awards or interpreting awards; the arbitrary nature of the three-year rule relating to the involvement of an arbitrator's firm with one of the parties; and the impression that the working group might have been unduly influenced by concerns raised by lawyers in international law firms, with respect to services rendered to one of the parties.

9.4 He concluded by saying that he thought it important that failure to disclose facts that should be disclosed should, of itself, incur sanctions, including possible disqualification as a result of the failure.

9.5 Adrian Winstanley observed that the member institutions of IFCAI already had established procedures to minimise the risk of bias and to deal swiftly and effectively with bias if and when it arose. Although he could see merit in the guidelines in *ad hoc* arbitrations, he was concerned at their potential to undermine the authority of the institutions in the event they were in conflict with criteria set by the institution.

9.6 On the specifics, Adrian thought that *"orange list"* item 3.5.3 might raise difficulties for institutions, with its vague reference to an arbitrator holding a *"position"* in an arbitration institution with appointing authority over the dispute. He could see no argument for calling into question the independence or impartiality of an arbitrator who was, for example, a member of the Court or Board of a neutral institution, although, such an arbitrator would obviously not be involved in his own selection or appointment in any case. Philip Yang said that HKIAC was of the same view.

9.7 Adrian argued that the standard of disclosure would only ever be as good as the arbitrator and that, whilst one may be able to go some way towards listing circumstances impacting upon independence, it was not possible to legislate for impartiality, which he saw fundamentally as a state of mind.

9.8 He suggested that the adoption of the guidelines would, ultimately, be for the parties and that the institutions would have to work with them in cases in which the parties had expressly adopted them.

9.9 Bill Slate agreed that there must be no uncertainty as to whether or not the IBA guidelines applied and that parties which either wished to adopt, or to exclude, them should ensure clarity in their drafting.

9.10 Robert Briner reported that the ICC had been consulted by the working group, along with a number of other IFCAI members, and thought the guidelines of interest, if not of particular assistance to the institution, particularly as many *"orange list"* disclosures would still be subject to the discretion and judgement of the administering institution. The ICC was generally not well disposed towards the guidelines.

9.11 Michael Pryles said that, whether the institutions like them or not, once promulgated, the guidelines would inevitably be consulted by arbitrators, by parties and by Counsel and all institutions would, therefore, have carefully to consider the ramifications and the basis upon which the guidelines would impact on their own conflicts practice and procedure.

10. PUBLICATION OF AWARDS

10.1 The President asked the meeting for its comments on the much-discussed question of the publication of arbitral awards.

10.2 Robert Briner said that an analysis of such arbitral awards, or parts of awards, as were published, had played a significant part in the creation of trade law, particularly *"lex mercatoria"* and the UNIDOIT Rules.

10.3 He said that, whilst no case law or precedents could be created, the publication of certain awards was in the interests of the legal community and he noted that the ICC had a long tradition of publishing redacted awards. He noted also that awards were frequently revealed in enforcement actions.

10.4 Adrian Winstanley said that, unusually, the LCIA Rules expressly required confidentiality and that it was not LCIA practice to publish awards, or parts of awards. He was, however, interested to be part of the continuing debate, which he would bring to the attention of the LCIA Court.

10.5 It was agreed that the question of the ownership of the copyright of awards was an interesting one that merited further discussion and consideration, as did the question of the desirability and acceptability of publishing the names of the arbitrators and of their counsel.

10.6 Robert's view was that there was nothing to be gained by publishing these names; to the contrary, doing so might lead to their being used as an element in the *"beauty contest"* to which arbitrators and counsel were increasingly subjected.

10.7 Michael Pryles endorsed the desirability of publishing awards as an important contribution to the body of knowledge in the field. He believed,

however, that, in the interests of transparency, the names of arbitrators should be published just as the names of judges were published in the decisions of state courts.

10.8 Bill Slate said that AAA had changed its position from being in favour of publishing the names of parties and counsel to not publishing their names.

10.9 Mr Abdul Hamid El-Ahdab said that it was the practice, in the Arab world, that all arbitral awards were published in redacted form.

10.10 Sergei Lebedev said that it was now widely accepted in Russia that awards be published, sometimes even including the names of the arbitrators. On the basis that awards were rendered by the arbitrators, not by the institution, he favoured the publication of the names of arbitrators.

10.11 Crenguata Leaua said that the practice in Romania was not to publish the names either of the parties or of the arbitrators. She said, however, that under Romanian IP law and unfair competition law, the publication of awards was one form of remedy available to the successful party.

10.12 Stefano Azzali reminded the meeting that arbitrators themselves did not always want to have their names on published awards and it might be left to the arbitrators to decide whether or not their names should appear.

10.13 He said that, in the past, the Milan Chamber used to ask the parties, at the outset of the arbitration, whether or not the award might be published and that 95% of the parties would not agree. The practice now was to ask the parties after the award had been issued and more now agreed that the award could be published.

10.14 Gustaf Möller thought that the names of the arbitrators should be published, as an award was a true reflection of an arbitrator's ability and not merely self-promotion.

10.15 Diana Droulers said that the Caracas Chamber did not currently publish awards, but was intending to ask parties' permission to do so.

10.16 Masaharu Onuki said that, in his experience, parties most frequently refused to allow the publication of awards.

10.17 Bill Slate observed that, in a recent survey conducted by AAA, in which parties were asked to rank eight elements of the arbitral process in the order of importance, confidentiality came overall second last.

10.18 Eric Wilbers said that there appeared to be a consensus that the publication of awards was a useful practice and said that WIPO was trying to produce *"case scenarios"*, in preference to publishing awards themselves.

10.19 Milanka Kostadinova said that ICSID published everything, as they were required to do under the Convention, including the names of parties, of arbitrators and of Counsel. She said however, that since January 2003, the rules had been amended to require parties' permission, without which extracts only were published. She said that previous decisions definitely had a material impact on subsequent decisions, almost to the extent of constituting *"quasi precedents"*.

10.20 Bette Shifman said that public international law awards were also routinely published, including full details, with the parties consent.

10.21 Summing up, Robert Briner said that international public law cases involving States had always been published and constituted a form of precedent, but awards in commercial cases also had an important role.

10.22 He said that the important question was one of the justification for publishing awards and from whom permission to do so should be sought.

10.23 He noted, however, a divergence of views (which was to be expected) over the desirability of publishing the names of arbitrators. He said that this was not comparable with the publication of the names of judges, who were neither chosen, nor paid, by the parties.

11. CLOSE OF MEETING

11.1 There being no further business, the President said that he looked forward to meeting members in Washington next year and the meeting was declared closed at 11.55am.

President

Date