Association for International Arbitration
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AIA Upcoming Events

- European Mediation Training Scheme for Practitioners of Justice (EMTPJ) mediation training course at the University of Warwick from 2 August—14 August, 2010. More information can be found at www.emtpj.eu
- New AIA postgraduate degree program at the VUB University of Brussels in International Business Arbitration. Registration is now open for the 2010-2011 Academic year. More information can be obtained from our official brochure, which you may download at www.arbitration-adr.org
- Conference on The Most Favored Nation Treatment of Substantive Rights organized by the Association for International Arbitration in Brussels, Belgium. October 22, 2010

For further information on conferences organized by the Association for International Arbitration in Brussels, Belgium, please visit our web site

http://www.arbitration-adr.org

UNCTAD: Latest Developments in Investor-State Dispute Settlement

The United Nations Conference on Trade and Development (UNCTAD), published in June 2010 in the IIA Issues Note No. 1, presents the latest developments in Investor-State Dispute Settlement. It contains the most significant figures for the last twenty (20) years (1989-2009) and the major jurisprudential developments for the year 2009. Some of the main figures and cases are considered below.

Number of Cases
The number of known treaty-based Investor-State dispute settlement cases filed under international investment agreements was 357 by the end of 2009. However, it is worth noting that the total number of actual treaty-based cases is likely higher because the International Centre for the Settlement of Disputes (ICSID) is the only arbitration facility to maintain a public registry of claims.

Applicable Rules
Of the 357 known disputes, 225 were filed with the International Centre for Settlement of Investment Disputes (ICSID) or under the ICSID Additional Facility, 91 were filed under the United Nations Commission of International Trade Law (UNCITRAL) rules, 19 were filed with the Stockholm Chamber of Commerce, eight were administered by the Permanent Court of Arbitration in the Hague, five were filed with the International Chamber of Commerce (ICC) and four were ad hoc cases. One further case was filed with the Cairo Regional Centre for International Commercial Arbitration, and in four cases the applicable rules are thus far unknown.

Country Participation
In 2009, the number of countries facing investment treaty arbitrations grew to 81. Of those 81, 49 are developing countries, 17 are developed countries and 15 are countries with economies in transition. Most claims were initiated by investors from developed countries. Only 23 cases were filed by investors from developing countries and nine cases originated from investors headquartered in transition economies.

Closed Cases v. Pending Cases

In all, 164 cases had been brought to conclusion by the end of 2009. Of these, 38 percent (62 cases) were decided in favor of the State and 29 percent (47 cases) in favor of the investor, while 34 percent (55 cases) were settled. For 26 cases, the current state of affairs or the outcome is unknown, and 167 cases were still pending at the end of 2009. It is important to stress that of the 357 cases, 202 – or 57 percent – were initiated during the last five years (i.e. from 2005 onward).

Substantive Issues

The UNCTAD Note includes several cases relating to substantive issues. Some of most significant awards on issues relating to most favored nation (MFN) treatment and fair and equitable treatment (FET) are reviewed below.

MFN Treatment clause

Under an MFN clause, the host state offers protection to the investors and investments of other contracting parties, which are no less favorable than the treatment the host state affords the investors and investments of other states. Various awards address the MFN treatment clause, with tribunals continuing their trend of issuing divergent opinions.

Regarding MFN treatment as it applies to jurisdictional matters, the tribunal in *Tza Yap Shum v. Peru* refused to permit the claimant to invoke the MFN clause in the China-Peru BIT in order to establish a jurisdictional basis for the dispute. The tribunal argued that the specific language in the underlying treaty's jurisdictional clause "*should prevail over the general wording of the MFN clause*." While in *Renta 4* the tribunal accepted the general proposition that MFN clauses may extend the tribunal's jurisdiction beyond the scope of the underlying treaty's jurisdictional clause, a majority of the *Renta 4* tribunal ultimately decided that the specific MFN clause in the Spain-Union Soviet Socialist Republics BIT could not be read to enlarge the competence of the Tribunal.

Regarding MFN treatment as it applies to substantive issues, the tribunal in *Bayindir v. Pakistan* relied on the MFN provision in the Pakistan-Turkey BIT to import the Fear and Equitable Treatment (FET) standard found in other treaties signed by Pakistan. The tribunal noted that the ordinary meaning of the applicable MFN clause demonstrated that the contracting parties "*did not intend to exclude the importation of a more favorable substantive standard of treatment accorded to the investors of third countries.*" Moreover, it noted that the fact that the FET provision referred to by the claimant pre-dates the MFN clause in the Pakistan-Turkey BIT "does not appear to preclude the importation of an FET obligation from another BIT concluded by the respondent."

Furthermore, the *Bayindir v. Pakistan* tribunal had to deal with an allegation of discrimination in violation of the MFN clause. In this regard, the tribunal noted that the MFN clause is not limited to regulatory treatment but also applies "to the manner in which a state concludes an investment contract and/or exercises its rights thereunder." The claimant had argued that, though there had been several other projects (some of which were run by foreign contractors) that had not been completed in time, the claimant was the only contractor to be expelled. The tribunal dismissed the MFN claim because the claimant had failed to prove the similarity of the situations at the level of contractual terms and circumstances among the several projects.

Fair and Equitable Treatment (FET)

According to Christian Leathley, fair and equitable treatment (FET) can manifest in several ways: the requirement of transparency in governmental process and decision-making; stability and consistency; the avoidance of the denial of justice; the prohibition of capricious, discriminatory or arbitrary conduct against a foreign investor; the prohibition of acts undertaken fraudulently or in bad faith; the regulation of willful neglect of duty and insufficiency of action, including lack of procedural safeguards; the guarantee of due process; the protection of investors' legitimate or reasonable expectations; and the regulation of the deprivation of a foreign investor's acquired rights in a manner that unjustly enriches the state. Two cases analyze the application of this important standard.

First, the Tribunal in *Toto Costruzioni v. Lebanon* denied its jurisdiction over an investor's claim of delays in two lawsuits before the Conseil d'Etat as breach of the fair and equitable standard provision in the Italy-Lebanon BIT, as the claimant had not satisfied the prima facie standard. More particularly, the tribunal based its decision (1) on a general reference to the lack of exhaustion of local remedies, which is required for a claim of denial of justice under customary international law and (2) on the lack of prima facie evidence that the claimant had itself made use of the local remedies to shorten the procedural delays (such as the right to consult the case files and the right to request that the Conseil d'Etat issue its report or review the matter quickly).

Second, in *Glamis Gold v. United States*, the tribunal was confronted with the definition of FET for purposes of the minimum standard of treatment embodied in article 1105 NAFTA. The tribunal noted that the customary international law minimum standard of treatment is "a minimum standard" and "*is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community,*" and "*is not meant to vary from state to state or investor to investor.*" Moreover, the tribunal emphasized that the level of scrutiny under the standard is the same as that articulated in the 1926 *Neer* case concluding that to violate the customary international law minimum standard of treatment codified in article 1005 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reason – so as to fall below accepted international standards and constitute a breach of article 1105(1).

Procedural Issues

The UNCTAD Note included several cases dealing with procedural issues. Some of the most significant awards on issues relating to burden, standard of proof and provisional measures are considered below.

Burden and Standard of Proof

Regarding the burden of proof at the jurisdictional level, the Tribunal in *Phoenix v. Czech Republic* emphasized the important role played by the facts as alleged by the claimant – for purposes of determining both jurisdiction and merit. The tribunal concluded in the following terms: "*If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their*

existence is ascertained or not at the merits level. On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage."

On the question of standard of proof, the tribunal in *Siag & Vecchi v. Egypt* specified that serious allegations such as fraud should be held to a high standard of proof. In particular, the respondent had based one of its jurisdictional objections on the claimant's allegedly fraudulent acquisition of his Lebanese nationality. The tribunal noted that, with regard to such a claim, "*the applicable standard of proof is greater than the balance of probabilities but less than beyond reasonable doubt. The term favored by Claimants is 'clear and convincing evidence.'* The Tribunal agreed with this test.

Provisional Measures

On the issue of provisional measures, the tribunal in *Perenco v. Ecuador and PetroEcuador* recommended provisional measures restraining the respondents from, inter alia, (1) demanding that Perenco pay any amount allegedly due pursuant to the Ecuadorian legislation under review and (2) instituting or further pursuing any action to collect from Parenco any payment the respondents claimed was owed by Parenco. The tribunal also invited the parties to (1) establish an escrow account where the above-mentioned amounts should be paid by the claimant and (2) agree on terms and conditions on which such an account could be established. The tribunal noted that "*it is now generally accepted that provisional measures are tantamount to orders, and are binding on the party to which they are directed.*"

Final Comments

With a total of 32 known new treaty-based claims, the year 2009 confirms that investors have continued to use international arbitration to resolve disputes with their host countries. However, none of the known cases initiated in 2009 appear to address measures taken by countries in response to financial and economic causes.

Some countries have revised (or are revising) those treaty provisions in their model BITs, which have been subject to controversial and divergent interpretations (e.g. investment, MFN and FET), with a goal of clarifying in greater detail the meaning and scope of these provisions and of ensuring more coherent and predictable interpretations. This should be a generalized practice used more often in the future to avoid loopholes.

The UNCTAD Note is available at http://www.unctad.org/en/docs/webdiaeia20103_en.pdf

Interested in UNCTAD and investment disputes? AIA's new one-year postgraduate degree program in International Business Arbitration at the Vrije Universiteit Brussel will offer a course specifically on International Trade and Investment Dispute Settlement as wells as courses on commercial arbitration in general. For more information about this program and registration, please visit www.vub.ac.be/english/infofor/prospectivestudents/postgraduate.html

The Abyei Arbitral Award: Still Effective One Year Later

Introduction

This month marks the one-year anniversary of the Abyei Award for the Sudanese by the Permanent Court of Arbitration (PCA). The PCA arbitrates some of the most highly contentious disputes in the world, including the conflict between the Government of Sudan (Sudan) and the Sudan People's Liberation Movement (SPLM). The namesake of the arbitration, Abyei, is an area in Sudan rich with oilfields. Abyei was the location of a hostile border dispute between the two parties. The ownership of the oilfields and surrounding land had been in contention since the parties signed a peace accord in 2005. The accord ended a bitter civil war that began over 50 years ago and cost approximately two million lives. The accord, however, was unsuccessful in ending the violence. Disputes in the region in the spring of 2008 resulted in the town of Abyei being burnt to the ground, forcing 50,000 people to flee.

Arbitration

Sudan and the SPLM signed the "Arbitration Agreement between The Government of Sudan and The Sudan People's Liberation Movement/Army on Delimiting Abyei Area" in the summer of 2008 in an attempt to curtail the violence. The parties also agreed to refer their dispute to final and binding arbitration under the PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State,

which are based on the UNCITRAL Arbitration Rules. Sudan appointed His Excellency Judge Awn Al-Khasawneh and Professor Dr. Gerhard Hafner to the panel, while SPLM appointed Professor W. Michael Reisman and Judge Stephen M. Schwebel. The four appointed arbitrators could not agree on an umpire, so under the rules of the PCA, the Secretary-General of the PCA was given the authority to select the umpire. The Secretary-General chose Professor Pierre-Marie Dupuy.

The arbitral panel had the task of deciding on an award that would satisfy both parties and hopefully relieve some of the tension still harboring in the area. The parties filed their written Memorials, and then their Counter-Memorials and Rejoinders in the winter of 2008. The oral pleadings were held open to the public in April. The award, announced in July 2009, included important concessions from both sides, but gave Sudan control of the richest oilfields. The court ruled on where Abyei's borders should be, not who owns the land. The award reduced the size of Abyei, but both parties accepted the PCA's ruling, making the arbitration a success in the eyes of the United States, the European Union, and the United Nations.

Aftermath

Although it has only been a year since the final award, it appears that the relations between Sudan and the SPLM have remained relatively peaceful. Many feared that a third civil war was inevitable one year ago, but now that fear has been assuaged. The parties agreed on a referendum that will allow the people to decide whether the oil-producing region of Abyei should join the south, controlled by the SPLM. The referendum is set to take place in January of 2011. The Abyei Arbitration can be hailed as a success and a great feat of peacemaking because two parties with a long history of war and hatred were able to come together and voluntarily submit themselves to a forum in which they had faith. This reflects the goodwill of the PCA throughout the world and its reputation for fairness. An even greater accomplishment is that both parties accepted the ruling as legitimate, transparent, and fair. Because both parties agreed to be bound and accepted the final award, they are more likely to comply with PCA's decision and work together to maintain peace.

Interview at the Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA) is a forum for arbitrating a variety of different disputes that arise in the international community. The last twenty years have seen a sharp increase in the level, diversity and importance of international arbitration. With currently over fifty pending cases, PCA has become a mainstay in international arbitration with a reputation for ensuring highly professional and organized proceedings. The PCA allows for countries, state entities, intergovernmental organizations and private parties to submit disputes under a flexible system of rules designed to accommodate the preferences of the parties. The flexibility of being able to choose their own rules and select their own arbitrators, within limits, makes the PCA attractive to parties. In today's globalized society, the PCA has demonstrated the ability to tackle some of the most culturally diverse and acrimonious disputes.

AIA recently had the privilege to visit the PCA at the Peace Palace and speak with Dirk Pulkowski, a legal counsel at the PCA. Mr. Pulkowski was kind enough to answer some questions on the role of legal counsel at the PCA and the PCA's role in the international community.

AIA: What path led you to the PCA?
DP: I have a background in public international law, am admitted as an attorney to the bar in Germany, and worked as an associate in the dispute-resolution group of an international law firm before joining the PCA. This path, including both academic training in international law and some private-practice experience, is quite typical for PCA legal counsel.
(Mr. Pulkowski graduated from Munich University, completed the two-year articling period granting admission to the German Bar, and received an LL.M. from Yale Law School, where he subsequently conducted research as an academic fellow.)

AIA: What is the day-to-day role of legal counsel at the PCA?
DP: Each legal counsel is assigned to specific cases and serves as the primary contact for the arbitrators and parties. Legal counsel provide procedural and technical support to the tribunal to facilitate the administration of the dispute. At the PCA, counsel are expected to be familiar with the file in each of their cases, so that they are able to effectively assist the tribunal – and in particular, the presiding arbitrator – in running the arbitration as efficiently as possible.

AIA: What is the most interesting aspect of your job?
DP: There are a number of interesting aspects. Working on a daily basis with a variety of leading arbitrators is certainly one. Another one is the frequent opportunity to observe hearings, including witness examination, as well as tribunal deliberations. The fact that we see all phases of the proceedings, form their commencement to the award, provides a unique understanding of the arbitral process and tribunal decision making "from the inside".

AIA: What do you think is the most attractive aspect of the PCA for parties seeking an arbitration forum?
DP: I think two features stand out: First, the level of support. The PCA has a group of dedicated and qualified legal staff with international arbitral experience, who are willing to provide support at all times. The ratio of cases per legal counsel at the PCA is significantly lower than at other arbitral institutions – a deliberate choice to ensure that counsel are familiar with their cases and available to the presiding arbitrator. A second characteristic is flexibility. At the PCA, parties are not

constrained to the use of any particular procedural rules, and the proceedings in general can easily be adapted to the needs of each case. The same is true for the PCA's support: Not all cases require the same level and type of support, and the PCA can tailor its services to fit the needs of each case.

AIA: Does the PCA ever approach disputing parties and suggest that they submit their dispute to the PCA?
DP: As part of its mission under the 1899 and 1907 Hague Conventions, the PCA does endeavour to raise awareness among the its Member States and other entities of the availability of the PCA as a forum for settling international disputes. However, with respect to specific disputes, PCA involvement follows an inquiry about, or request for, PCA services, either pursuant to the terms of an arbitration clause in a contract, treaty, or compromis, or on an ad hoc basis when a submission to arbitration is already being contemplated.

AIA: Does the PCA ever turn down the submission of a dispute?
DP: As long as a case falls within the PCA's mandate, the PCA will be prepared to administer the dispute. The PCA was established under the Hague Convention as an international institution that is "accessible at all times".

AIA: What role will the PCA have in international arbitration in the future?
DP: I imagine that the PCA will consolidate its position as a primary institution for international arbitration involving states or state entities. Investor-state arbitration will likely continue to account for a major proportion of our docket, and there will continue to be high-stakes state-state arbitrations, such as maritime boundary disputes. (As a default, Annex VII of the Law of the Sea Convention refers maritime disputes to arbitration, and the PCA has repeatedly been asked to act as registry for such proceedings.) As the PCA is experiencing an increasing interest in environmental disputes, I would expect that international environmental arbitration will become more and more prevalent.

* * *

In light of the one-year anniversary of the Abyei Arbitral Award, AIA was able to ask a few questions about the Abyei Arbitration and its success. Mr. Pulkowski was joined by fellow legal counsel Aloysius Llamzon, who was the acting registrar of the Abyei Arbitration. The Abyei Arbitration is regarded as one of the politically most important cases the PCA has administered in recent years.

AIA: One year on, what are your most vivid memories of the Abyei arbitration?
AL: July 22nd, 2009 was memorable not only for the PCA but for the Peace Palace itself, which rarely sees the level of public and media interest that was present that day and rarely has the opportunity to host an event with such important peace implications. It was the day of the rendering of the award, and the Parties had brought well over 100 members of the Misseriya and Ngok Dinka tribes, and international media such as Al-Jazeera carried the award-rendering ceremony live – officials of both parties and the UN were following the ceremony on the ground. Tensions seemed to run quite high and from media reports, it seemed that the people of the Abyei region, of Sudan, and many of the guarantor States and organizations of the Comprehensive Peace Agreement were unsure what impact the award would have on the peace and order situation on the ground -- whether the award would serve as a catalyst for peace or renewed violence. So that day was quite unlike any other arbitral proceeding the PCA has experienced in recent years, and we were happy to assist the Tribunal in the endeavor.

AIA: Compared to other cases on which you have worked at the PCA, what made the Abyei case unusual and special?
DP: First of all, there is the fact that international arbitration procedure was adapted to the context of an intra-State conflict – possibly, a unique innovation. The Abyei Arbitration is also a rare instance where arbitration hearings were made entirely open to the public, and the proceedings were webcast live. (Incidentally, all the pleadings and videos are still available on the PCA's website.) Another peculiarity was the speed of the proceedings. No doubt due to the importance of the case for peace and stability in Sudan, the Parties' Arbitration Agreement imposed a very tight schedule for the rendering of the award – less than a year from the commencement of the arbitration. In the course of that year, three rounds of written pleading were exchanged, oral hearings were held, and the 270-page Award redacted: quite a challenge for all involved.

AIA: Can you describe the Abyei Arbitration as a success?
AL: It's a difficult question to answer definitively, and you would have to parse out the legal and political implications of the award to do that question justice. Many people were involved in that arbitration, whether as Members of the Tribunal party agents and counsel, or the PCA acting as Registry; or as direct stakeholders -- the communities within and surrounding the Abyei Area, officials in Khartoum and Juba, the UN, African intergovernmental organizations, the international community -- and all of them will have their own answers to that question.

What does seem clear is that in within hours after the award was announced on July 22nd, 2009, the UN, African regional organizations, and many of the guarantor States of the Peace Agreement responded positively and urged the parties to recognize and implement the award. The parties themselves quickly expressed their recognition and commitment to the Award as well. So one might say that there was a remarkable degree of commitment towards the award from the outset.

Consensual Arbitration

Consensual arbitration is an arbitration proceeding which includes an arbitration agreement executed at the outset, an appeal instance, review, objection or re-examination (hereinafter: "appeal"), which is intended to review the arbitration award and instruct, if necessary, as to an appropriate rectification thereof.

By Attorney Israel Shimony
Founder of the Institute for Consent Arbitration Ltd.

Consensual commercial arbitration focuses on consensual arbitration proceedings that are designed to resolve commercial disputes. We have elected to use the term "consensual arbitration" for this purpose.

The Arbitration Law in its new format represents a very real transformation in the new method it offers of resolving disputes. It creates a reliable, effective and safe manner of judicial adjudication, as follows:

1. It serves as a safety valve that enables a proper review where necessary and can be controlled by the litigants:
1.1 Will permission be granted to intervene in the factual findings? And if so, when?

1.2 Will there be authorization to rectify the arbitration award or will it be necessary to return it to the first instance?
1.3 What will be the composition of the appeal panel?
1.4 What will be the specialist area of the members of the appeal panel?

2. It streamlines the process in the first instance since, with no way back in the non-appeal arbitration route there is a tendency to "split hairs". The appeal instance gives litigants and their attorneys peace of mind and assurance that it is possible to focus on the gist of the matter and prove it, instead of grasping at every shred of evidence in hope that it will portray the picture better for the arbitrator. In the event that the arbitrator exercises his discretion in a manner that is unreasonable under the circumstances, the litigants have an option to refer to appeal. Unreasonable exercise of discretion does not depend on a shred of evidence that will occupy valuable time for which the litigants will be charged. Thus the arbitration proceeding will be conducted more efficiently.

The Consensual Arbitration Revolution

In recent years not much attention was paid to arbitration. Broad social movement is afoot and it is appropriate for such social change – the "arbitration revolution" – to come into its own. After all, many are the perils along the road of the arbitration revolution; the greater the phenomenon, the greater the risks of its failure. Everything possible should be done to deter untrained arbitrators from infiltrating the field, while ensuring supervision and advanced qualification; at the same time arbitrators acting in good faith to fulfill their assignment should be guaranteed proper protection; the culture of out-of-court settlement of disputes should be disseminated at all levels of society; and a suitable level of training should be ensured for arbitrators.

This is a time of transition: if the arbitration revolution succeeds, it will flourish and the culture of arbitration will spread to become an integral part of our overall business culture. To this end, all possible government bodies (the Knesset, the government and the courts) and private entities should be recruited to ensure the success of the revolution. The legislation of the new Arbitration Law must be supplemented, prescribing appropriate normative frameworks for conducting judicial proceedings and guaranteeing that arbitrators are trained to a suitable level. For their part, the courts should contribute to the success of the arbitration revolution – which in turn will contribute to the success of the courts – by increasing the volume of cases referred to arbitration proceedings. Academic research and education in arbitration should also be encouraged.

The Principle of Consent

Consent forms the very foundation of arbitration proceedings - from beginning to end they are based on consent.

The essence of the new Arbitration Law – the promotion of certainty, autonomy and security in the world of commerce – requires a high degree of consent in the proceedings, along the lines of "informed consent". This type of consent is required in connection with the procedural aspects of the essence of the dispute in conducting arbitration proceedings, and in connection with material matters related to the content of the decision, which are significant to the commercial future of the litigants.

The Concept of Consent in Civil Law

The concept of consent is relevant in a variety of contexts of civil law in the world of commerce. This refers to resolve in contracts law. The concept of "resolve" in contract laws refers to the presence of preparedness in a party to take upon itself the legal obligation embodied in the contract. Resolve is examined objectively; the question is whether a party appears to have assumed a contractual undertaking in order to protect the other party's reliance interest. Hence, it is not impossible that a contract may be signed and a party will find itself obligated thereunder, even if there were informative and voluntary disruptions in formulating the subjective resolve. It is true that in certain cases a party whose demands were not answered may be released from the contract pursuant to Chapter B of the Contracts Law (General Part), 5733-1973; however, the right to annul is limited to defects of sufficient severity and is also dependent on the mental status of the other party regarding the defect. In terms of form, consent to enter into a contract does not for the most part entail any special format and it may be done verbally or by conduct, expressly or tacitly. What is the common and proper model for consent in the area of arbitration and where should it be positioned?

If a key rationale for favoring arbitration proceedings as a means of resolving disputes is the reinforcement of personal autonomy, as suggested above, then it follows that the level of consent required from the parties should be high, so as to reflect a fitting exercise of individual will.

And indeed, in light of such rationale American literature offers the opinion that arbitration proceedings require consent at a higher level than is usual in civil law.

One suggested version is the presence of "high quality consent". Another version is found in various ethical codices in the United States. The literature rightly points to the essentiality of informed consent in arbitration as an element protecting human dignity.

IBA Revises Rules on the Taking of Evidence in International Arbitration for a Modern World

The International Bar Association (IBA) recently revised its influential Rules on the Taking of Evidence in International Arbitration* "Rules" to reflect the demands of modern international arbitration. The review process was initiated in 2008 and led by the Rules of Evidence Subcommittee to the Arbitration Committee. The revisions by the Subcommittee were adopted by a resolution of the IBA Council on May 29, 2010. Over 90 percent of all business information is stored electronically. This means that the vast majority of evidence is in electronic form, such as emails and metadata. The Subcommittee addressed the rising issue of 'e-disclosure' by including more guidance to the tribunal on how to respond to electronic documents and other electronic information. Specifically, Article 3(3) allows a party to request documents identified by "specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner." Electronic evidence is an ever-increasing obstacle for courts and tribunals alike because of its rapid growth and constant state of flux. The Rules attempt to make electronic evidence more manageable by providing clear guidelines on how to obtain such evidence.

The revision has made the Rules less cumbersome to witnesses by requiring them to appear for oral testimony only if their appearance has been requested by a party or the tribunal. Video conferencing and other communication technology are also now allowed in certain instances in lieu of physical presence during the taking of evidence to make the process more efficient. These changes make the Rules more attractive by reducing the costs associated with the taking of evidence, such as travel expenses for witnesses and other people associated with the proceedings.

Because the Rules have been updated to function with modern technology and the fast-paced lives and demanding schedules of involved parties, they are well-suited to be adapted for Online Dispute Resolution (ODR). The high level of detail in the Rules provides a desired structure for the guidance of the taking of evidence in ODR. Parties may be wary to use ODR because it is still in its developmental stages, but if the ODR proceedings are governed by strict and detailed rules, then the fear of unknown problems arising is mitigated.

The Subcommittee made important non-technological revisions to the Rules that could benefit ODR as well. The most noticeable change is the omission of "Commercial" from the title. The removal of the word 'commercial' represents the Subcommittee's belief that the Rules are applicable to commercial as well as non-commercial arbitrations, such as investment treaty-based disputes.

ODR raises the issue of confidentiality. The problem arises of ensuring that the correct person is logging on and accessing and/or inputting privileged information. The updated Rules provide a greater level of confidentiality in regards to documents produced pursuant to requests and documents submitted by parties. Increasing confidentiality protections fosters more sharing of evidence and respects the privacy of involved parties.

Another improvement to the Rules is the addition of an express requirement of good faith in taking evidence and the empowerment of the tribunal to consider lack of good faith when awarding costs. The added language requiring good faith reminds parties of their obligation to behave fairly. Vesting the tribunal with the power to take away money from parties as a result of poor faith serves as a compelling incentive for parties to adhere to good faith. Ensuring good faith is especially important for ODR because parties may be more likely to misbehave when they are physically removed from the proceedings.

No major arbitral institution has created rules for the specific application of ODR, but UNCITRAL is considering the prospect. UNCITRAL, the Institute of International Law of Pace Law School and the Penn State Dickinson School of Law held a colloquium at the United Nations Vienna International Centre in March of this year called "A Fresh Look at Online Dispute Resolution (ODR) and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader (Consumer and Merchant)." The occurrence of this colloquium and the fact that global ODR was a topic at UNCITRAL's working group meeting last month in New York City demonstrate an awareness for the need for ODR-specific arbitral rules. While the world waits for a coherent set of arbitral rules designed for ODR to emerge, it may find the IBA's Rules useful.

*Available at: http://tinyurl.com/IBA-Arbitration-Guidelines

Check out an upcoming ADR conference:

AMINZ - IAMA Alternative Dispute Resolution Conference
Challenges and Change
Christchurch, New Zealand 5 - 7 August, 2010

Over 60 presenters from New Zealand, Australia, United States, Indonesia, Sri Lanka and Malaysia
Over 55 separate sessions, many aimed at construction disputes, with concurrent streams featuring construction adjudication, arbitration, mediation, expert determination and expert witnessing
Plenary addresses by Hon. Chris Finlayson, New Zealand Attorney General and Minister for Treaty of Waitangi Negotiations
Hon. Michael Kirby AC CMG Hon Robert Fisher QC
Early-bird registration is now open. All registration completed online will go into a draw to receive registration FREE!
Conference includes 2 ½ days of conferencing, Newbies Function, (for anyone new to an AMINZ or IAMA Conference), the launch, Annual Dinner, Fellows' Breakfast, (for AMINZ and IAMA Fellows), meals at conference from just NZ$540. This price is available for a limited time only.
We strongly advise that you book your accommodation and travel now because conference falls within the Bledisloe cup weekend in Christchurch.
www.aminz.org.nz