

EDITORIAL

Welcome to the first edition of Volume 8 of *The Vindobona Journal of International Commercial Law and Arbitration*.

We certainly cover a wide range of interesting, topical and thought-provoking issues in this edition.

- ‘International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini, 26 November 2002’ is an excellent analysis of the decision handed down in *Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.*. As noted by *Professor Franco Ferrari* in this Comment, there are not many Italian decisions dealing with the United Nations Convention on Contracts for the International Sale of Goods (‘CISG’) although it entered into force in Italy more than fifteen years ago. The number of foreign decisions quoted, the answer given to the question of what value these foreign decisions have, as well as the very detailed examination of the relationships between uniform substantive law and private international law would *per se* be sufficient to make the decision by the Tribunale di Rimini one of the most important court decisions applying the CISG. In addition, this decision deals with an issue that has never been examined in depth before in case law - the relationship between the uniform substantive law laid down by the CISG and the so-called forum shopping. There can be little doubt that this really is the most important court decision applying the CISG. A translation of this decision, undertaken by Angela Maria Romito and Francesco G. Mazzotta, is also included in this edition of the journal.
- *Roberto Bergami* unravels the new eUCP regulations in ‘eUCP: A Revolution in International Trade?’ Letters of Credit continue to be the most popular method of international payments in the trading community, but there is a push to convert traditional processes to the electronic age of paperless transactions. This paper discusses the new eUCP regulations (version 1.0), which became effective on 1 April 2002. Touted as a revolution by some commentators, this set of rules is an electronic supplement to the established principles of the traditional Letter of Credit rules, which rely on paper-based flows of documents to satisfy the requirements of this instrument of payment. The eUCP provides some flexibility, but also some uncertainty about their operations, particularly on issues related to systems standards and certainty of electronic records integrity. In the discussion, comments will be made about the reservations and concerns traders and service providers may have about the operations of these new rules and whether they facilitate or complicate presentation of documents under this method of payment.

- ‘Confidentiality of Arbitrations - Singapore’s Position following the recent case of *Myanma Yaung Chi Oo Co Ltd v. Win Win Nu*’ by *Gordon Smith and Meef Moh* discusses, as the title of their article suggests, the issue of confidentiality in arbitration in light of recent Singapore case law. Over the past decade, much literature has been devoted to confidentiality in arbitration proceedings. The decision of the Australian High Court in 1995, *Esso Australia Resources Ltd v. Plowman (Ministry of Energy and Minerals)*, appears to be one of the contributing factors to the proliferation in writing on this subject. This decision (described as ‘a nuclear event in Australia’ whose ‘seismic tremors’ were felt throughout the arbitration world) rejected the view that a general duty of confidentiality existed in arbitration proceedings. Before the *Esso* decision, there were some English cases which recognised that it is an implied term of arbitration agreements that the proceedings are private and confidential albeit subject to certain limited qualifications or exceptions. Recently, the issue of confidentiality in arbitrations arose again in the Singapore court in *Myanma Yaung Chi Oo Co Ltd v. Win Win Nu*. Interestingly, though not surprising, the Singapore High Court chose to follow the English approach rather than the more controversial Australian approach. This paper explores the issue of whether there is a general principle of confidentiality applicable to commercial arbitrations. Decisions from the English Court and the Australian Court are discussed. The recent case of *Myanma Yaung Chi Oo Co Ltd v. Win Win Nu* is also examined in detail and the authors discuss some unanswered questions which still linger. Finally, this paper examines the confidentiality clauses in the various institutional and *ad hoc* arbitration rules.

- The discussion on confidentiality and arbitration proceedings is continued by *Emma Cashen* in her paper ‘Confidentiality and Arbitration - *Associated Electric & Gas Services Limited v European Reinsurance Company of Zurich: A Case Summary*’. This recent Privy Counsel decision suggests that express confidentiality provisions in arbitration proceedings may be overridden in some circumstances. This is an important decision in light of judicial inconsistency on this matter.

- The interpretation of arbitration clauses is discussed by *Andrew Sykes* in ‘The *Contra Preferentem* Rule and the Interpretation of International Commercial Arbitration Agreements – The Possible Uses and Misuses of a Tool for Solutions to Ambiguities’. This article investigates the international recognition of a general tool of interpretation - regularly referred to as the *contra preferentem* rule – which is used in relation to various types of agreements, and then considers its possible applications to the interpretation of disputes in relation to arbitration agreements. Although various articulations and formulations exist, in international law this rule basically provides that an interpretation *against* the drafter of a clause should be preferred when the clause has not been individually

negotiated. How this rule is to be applied, and under what authority, is explored.

A special feature in this edition of the *Vindobona Journal* is a selection of papers which were presented at the 2nd International Conference on Law and Commerce – *Law, Commerce and Ethics*, from 8 – 10 December 2003 at the host School of Law, Victoria University, Melbourne, Australia. We are very pleased to be able to include the following four articles:

- ‘Fundamental Breach and the CISG – A Unique Treatment or Failed Experiment?’ by *Dr Bruno Zeller* builds on and questions suggestions by Koch, who pointed out that academic writing and case law points to several approaches in the application and interpretation of Article 25 CISG. Koch furthermore advocates that pursuant to Article 7, a unified and coherent approach is necessary. The paper also briefly examines the common law approach to fundamental breach, the connection between Article 25 and to Article 8, and a ‘functional’ approach to fundamental breach as opposed to an ‘interpretative’ one.
- *Professor Syed Khalid Rashid* provides a very informative overview of extra-legal settlement of disputes within the Islamic legal system in ‘Alternative Dispute Resolution in the context of Islamic Law’, which finds support in its two highest sources: Quran and *hadith*. His discussion takes place within the context of the emergence of ‘Alternative Dispute Resolution’ or ‘ADR’ during the last two decades, consisting of amicable ways of dispute settlement through such means as negotiation, mediation, conciliation, arbitration, ombudsman and expert determination.
- *Professor D. Thomas Rhidian* addresses the issue of prudential risk management in international sales through the use of insurance in ‘Procuring Insurance for the Benefit of Buyers under International Sales Contracts’. There is an inevitable divide in terms of space and time between sellers and buyers in international sales contracts - a divide that is bridged by the transport element of the contracts. The transport element may be in the form of carriage by sea, air, land, rail or inland navigation, or may be a combination of any two or more. Whether the transport is unitary or a combined or multi-modal system there is attendant potential serious risk to the goods in transit and also potential collateral risks. Professor Thomas advocates that insurance represents the most effective means of protection against the materialisation of these potential risks, in all probability more effective and certainly more convenient than seeking remedies under the contract of carriage. Parties to international sales contracts should when negotiating international sales contracts expressly address the question of insurance, in addition to the sale and transport and other elements.

- Professor Dr. Mohd Altaf Hussain Ahangar discusses the exception to the common law principles used to determine the assessment of damages for loss of future earnings in cases of personal injury and death in most countries of the world, which was created through the adoption of express legislative rules in Malaysia in 1984. In ‘Assessment of Damages for Loss of Future Earnings in Malaysia: An Appraisal of Judicial Ethics’, readers will be acquainted to the liberal judicial response to these provisions with the object of attaining the ends of justice. Recommendations concerning the form which the enacted provisions should assume in future are made.

- *Judge Xiaolin Wang and Camilla Baasch Andersen*, in their article ‘The Chinese Declaration against Oral Contracts under the CISG’, focus on one of the two reservations made by China when the CISG entered into force in China on January 1st 1988. The first reservation, an Article 95 reservation, disregards the application of Article 1.1(b) of the CISG so its application is limited to cases where both seller and buyer reside in CISG states, restricting the role of private international law. This reservation has been taken by other CISG States, and the policies of certainty and predictability which underpin it are unchanged from the date of ratification until today. The application of the second reservation in China today is more questionable. In essence, the declaration reserves the application of Article 11 allowing oral contracts and contracts with no consideration. In other words, the reservation brings to the application of the CISG in China a formal requirement that contracts be evidenced in writing. The authors strongly recommend that, in light of the developments in Chinese trade and domestic law, the reservation made by China over twenty years ago on the principle of freedom from contract requirement as to form under the CISG should be withdrawn.

This edition concludes with a book review of *Arbitration: Commentary and Resources* by *Emilia Onyema*.

The overwhelming theme of this edition is change, evidenced by new approaches and techniques in the application of international law, new laws, the revival of age-old traditions to facilitate international trade and cultural transformation. We hope you find this an invigorating read.

Elisabeth Opie
 Editor-in-Chief
 4 March 2004