International Federation of Commercial Arbitration Institutions
(IFCAI)

Institutional Section Meeting

22 November , 2002
Paris – France

- Chaired by Dr. M.I.M. Aboul-Enein, the meeting was opened at 11.30 a.m. at the Offices of the International Chamber of Commerce (ICC) and the following members were in attendance:

Mr. Adrian Winstanley	London Court of International Arbitration (LCIA)
Mr. Adrian Severin	International Commercial Arbitration Court Romanian Chamber of Industry and Trade
Mr. Alexander Komarov	International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry
Ms. Anne Marie Whitesell	International Chamber of Commerce (ICC)
Mr. Bernhard Meyer-Haqmser	International Arbitration Court of the Zurich Chamber of Commerce
M. Brooks Doly	Permanent Court of Arbitration
Mr. Dair Farrar Hockley	Chartered Institute of Arbitrators
Dr. Eva Horvath	Arbitration Court Attached to the Hungarian Chamber of Commerce and Industry
Dr. Francis Gurry	WIPO Arbitration and Mediatio Centre
Mr. Habib Malouch	President Mediterranean Arbitration Consel-Milan-Tunis
Mr. Igor Polirchenko	International Commercial Arbitration Court at the Ukraine Chamber of Commerce and Industry
Mr. Jesper Leti	Copenhagen Arbitration
Dr. M.I.M. Aboul-Enein	Cairo Regional Centre for International Commercial Arbitration
Mr. Mauro Robino Sammartano	President European Court of Arbitration
Ms. Milanka Kostadinova Dr. Antonio Parra	International Centre fore the Settlement of Investment Disputes
Mr. Neil Kaplan	Hong Kong International Arbitration Commission

	(HKIAC)
Mr. Palal Bhattachaijee	Global Centre
M. Paula Paloranta	Board of Arbitration, Finland
Mr. Pierre A. Karrer	ASSN-Suisse de L'Arbitrage
Mr. Raphael Jacoba	CAMM (Chamber of Arbitration and Mediation of Madagascar)
Mr. Richard Naimark	American Arbitration Association
Mr. Shehara Varia	ICLP-Srilanka
Mr. Stefano Azzali	Secretary General-Chamber of Arbitration of Milan
Mr. Talyana Slipaehuk	International Commercial Arbitration Court at the Ukraini au CCI
Mr. Tang Houzhi	CIETAC, CMAC CCPIT Conciliation Centre
Mr. Ulf Franke	Arbitration Institute of the Stockholm Chamber of Commerce
Mr. Victor Babiuc	Cour d'Arbitrage Commercial International Chamber a Commerce et Industri Romania
Mr. Werner Melis	International Arbitration Center of the Austrian Federal Economic Chamber

I. Chairman's Address :

■ The Chairman welcomed all present and expressed appreciation to the International Chamber of Commerce for hosting the meeting. The four topics of the agenda were then presented as follows :

II. First Topic : Advantages of Institutional Arbitration

■ Dr. Aboul-Enein started by posing a number of questions as to why some users opt for ad hoc arbitration, rather than institutional, and as to the possible ways in which institutions might attract users of ad hoc arbitration. Mr. Adrian Winstanley was then invited to introduce the topic.

Mr Winstanley started by referring to his detailed paper, published in the IFCAI Newsletter under the title ***"The Added Value of Institutional Arbitration"***. He then focused on a number of issues. His starting point was that institutions must more effectively preach the advantages of institutional arbitration, as it is apparent that the majority of arbitrations are ad hoc. Mr Winstanley emphasised that dispute resolution procedures are driven by users and that arbitral institutions should focus on ways to promote institutional arbitration generally, whilst enhancing their respective services, in particular, and should ensure that their services are sufficiently flexible and relevant to meet users' needs. In major infrastructure projects, for example, a standing panel may be a better option than an arbitral tribunal and so on. The LCIA was itself involved in producing sets of rules and procedures specifically applicable to certain sectors of

industry and combining a number of different options for resolving disputes arising. He argued that the institution should be familiar with, and able to offer, a range of different dispute resolution methods, such as early neutral evaluation, dispute review boards, expert determination, mediation, conciliation and adjudication. Taking the adjudication example, Mr Winstanley said that this method was proving extremely popular and successful in the resolution of domestic construction disputes in England.

Mr. Winstanley then proposed the following advantages of institutional arbitration as compared to ad hoc arbitration:

1. Certainty in drafting
2. Taking care of the fundamentals without recourse to the state courts
3. Professional and cost-effective administration
4. Controlled costs
5. Administration of funds
6. Testing the water
7. Knowledge of arbitrators
8. Keeping the process moving
9. Balance of relationships
10. Ad-hoc more likely to mimic litigation?
11. The imprimatur of the institution
12. Permanent information and support service

In discussions among members, it was stressed that there are radical legal cultural differences as between one jurisdiction and another and that it is not universally the case that the number of ad hoc arbitrations exceeds institutional arbitration in all jurisdiction. Whilst in some countries, like Italy, there are significantly more ad hoc arbitrations, especially in domestic cases, in other parts of the world, such as the Eastern European countries, Romania, Russia and others, institutional arbitration is much more used than ad hoc arbitration. In some jurisdictions, there is also a trend to institutionalise ad hoc arbitration by seeking institutional assistance and it was evident that many IFCAI member-institutions provide significant assistance in this way.

It was agreed that, if institutions were to conduct research on the respective prevalence of institutional versus ad hoc arbitration, the counter-arguments of those who prefer the ad hoc option should be sought and carefully considered. It was accepted that there might be a reasonable argument for the ad hoc option in certain areas of enterprise which have long-established trade associations, for example in insurance, reinsurance and maritime arbitration, though the institutions should not assume that they do not have a valid role, and a useful service to offer, in those areas also.

III. Second Topic : Online Arbitration :

The Chairman introduced the topic in general and the challenges technology does impose on the practice of Alternative Disputes Resolution (ADR) Techniques stressing the importance of institutionally responding to the needs of users in a revolutionary age of technology. Dr. Aboul-

Enein then added that one of the most crucial matters in this concern is the lack of consistency between the nature of online dispute resolutions and the provision of article 2 of the New York Convention which necessitates the traditional writing of the arbitration agreement. Parallel to this, the award should be on paper and traditionally signed by arbitrators.

The UNCITRAL is working hard to overcome this difficulty by studying the preparation of an amending protocol or an interpretative instrument to the New York Convention and keeping both options open for consideration. Another view to this end which is also being studied is to prepare a guide to enactment of the draft new article 7 of the UNCITRAL Model Law on Arbitration to establish a "friendly bridge" between the provisions and the New York Convention. Despite these efforts, it is believed that national judges in many countries will hardly accept any of these alternatives.

Mr. Richard Naimark , Vice President of the American Arbitration Association (AAA) who attended in representation of Mr. William Slate, the AAA President was then invited to introduce the AAA's unique experience in the field. In introducing the topic, Mr. Naimark pointed out that the AAA has developed an Online Dispute Resolution Software and a set of On-line Rules and has trained selected panel of arbitrators to handle on-line disputes. Over an approximate period of 13 months, a total number of 1567 claims were filed in the commercial case category ; 566 of which have been completed while the remaining 1001 are in various stages of progress. Unlike the WIPO System, the AAA Online Mechanism does not entail completely conducting cases online as it includes filing of cases, early stages of selecting arbitrators and exchange of documents. Mr. Naimark added that one of the most outstanding merits of online arbitration is that it widens the scope of accessibility to arbitral cases as large number of AAA cases are filed online during weekends and in non-working hours. The types of cases dealt with online, Mr. Naimark clarified, are varying as there are construction, employment, accounting, real estates, security and other cases. About disputed amounts, the majority of claims amounts to $300000 or lower. However, some other claims amount up to the mid-way between $300000 and $500000 and some other claims exceed half a million dollars. So, there are some larger cases coming in. Mr. Naimark clarified that the AAA experience in online arbitration addresses institutional concerns that there might be some financial difficulties in case management and collection of fees as by the end of November 2002, the AAA has crossed the threshold of one million dollars being administrative filing fees for online cases. At the end of his speech, Mr. Naimark pointed out that the AAA is currently working on extending the scope of online arbitration to go beyond domestic cases.

One of the pioneering online experiences is that of the **WIPO Arbitration and Mediation Centre** reported by Dr. Francis Gurry. According to Dr. Gurry, the WIPO online experience confines only to domain names dispute resolution. However, the procedures are all done online as within the context of domain names disputes, all procedures are wholly based on documents. The number of WIPO online cases amounts up to 5000 cases. Outside the domain names area, the WPO is also progressing but out of a bit different springboard, speaking less in terms of Online Dispute Resolution as a system and more in terms of the use of information technology in support of arbitration and other dispute resolution techniques because users are sometimes reluctant to convert to a completely on-line system. With this background, Dr. Gurry pointed

out that institutions should give special consideration to the marketing howabouts of on-line arbitration services (in other than domain names disputes) stressing the various privileges of on-line communication, exchange of documents as well as other aspects of information technology supporting arbitration.

■Speaking of **the Milan Chamber of Arbitration**, Mr. Stefano Azzali pointed out that due to some negative reactions, they are for the strategy of only using information technology to facilitate communications and reduce costs. Pararell to this, they have developed **a Mediation Online Service in e-commerce disputes** which proves to be very successful and is constantly growing in wide use as 40 online mediation cases have been so far registered, which is a relatively significant number that pushes the Milan Chamber of Arbitration forward towards Mediation as a flexible, less formal and less procedural dispute resolution technique.

■ **As for the ICC Court of Arbitration**, Mrs. Anne Marie Whitesell said that the ICC Arbitration Court is currently developing a project according to which there will be for each case an established intranet system and it will be up to parties and arbitral tribunal to decide how suitable it is to make use of this electronic facility. However, Mrs. Whitesell illustrated that it is not necessarily envisaged to have everything done online.

• Members then focused discussions on security issues. According to some institutional experiences, the parties and the tribunal are asked to determine the extent of security they want, as they can have either a just password security system or they may opt for a higher level of security. In handling some worries about institutional inability to absolutely guarantee non-disclosure of on-line mediation chatting, it was opined that the UNCITRAL Model Conciliation Law provides securities in this concern.

IV. Third Topic : Independence and Impartiality of Arbitrators

■ The Chairman introduced the topic referring to the importance of the issues related to the independence and impartiality of arbitrators and the controversies they entail. As reported, this topic was actually a continuation of the discussions held during the previous Institutional Section Meeting held in December 2000. Mrs. Whitesell was invited to handle the topic before opening it up for discussion. She started by stating that the independence and impartiality of arbitrators are essential for international arbitration to have credibility in the international business community and that the changing environment of international arbitration, the changing nature of legal practice as well as the increasing number of complex cases, all combine to bring about complex independence questions especially taking into consideration that there is no commonly identified standard of what constitutes independence. Within this context, arbitral institutions do have a quite significant role in handling key independence and impartiality issues as presented mainly in two stages; the appointment stage and the stage of dealing with the challenge of arbitrators. Speaking of the ICC System, before confirming the nomination of arbitrators, a statement of independence is submitted to the Secretariat and transmitted to the

parties. Statistically speaking, last year witnessed the appointment or confirmation of 948 arbitrators. It is interesting also, Mrs. Whitesell added that there is an increasing number of requests for appointment of arbitrators in ad hoc procedures.

The advantages of institutional – versus ad hoc – arbitration are especially apparent insofar as the challenge of arbitrators is concerned. According to the recent ICC experience, there has been an increasing number of challenges in ad hoc procedures and an increase in the number of those challenges being accepted. The task institutions do carry out at the appointment stage may actually avoid the challenge stage. Taking the ICC example, last year there were 33 challenges, two of which were accepted. This year until the end of October there were only 16 challenges in ICC cases.

Members then posed some questions regarding the various aspects of the ICC experience. In response, Mrs. Whitesell made the following clarifications:

- In case of non-disclosure of an arbitrator-lawyer/party relation for example, the ICC Secretariat may contact the arbitrator and invite him to consider changing his statement or to inform the parties of the matter: the Secretariat may inform the Court regardless of the arbitrator's stance. The Court draws the consequences accordingly.

- There have not been recent questions of admissibility of challenges. However, even when there is any, the Court looks into the substance of the challenge. Practically speaking, it remains difficult for the Court to know exactly the starting date of the 30 days within which the challenging request should have been submitted. However, the fact remains that if any party challenges one of the arbitrators without grounds, the challenge should be turned down.

Mrs. Whitesell then referred to an initiative launched by the International Bar Association – Committee D (IBA) to draft **"Guidelines Regarding the Standard of Disclosure in International Commercial arbitration"**. Such Guidelines – now in their draft form – classify disclosure into three categories : (1) Items that are put on a **Black List**; meaning that if the situation gives rise to justifiable doubts as to the arbitrators' impartiality and independence (i.e. an objective conflict of interest exists) , then the arbitrator ***must not*** accept the appointment or must withdraw. (2) There is a **White List**, situation where no appearance of and no actual conflict of interest exists from the relevant objective point of view; this information will not be in need to be disclosed. (3) Finally, the **Gray List** it is a situation which is likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. So, a conflict of interests appears to exist and would thus require disclosure.

According to Mrs. Whitesell, this IBA project has been developed by the working group and is now being reviewed by the drafting group and it is said to be open for institutional commentary. In this concern, Mrs. Whitesell pointed out that she is not sure at all that the ICC shares the IBA viewpoint on all issues and called upon all members to give their opinions because straightening out such a matter requires in the first place the neutral judgment of arbitral institutions. Added to this, it may prove in some cases a bit impractical to try to draw clear lines in certain matters where a question of degree is involved.

Some members expressed the opinion that despite sharing such concerns, having a sort of universal standard would provide clear-cut criteria in certain situations and save the time and efforts likely to be wasted in investigating undue challenges that sometimes are nothing but tactics to delay the arbitral process.

Members then started discussing ***the effect of cultural difference on the question of independence and impartiality.*** The most outstanding example cited for this concern was a case in which the lead counselor of one of the parties was an English Barrister belonging to the same Chamber of one of the co-arbitrators who was also English. It seems that according to the Swiss and the Danish cultural conception, it is completely unacceptable to communicate with a co-arbitrator through the same fax of the legal representative of one of the parties. However, the English viewpoint is quite different as this is seen to be completely normal; English barristers work independently and they can have opposing clients in the same case. Within the bounds of this, it was stated that the ICC Court never actually has had to decide the question of a challenge of barristers from the same chamber.

The various differing aspects involved in this matter brought about a collective call that the IBA Guidelines should comprehensively handle the cases where cultural differences are involved and avoid general statements in this concern.

It was mentioned that there will be two revised drafts of the Guidelines, one in next February and the other will be presented at the IBA Annual Conference in San Francisco and comments should be addressed to the members of the Working Group as soon as possible.

V. Fourth Topic : Arbitrators' Fees :

The Chairman introduced the topic and hinted at two recent high court decisions pertaining to the problems of Arbitrators' fees, the first of which was issued by the Federal Court of Justice of Germany in September 2000 and addressed the issue of the financial incapacity of parties to pay the arbitrators' fees. The Court held that when the parties lack sufficient financial means to carry out the arbitration proceedings, the agreement of arbitration will be considered inoperable and thus the parties may proceed to state courts. The second decision was issued by the New South Wales Court of Appeal in Australia in 18/4/2002 and was related to arbitrators' repeatedly pressing their claims for cancellation fees in the face of the parties' resistance. In this case, the Court found out that the arbitrators abused their position and showed an attitude that destroyed their apparent capacity to adjudicate the dispute fairly and without bias and that such misconduct justified their removal.

Dr. Eva Horvath, the President of the International Arbitration Court of Hungarian Chamber of Commerce and Industry was then invited to tackle the topic and she provided many illustrations addressing the following problems :-

- The difficulties in fixing fees taking into consideration the sometimes opposing factors being ; the value of disputes, the culture of arbitrators and the financial capacity of parties involved.

- The difficulties in fixing fees when the tribunal is composed of both Western and Eastern arbitrators and a developing country is involved.
- When after nomination and before hearings, the tribunal asks for increase of fees and the two or one of the parties refuse because they have originally agreed on a given institutional schedule of costs.
- When each arbitrator in the same case has his own fees requirement and expectation

On handling the last point, it was seen that legal culture plays an important role in determining this issue as in some countries such as England it is allowed to pay arbitrators differently according to their backgrounds and professional status while in other countries like Hungary this is seen to be totally unacceptable.

Some members suggested that it would be useful to have all-inclusive standards or a check list regulating all important questions of costs including travel expenses ...etc and handling issues peculiar to the different jurisdictions and legal cultures. It was expressed that what would add credibility to this sort of work is to have it published by the IFCAI. It was volunteered to prepare a draft check list for the consideration of all members.

V. Other Business

Mr. Ulf Franke drew the attention of all attendees that the different aspects related to interim measures (IM) are controversial in international commercial arbitration and that the UNCITRAL has very significant recent works in this concern. The recent initiatives are Two US Delegation Proposals submitted to the UNCITRAL IM Working Group regarding Interim Measures of Protection, one constituting a request to the arbitrators and the other regards the enforceability of measures already made by arbitrators. It was reported that such proposals triggered many differing reactions; in Milano for instance the Colloquium of the Club of Arbitrators forwarded a declaration signed by 35 club members hoping to keep discussions open and to widen the debate. It was considered necessary for the IFCAI to hold meetings and discussions in this concern and to call for creating relevant contacts between arbitration institutions in each country and their respective governments in order to spring a national stance out of factual practices as the impression was that delegates handling the matter within the UNCITRAL held no contacts with their national or regional institutions. It was announced that the next UNCITRAL Meeting on Interim Measures will take place next May in New York and it was called upon to have the IFCAI utmost possible involvement in this matter.

Having no other business, the meeting was adjourned at 4.00 p.m.

- **Post-meeting note :** Upon cancellation of the March Conference, it was scheduled to hold an IFCAI Conference on Interim Measure on 27 June 2003 in Vienna.

END OF MEETING