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FOR COMMERCIAL ARBITRATION

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VOLUME XXX – 2005

GENERAL EDITOR
ALBERT JAN VAN DEN BERG

with the assistance of
International Bureau of the
Permanent Court of Arbitration
The Hague
INTRODUCTION

With this Volume XXX, the Yearbook completes its third decade of reporting on international commercial arbitration law and practice. As Jean Robert, President of ICCA, wrote in 1976 in his Preface to Volume I of the Yearbook, “at the New Delhi Congress in 1975, ICCA decided to publish a Yearbook that would serve as a source of information of what is going on in the field of commercial arbitration throughout the world”. Pieter Sanders, the Yearbook’s first General Editor, opened his Introduction to the first Yearbook stating “This Yearbook is the first of a series of at least five”. Thirty volumes later, the Yearbook still reports on “what is going on” in a greatly expanded field of commercial arbitration.

The XXXth volume of the Yearbook retains its traditional printed format. In addition, in collaboration with its publisher, Kluwer Law International, the Yearbook, along with ICCA’s International Handbook on Commercial Arbitration and selected volumes of ICCA’s Congress Series, are made available by subscription in two electronic formats as part of the materials on the Arbitration CD-Rom: Resources on International Commercial Arbitration and the online service <www.kluwerarbitration.com>.

The International Handbook on Commercial Arbitration functions alongside the Yearbook in providing up-to-date information on arbitration law and practice in more than sixty countries. National Reports together with the relevant legal texts are published in the Handbook. The Table of Contents of the Handbook is reproduced in Part I of the Yearbook where, until the introduction of the Handbook, National Reports were published. Thus, the reader will find arbitral awards, rules and leading court decisions from a broad range of countries and institutions in the Yearbook, and National Reports and legislation on arbitration in the Yearbook’s companion publication, the Handbook. In addition, Part IV of the Yearbook, entitled Recent Developments on Arbitration Law and Practice, provides a summary of the salient features of newly enacted arbitration legislation, this year reporting on Chile, Denmark, Norway, Philippines and Poland.

The contents of Part II – A of this Yearbook reflect the evolving policy of arbitral institutions increasingly to make awards and decisions issued under their auspices available online on their websites or in their printed publications. In response to this increased availability, the Yearbook has become more selective, publishing relevant awards from sources which otherwise are not readily available. This year’s selection includes awards from the German Maritime Arbitration Association, Hamburg Friendly Arbitration and the International
INTRODUCTION

Chamber of Commerce. The awards deal with issues such as a holding of lack of jurisdiction, consolidation, applicable law to the validity of the arbitration agreement and the applicable substantive law, applicability of the 1980 UN Sales Convention, employment disputes, interim relief and the various forms in which it may be ordered, and the recurring question of calculation of damages.

Part II – B reports on leading court decisions falling outside the scope of Part V’s reporting on the major arbitration conventions. It includes a Canadian decision upholding a NAFTA award, stating that the “applicable standard of review … is at the high end of the spectrum of judicial deference”; two French decisions, one holding that WIPO internet domain name decisions are not awards and that applications for setting aside are not admissible in the French courts and the other granting a request to assist in the appointment of a party arbitrator in an arbitration where the only connection with France was that the president of the ICC Chamber of Commerce would appoint the third arbitrator if the parties failed to do so, on the basis that to not do so would be a denial of justice. The 1923 Geneva Protocol is found not to be applicable in a Pakistani court decision, and finally, in a Swedish court decision, the court held that it did not have jurisdiction over an application to set aside an award where the award stated that the place of arbitration was Stockholm, but in the view of the court, there was no connection with Sweden and it did not foresee a denial of justice as the award could be subject to setting aside elsewhere.

Part II – C reproduces court decisions applying the UNCITRAL Model Law as reported in UNCITRAL’s periodical Case Law on UNCITRAL Texts (CLOUT).


The reporting this year on the Iran-US Claims Tribunal in Part III – B contains a Decision relating to the Security Account and an Interlocutory Award on jurisdiction over counterclaims issued by the Full Tribunal in disputes between the United States and Iran.

A major part of the Yearbook reporting consists in the documentation of court decisions applying the 1958 New York Convention. This year, Part V – A reports the decisions in seventy-nine cases from twelve countries, including two newcomers, Brazil and Ireland. While, as usual, the majority of cases comes from courts in the United States, the reporting this year includes twelve German cases and five decisions each from Canada, Spain and the United Kingdom.
INTRODUCTION

Recurring issues in the decisions are stay of enforcement proceedings pending annulment proceedings; waiver of rights and estoppel; sovereign immunity; the Brussels/Lugano Conventions and the former’s successor, the EU Council Regulation no. 44 of 2001; and, particularly in the German decisions, the more-favourable-right provision. Injunctions enjoining a foreign lawsuit are a frequent issue in the UK decisions.

Issues relating in particular to US decisions include removal to federal court and remand to state court and the relationship among Chapters 1 (domestic arbitration), 2 (New York Convention 1958) and 3 (Panama Convention 1975) of the Federal Arbitration Act (FAA). A significant number of US cases deal with the question of whether the FAA allows disputes relating to contracts of employment of seamen which provide for foreign arbitration, to be referred to arbitration under Art. II of the Convention. In most cases the courts have held that the exemption in Chapter 1 FAA, which excludes employment contracts from the scope of the Act, does not apply to arbitrations falling under Chapter 2 of the Act, which implements the New York Convention. See:

United States District Court, Southern District of Florida, 15 June 2004 (US no. 493), Holmes;
United States Court of Appeals, Fifth Circuit, 9 August 2004 (US no. 498), Freundsprung;
United States District Court, Eastern District of Louisiana, 19 October 2004 (US no. 503), Amizola;
United States District Court, Eastern District of Louisiana, 10 November 2004 (US no. 506), Umali; and
United States Court of Appeals, Eleventh Circuit, 18 January 2005 (US no. 513), Bautista.

Amizola, Umali and other decisions deal with the sometimes interrelated question of whether the Convention preempts mandatory provision of state laws prohibiting forum selection clauses. See also:

United States Court of Appeals, Fifth Circuit (US no. 490), Dahiya;
United States District Court, Eastern District of Louisiana, 27 May 2004 (US no. 492), Lejano; and
United States Court of Appeals, Fifth Circuit, 24 March 2005 (US no. 518), Lim.

Part V – B reports two decisions applying the 1961 European Convention, including for the first time a decision from the Russian Federation. Part V – D
INTRODUCTION

reports two IS decisions applying the 1975 Panama Convention, in line with the continuing trend of an increasing number of courts applying this Convention.


The Volume concludes with a list of journals on arbitration and a bibliography announcing recently published books relating to general topics in arbitration and individual countries and regions. This year’s selection includes several new or updated handbooks and textbooks on international commercial arbitration, as well as a number of publications on settling foreign investment disputes.

The worldwide network of correspondents who generously provide assistance and material for the Yearbook is an essential element in the compilation and editing of the Yearbook. The correspondents are too numerous to thank individually in this Introduction. They are mentioned and acknowledged in the Introductions to the various Parts and in footnotes where appropriate.

The ICCA Editorial Staff works in close cooperation as a team throughout the year to collect and process the contents of the Yearbook. I would like, however, to express my thanks and appreciation to each of them individually for their essential contribution:

– Ms. Alice Siegel, who as sub-editor continues to assure that the Yearbook is presented in a literate, consistent and attractive format;
– D.ssa Silvia Borelli, who has assumed the responsibility for the New York Convention reporting, including translations into English from French, German, Italian and Spanish;
– Ms. Judy Freedberg, who with great skill and dedication puts together and manages the entire Yearbook.

On behalf of ICCA, continuing thanks go to the Permanent Court of Arbitration and its Secretary-General, Tjaco T. van den Hout, for hosting the Editorial Staff at the headquarters of its International Bureau at the Peace Palace. The administrative and technical support of the entire PCA staff is greatly appreciated.

In all of its publications, ICCA is advised by ICCA’s Editorial Board. The
INTRODUCTION

Editorial Board is presently composed of Dr. Gerold Herrmann, President of ICCA (Austria); Mr. Antonio Parra, Secretary-General of ICCA (United States); Mr. Jan Paulsson, General Editor, *International Handbook on Commercial Arbitration* (France); Mr. Martin Hunter (United Kingdom) and the undersigned as General Editor of the ICCA publications.

Since the inception of the Yearbook, readers throughout the world have been a major source of material. Therefore, may I continue to call on you, as reader and Yearbook user, to submit texts concerning:

— recent changes in arbitration legislation;
— newly enacted arbitration rules;
— arbitral awards (the confidentiality of which is ensured);
— court decisions of general interest and, in particular, court decisions applying the UNCITRAL Model Law or the New York, European, Washington or Panama Convention.

The names of the readers who have provided materials for this volume are gratefully acknowledged in the appropriate Parts.

Brussels
October 2005

Albert Jan van den Berg
General Editor

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# TABLE OF CONTENTS

**VOLUME XXX – 2005**

**Introduction**
Albert Jan van den Berg, General Editor v

**18th ICCA Congress** xi

**Table of Contents** xiii

**Part I – National Reports** 1

*Note General Editor*
Table of Contents of *International Handbook on Commercial Arbitration* 1

**Part II – A. Arbitral Awards** 11

*Germany*
*German Maritime Arbitration Association*
- Award of 30 November 2000 13

*Hamburg Friendly Arbitration*
- Award of 27 May 2002 17

*International Chamber of Commerce (ICC)*
- Case no. 9781 of 2000, interim award 22
- Case no. 10060 of 1999, final award 42
- Case no. 10596 of 2000, interlocutory award 66
- Case no. 10973 of 2001, interim award 77
- Case no. 11443 of 2001, award by consent 85

*Yearbook Comm. Arb’n XXX (2005)* xiii
TABLE OF CONTENTS

Index of Arbitral Awards 91

Introduction 91
Index of Arbitral Awards 93

Part II – B. Court Decisions on Arbitration 97

Canada
• Court of Appeal for Ontario, 11 January 2005
  *United Mexican States v. Marvin Roy Feldman Karpa* 99

European Court of Justice
• European Court of Justice, Fourth Chamber, 27 January 2005
  *Guy Denuit, et al. v. Transorient – Mosaique Voyages et Culture S.A.* 113

France
• Cour d’Appel, Paris, 17 June 2004

• Cour de Cassation, 1 February 2005
  *State of Israel v. National Iranian Oil Company (NIOC)* 125

Pakistan
• Sindh High Court, Karachi, 20 October 2003
  *Lithuanian Airlines v. Bhoja Airlines (Pvt.) Ltd.* 129

Sweden
• Svea Court of Appeal, Division 2, 28 February 2005
  *The Titan Corporation v. Alcatel CIT SA* 139

Part II – C. Court Decisions Applying the UNCITRAL Model Law 145

Case Law on UNCITRAL Texts (CLOUT) 147
Canada
• Case 501: Prince Edward Island Supreme Court, Trial Division,
  23 March 2001 149

Table of Contents

- Case 502: British Columbia Supreme Court, 2 May 2001 150
- Case 503: Alberta Court of Appeal, 18 June 2001 151
- Case 504: Ontario Superior Court of Justice, 17 April 2002 152
- Case 505: Ontario Superior Court of Justice, 30 April 2002 152
- Case 506: Ontario Superior Court of Justice, 26 June 2002 153
- Case 507: Ontario Superior Court of Justice, 20 September 2002 153
- Case 508: Ontario Superior Court of Justice, 8 October 2002 154
- Case 509: Ontario Court of Appeal, 30 May 2003 154
- Case 510: British Columbia Supreme Court, 6 March 2003 156
- Case 511: Supreme Court of Canada, 21 March 2003 157
- Case 512: British Columbia Court of Appeal, 15 January 2004 158
- Case 513: Alberta Court of Queen’s Bench, 2 February 2004 158
- Case 514: British Columbia Supreme Court, 10 July 2003 159
- Case 515: Ontario Superior Court of Justice, 30 June 2003 159
- Case 516: Quebec Superior Court, 14 March 2003;
  Quebec Court of Appeal, 2 June 2003 160

Hong Kong

- Case 517: High Court of Hong Kong Special Administrative Region,
  Court of First Instance, 6 July 2000 161
- Case 518: High Court of Hong Kong Special Administrative Region,
  Court of First Instance, 17 November 2000 162
- Case 519: High Court of Hong Kong Special Administrative Region,
  Court of First Instance, 8 December 2000 163
- Case 520: High Court of Hong Kong Special Administrative Region,
  Court of First Instance, 2 February 2001 163
- Case 521: High Court of Hong Kong Special Administrative Region,
  Court of First Instance, 23 February 2001 164
- Case 522: High Court of Hong Kong Special Administrative Region,
  Court of First Instance, 6 March 2001 165
- Case 523: High Court of Hong Kong Special Administrative Region,
  Court of First Instance, 6 March 2001 166
- Case 524: High Court of Hong Kong Special Administrative Region,
TABLE OF CONTENTS

Court of First Instance, 17 March 2001 167
• Case 525: High Court of Hong Kong Special Administrative Region,
  Court of First Instance, 7 June 2001 168
• Case 526: High Court of Hong Kong Special Administrative Region,
  Court of First Instance, 12 June 2001 168
• Case 527: High Court of Hong Kong Special Administrative Region,
  Court of First Instance, 11 October 2001 169
• Case 528: High Court of Hong Kong Special Administrative Region,
  Court of First Instance, 15 October 2001 170
• Case 529: High Court of Hong Kong Special Administrative Region,
  Court of First Instance, 14 December 2001 171
• Case 530: High Court of Hong Kong Special Administrative Region,
  Court of First Instance, 20 December 2001 172

Index of Articles 174

Part III – A. Arbitration Rules 183

China International Economic and Trade Arbitration Commission (CIETAC)
• Arbitration Rules, 1 May 2005 185
• Financial Disputes Arbitration Rules, 1 May 2005 210

China Maritime Arbitration Commission
• Arbitration Rules, 1 October 2004 219

International Chamber of Commerce
• Dispute Board Rules of the International Chamber of Commerce,
  1 September 2004 246

Part III – B. Iran-US Claims Tribunal 269

Introduction 271
Survey of Awards, Decisions and Orders 274
Awards of the Full Tribunal
• Decision in Case No. A33 (132-A33-FT) of 9 September 2004
  United States of America v. The Islamic Republic of Iran 279
TABLE OF CONTENTS

• Award in Case No. B1 (Counterclaim) (ITL 83-B1-FT) of 9 September 2004
  United States of America v. The Islamic Republic of Iran 303

Part IV – Recent Developments in Arbitration Law and Practice 333

  Introduction 335
  Chile 336
  Denmark 336
  Norway 337
  Philippines 338
  Poland 340

Part V – A. Court Decisions on the New York Convention 1958 341

  Introduction 343
  List of Contracting States (as of 28 October 2005) 346

  Index of Cases Reported in Volume XXX (2005)
  Albert Jan van den Berg 353

  Australia
  • No. 24. Supreme Court of Tasmania, 14 August 2002 and 22 November 2002
  • No. 25. Supreme Court of New South Wales, Equity Division, Commercial List, 29 July 2004
    Corvetina Technology Limited v. Clough Engineering Limited 409

  Austria
  • No. 12. Oberster Gerichtshof, 19 February 2004
    Croatian Manufacturer v. Austrian Buyer 416
  • No. 13. Oberster Gerichtshof, 26 January 2005
    Austrian Buyer v. Serbian and Montenegrin Seller 421

Yearbook Comm. Arb’n XXX (2005) xvii
TABLE OF CONTENTS

**Brazil**
- No. 1. Superior Court of Justice, 18 May 2005  
  *L’Aiglon SA v. Textil União SA*  
  437

**Canada**
- No. 15. Court of Queen’s Bench, 30 June 2000  
  *Cangene Corporation (Canada) v. Octapharma AG*  
  440
- No. 16. Supreme Court, Province of Prince Edward Island, Trial Division, 23 March 2001  
  450
- No. 17. Supreme Court of British Columbia, 30 June 2004; Court of Appeal of British Columbia, 4 October 2004  
  *Powerex Corp. v. Alcan, Inc.*  
  466
- No. 18. New Brunswick Court of Queen’s Bench, Trial Division, Judicial District of Saint John, 28 July 2004  
  *Adamas Management & Services Inc. v. Aurado Energy Inc.*  
  479
- No. 19. Alberta Court of Queen’s Bench, Judicial District of Edmonton, 9 December 2004,  
  488

**France**
- No. 35. Cour d’Appel, Paris, 10 June 2004  
  *Barques Agro Industrie SA v. Young Pecan Company*  
  499

**Germany**
- No. 72. Oberlandesgericht, 26 September 2002  
  *Russian Debtor v. Creditor (in fact: Franz Sedelmayer)*  
  505
- No. 73. Hanseatisches Oberlandesgericht, Hamburg, 24 January 2003  
  *Polish Buyer v. Polish Seller*  
  509
- No. 74. Oberlandesgericht, Schleswig, 15 July 2003  
  *Ukrainian Seller v. German Buyer*  
  524
- No. 75. Oberlandesgericht, Celle, 4 September 2003  
  *Buyer v. Seller*  
  528
- No. 76. Oberlandesgericht, Celle, 18 September 2003  
  *Seller v. Buyer*  
  536
TABLE OF CONTENTS

- No. 77. Oberlandesgericht, Cologne, 6 October 2003
  Investor (in fact: Franz Sedelmayer) v. Russian State Agency  541
- No. 78. Oberlandesgericht, Celle, 20 November 2003
  Supplier v. Shipper  547
- No. 79. Oberlandesgericht, Dresden, 1 March 2004
  Claimant v. Defendant  555
- No. 80. Oberlandesgericht, Cologne, 23 April 2004
  Israeli Trading Company v. German Buyer  557
- No. 81. Bayerisches Oberstes Landesgericht, 5 July 2004
  Austrian Lawyer v. German Client  563
- No. 82. Bayerisches Oberstes Landesgericht, 23 September 2004
  K Trading Company v. Bayerischen Motoren Werke AG  568
- No. 83. Oberlandesgericht, Cologne, 26 October 2004
  Claimant v. Defendant  574

India
- No. 40. High Court, Andhra Pradesh, 9 September 2002
  International Investor KCSC v. Sanghi Polyesters Ltd.  577

Ireland
- No. 1. High Court, Dublin, 19 May 2004
  Brostrom Tankers AB v. Factorias Vulcano SA  591

Italy
- No. 166. Corte di Cassazione, Plenary Session, 1 March 2002
  UMS Generali Marine SpA v. Clerici Agenti srl, et al.  599

Spain
- No. 38. Tribunal Supremo, 14 January 2003
  Glencore Grain Limited v. Sociedad Ibérica de Molturación, S.A.  605
- No. 39. Tribunal Supremo, 9 May 2003
  Barconoya, S.A. v. Lavinia Corporation, S.A.  610
- No. 40. Tribunal Supremo, 7 October 2003
  Shaanxi Provincial Medical Health Products I/E Corporation v.
  Olpesa, S.A.  617

Yearbook Comm. Arb’n XXX (2005)  xix
TABLE OF CONTENTS

- No. 41. Tribunal Supremo, 9 October 2003
  Unión Naval de Levante S.A. v. Bisha Comercial Inc. 623

- No. 42. Tribunal Supremo, 14 October 2003
  Fashion Ribbon Company, Inc. v. Iberband, S.L. 627

**United Kingdom**

- No. 65. High Court of Justice, Queen’s Bench Division,
  Commercial Court, 25 April 2002 and 14 October 2002;
  Court of Appeal, Civil Division, 3 July 2003
  Welex AG v. Rosa Maritime Limited 633

- No. 66. High Court of Justice, Queen’s Bench Division,
  Commercial Court and Admiralty Court, 27 May 2004
  Atlanska Ploidba, et al. v. Consignaciones Asturianas S.A. 649

- No. 67. Court of Appeal (Civil Division), 2 December 2004
  Through Transport Mutual Insurance Association (Eurasia) Limited v.
  New India Assurance Association Company Limited 662

- No. 68. High Court of Justice, Queen’s Bench Division,
  Commercial Court, 11 January 2005
  Svenska Petroleum Exploration AB v. Government of the Republic of
  Lithuania, et al. 701

- No. 69. High Court of Justice, Queen’s Bench Division
  Commercial Court, 21 March 2005
  West Tankers Inc. v. RAS Riunione Adriatica di Sicurtà SpA, et al. 717

**United States**

- No. 483. United States District Court, Southern District of
  New York, 27 June 2003; United States Court of Appeals,
  Second Circuit, 3 August 2004
  Lucent Technologies Inc., et al. v. Tatung Co. 747

- No. 484. United States District Court, District of Columbia,
  20 July 2003; United States Court of Appeals, District of Columbia
  Circuit, 9 April 2004
  Telcordia Technologies, Inc. v. Telkom SA, Limited 762

- No. 485. United States District Court, Southern District of
  Alabama, Southern Division, 6 April 2004
  Ineos Phenol, Inc. v. Lungi Oel Gas Chemie GmbH, et al. 771
TABLE OF CONTENTS

• No. 486. United States District Court, Eastern District of Louisiana, 8 April 2004; United States Court of Appeals, Fifth Circuit, 23 March 2005
  Keytrade USA, Inc. v. M/V AIN TEMOUCHENT and
  Transports Maritime & Compagnie Nationale Algérienne de Navigation Maritime 777

• No. 487. United States District Court, Eastern District of New York, 23 April 2004
  Karen Maritime Limited v. Omar International Incorporated 790

• No. 488. Court of Appeal of California, Second Appellate District, Division Five, 28 April 2004

• No. 489. Court of Appeal of California, Second Appellate District, Division Five, 11 May 2004

• No. 490. United States Court of Appeals, Fifth Circuit, 18 May 2004 and 27 July 2004
  Vinod Kumar Dahiya v. Talmidge International, Ltd., et al. 809

• No. 491. United States District Court, Southern District of Florida, 25 May 2004

• No. 492. United States District Court, Eastern District of Louisiana, 27 May 2004

• No. 493. United States District Court, Southern District of Florida, 15 June 2004
  Leslie Holmes v. Westport Shipyards, Inc. d/b/a Westport Yacht Sales, et al. 850

• No. 494. United States Court of Appeals, District of Columbia Circuit, 29 June 2004
  Raytheon Company v. Ashborn Agencies, Ltd. 860

• No. 495. United States District Court, Southern District of New York, 12 July 2004

• No. 496. United States Court of Appeals, Eleventh Circuit, 20 July 2004

Yearbook Comm. Arb’n XXX (2005)  xxii
TABLE OF CONTENTS

Four Seasons Hotels and Resorts, B.V., et al. v. Consorcio Barr S.A. 872

- No. 497. United States Court of Appeals, Third Circuit,
  23 July 2004
  Flexi-Van Leasing, Inc. v. Through Transport Mutual Insurance
  Association, Ltd., et al. 882

- No. 498. United States Court of Appeals, Fifth Circuit,
  9 August 2004
  Fred Freudsprung v. Offshore Technical Services, Inc., et al. 891

- No. 499. United States Court of Appeals, Ninth Circuit,
  16 August 2004
  China National Metal Products Import/Export Company v. Apex Digital, Inc. 908

- No. 500. United States District Court, Southern District of
  New York, 31 August 2004
  Pemex Refinacion v. Thilisi Shipping Co. Ltd. et al. 915

- No. 501. United States District Court, Northern District of
  Illinois, Eastern Division, 29 September 2004; United States
  Court of Appeals, Seventh Circuit, 4 March 2005
  Stawski Distributing Co., Inc. v. Browary Zywiec S.A. 923

- No. 502. United States Court of Appeals, Ninth Circuit,
  7 October 2004
  The Ministry of Defense and Support for the Armed Forces of the Islamic
  Republic of Iran v. Cubic Defense Systems, Inc., et al. 930

- No. 503. United States District Court, Eastern District of
  Louisiana, 19 October 2004
  Editha T. Amizola v. Dolphin Shipowner, S.A. 941

- No. 504. United States Court of Appeals, Second Circuit,
  22 October 2004
  Motorola Credit Corporation, et al. v. Kemal Uzan, et al. 951

- No. 505. United States Court of Appeals, Second Circuit,
  26 October 2004

- No. 506. United States District Court, Eastern District of
  Louisiana, 10 November 2004
  Francisca Umali Magsino v. Spiaggia Maritime, Ltd., et al. 986

- No. 507. United States District Court, Southern District of
  New York, 30 November 2004
TABLE OF CONTENTS


- No. 508. United States District Court, Southern District of New York, 10 December 2004
  Energy Transport, Ltd., et al. v. M.V. SAN SEBASTIAN and Oilmar Co., Ltd. 1006

- No. 509. United States Court of Appeals, Second Circuit, 10 December 2004
  Phoenix Aktiengesellschaft v. Ecorlas, Inc. 1026

- No. 510. United States Court of Appeals, Second Circuit, 20 December 2004
  Stone & Webster, Inc. v. Triplefine International Corporation 1035

- No. 511. United States District Court, Eastern District of Louisiana, 20 December 2004
  Greg J. Lannes, III v. Operators International 1041

- No. 512. United States District Court, Southern District of West Virginia, Beckley Division, 13 January 2005

- No. 513. United States Court of Appeals, Eleventh Circuit, 18 January 2005

- No. 514. United States District Court, Southern District of New York, 7 February 2005
  Bristol-Myers Squibb Company v. SRI International Business Insurance Company Ltd. 1086

- No. 515. United States District Court, Eastern District of Pennsylvania, 10 February 2005
  IFC Interconsult, AG v. Safeguard International Partners, LLC 1095

- No. 516. United States District Court, Southern District of Texas, Brownsville Division, 23 February 2005
  Enso Offshore Company v. Titan Marine L.L.C. 1102

- No. 517. United States District Court, District of Columbia, 8 March 2005
  International Bechtel Company Limited v. Department of Civil Aviation of the Government of Dubai 1113

Yearbook Comm. Arb’n XXX (2005) xxiii
TABLE OF CONTENTS

• No. 518. United States Court of Appeals, Fifth Circuit, 24 March 2005
  Joselito Madriaga Lim. v. Offshore Specialty Fabricators, Inc. 1118

• No. 519. United States District Court, Southern District of New York, 25 March 2005 and 10 May 2005
  Chemical Overseas Holdings, Inc., et al. v. Republica Oriental del Uruguay 1130

• No. 520. United States Court of Appeals, Second Circuit, 31 March 2005
  Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc. 1136

• No. 521. United States Court of Appeals, Fourth Circuit, 1 April 2005
  Joseph C. Phillips v. Mowbray, L.L.C. (The White Mountain Mining Company) 1144

• No. 522. United States District Court, Northern District of Illinois, Eastern Division, 12 April 2005
  Alto Mar Girassol v. Lumbermens Mutual Casualty Company 1152

• No. 523. United States Court of Appeals, Second Circuit, 14 April 2005
  Sarhank Group v. Oracle Corporation 1158

• No. 524. United States District Court, Northern District of Texas, Dallas Division, 20 May 2005
  Mitsui & Co., Ltd. v. Delta Brands, Inc., et al. 1165

• No. 525. United States Court of Appeals, District of Columbia Circuit, 17 June 2005
  State Property Fund of Ukraine v. TMR Energy Limited 1179


List of Contracting States (as of 28 October 2005) 1197

France
• No. E6. Cour de Cassation, 30 March 2004
  S.a.r.l. UNI-KOD v. Ouralkali 1200
# TABLE OF CONTENTS

**Russian Federation**
- No. E1. Presidium of the Supreme Arbitration Court of the Russian Federation, Moscow, 30 March 2004

**Part V – C. Court Decisions on the Washington Convention 1965** 1209
- *List of Contracting States and Signatories (as of 25 May 2005)* 1211

**Part V – D. Court Decisions on the Panama Convention 1975** 1219
- *List of Contracting States (as of 27 October 2005)* 1221

**United States**
- No. P20. Supreme Court of New York, New York County, 18 March 2005

**Part VI – Articles on Arbitration** 1237

**Part VII – Bibliography** 1239

  1. General 1241
  2. Countries 1253
  3. Journals on Arbitration 1261

**List of ICCA Officers and Members** 1273

*Yearbook Comm. Arb’n XXX (2005)* xxv