

THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION

Vol. XIII – 2002

This volume comprises the series of papers on International Arbitration that were presented at a Research Conference on International and Domestic Arbitration, sponsored by the Institute of Judicial Administration. The Conference was held at the New York University School of Law. This collection constitutes Volume XIII of *The American Review of International Arbitration* in its entirety.

**Center for
International Arbitration
And Litigation Law**

Columbia University

New York

2002

The American Review of International Arbitration is a publication of the Center for International Arbitration and Litigation Law which is devoted to the study of laws relating to international arbitration and litigation throughout the world. To that end, it promotes and sponsors the publication of books, commentaries, articles, periodicals and conferences on these subjects. *The American Review of International Arbitration* is one of the Center's publications. Other publications sponsored by the Center are the eight volume *Guides to International Arbitration* and the *World Arbitration Reporter*. The Center also co-operates with institutions engaged in advocating and administering international arbitration and sponsors clerkships at those institutions.

The Director of the Center is Hans Smit, Stanley H. Fuld Professor of Law, Columbia University. Inquiries about the Center and its activities should be addressed to:

Hans Smit
Stanley H. Fuld Professor of Law
Columbia Law School
435 West 116th Street
New York, New York 10027
Tel: (212) 854-2693; Fax (212) 222-4256
E-mail: hsmit@law.columbia.edu

ISSN 1050-4109

Copyright © 2003 by Hans Smit and Juris Publishing, Inc.

THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION

EDITORS-IN-CHIEF

HANS SMIT
VRATISLAV PECHOTA

MANAGING EDITOR

ELIZABETH H. COOPER

SENIOR STUDENT EDITORS

HOWARD BAKER, YONA CONZVOY, MINDY FOSS, KATHRINE GEHRING,
ADRIA PEREZ, MARRI TUSSING

STUDENT EDITORS

LESLIE BENNETT, EDUARDO CORRETJER, JOSE DIAZ, JONATHAN FARKAS,
SARAH FRIEDMAN, YUICHI HARAGUCHI, ABID IMAM, RACHEL JACOBS,
CHEOMA JULIEN, JOANNA MCRAE, GEOFFREY MORRIS, STUART ORSAK,
CHAD SILVERMAN, ANDREAS STIER, YI ZHANG

BOARD OF ADVISORS

GIORGIO BERNINI	<i>President, International Council for Commercial Arbitration</i>
HORACIO A. GRIGERA NAÓN	<i>Special Counsel, White & Case, Washington, D.C.</i>
BERNARD HANOTIAU	<i>Professor, Universities of Louvain and Namur</i>
MICHAEL F. HOELLERING	<i>General Counsel, American Arbitration Association</i>
J. MARTIN H. HUNTER	<i>Barrister, London and Professor, Nottingham Law School</i>
NEIL KAPLAN	<i>Special Counsel, Debevoise & Plimpton</i>
SERGEI N. LEBEDEV	<i>President, Maritime Arbitration Commission, Moscow</i>
PIERRE MAYER	<i>Professor, Université de Paris I — Sorbonne, Paris</i>
WERNER MELIS	<i>Chairman, Arbitral Centre of the Federal Economic Chamber, Vienna</i>
ALLAN PHILIP	<i>Philip & Partners, Copenhagen</i>
MICHAEL CHARLES PRYLES	<i>Arbitrator; Consultant to Clayton, Utz.</i>
CLAUDE REYMOND	<i>Professor, University of Geneva</i>
OTTO SANDROCK	<i>Professor Emeritus, University of Muenster;</i> <i>Partner, Hoelters & Elsing</i>
TOSHIO SAWADA	<i>Professor, Sophia University, Tokyo</i>
VINCENZO VIGORITI	<i>Professor, University of Florence</i>

THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION

Vol. 13	2002	Nos. 1-4
INTRODUCTION	<i>Oscar Chase & Samuel Estreicher</i>	vii
REPORTS		
INTERNATIONAL ARBITRATION: SCAPEGOAT OR SOLUTION	<i>Andreas F. Lowenfeld</i>	1
INTERNATIONAL ARBITRATION: COMMENTS FROM A CRITIC	<i>Linda Silberman</i>	9
SEPARABILITY AND COMPETENCE – COMPETENCE IN INTERNATIONAL ARBITRATION: <i>EX NIHILO</i> <i>NIHIL FIT?</i> OR CAN SOMETHING INDEED COME FROM NOTHING?	<i>Robert H. Smit</i>	19
IN THE SHADOW OF THE UNRULY HORSE: INTERNATIONAL ARBITRATION AND THE PUBLIC POLICY EXCEPTION	<i>Homayoon Arfazadeh</i>	43
COMMENTS ON PUBLIC POLICY IN INTERNATIONAL ARBITRATION	<i>Hans Smit</i>	65
MASS CLAIMS PROCESSES	<i>Howard M. Holtzmann</i>	69
AMENDING THE FEDERAL ARBITRATION ACT:	<i>William W. Park</i>	75
COMMENT ON A PROPOSED NEW STATUTE FOR INTERNATIONAL ARBITRATION	<i>Richard W. Hulbert</i>	153
REMARKS ON AMENDING THE FAA	<i>Kenneth Davis</i>	167

THE RULE OF LAWYERS AND THE ETHOS OF DIPLOMATS: REFLECTIONS ON THE INTERNAL AND EXTERNAL LEGITIMACY OF WTO DISPUTE SETTLEMENT	<i>J.H.H. Weiler</i>	177
THE WTO'S LEGITIMACY CRISIS: REFLECTIONS ON THE LAW AND POLITICS OF WTO DISPUTE RESOLUTION	<i>Jeffrey L. Dunoff</i>	197