INTRODUCTION

Volume XXXVI (2011) of the Yearbook again presents readers with a selection of arbitral awards and court decisions made accessible by translations, indices and categorized lists. Since Volume XXXV (2010), the Yearbook’s selection of arbitral awards and court decisions is available in a combination of print edition and online publishing. Arbitral awards continue to be published in print in their entirety, as are Parts of the Yearbook providing various information. Court decisions are presented at two levels of consultation: a Summary of each decision, prefaced by a short recap, is published in print; a detailed Excerpt of the decision is available online at <www.kluwerarbitration.com>. A code provided with the Yearbook allows readers to access the relevant Volume online, as well as the preceding Volume. Readers who have purchased Volume XXXVI (2011) can therefore access materials from both this Volume and Volume XXXV (2010).

Information on how to access the online materials is provided in a Note to the Reader at the beginning of this Volume (p. xv).

All volumes of the Yearbook, along with ICCA’s International Handbook on Commercial Arbitration and selected volumes of ICCA’s Congress Series, are also made available by general subscription on 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 seventy countries. The Handbook contains National Reports together with the relevant legal texts. Its Table of Contents is reproduced in Part I of the Yearbook.

In Part II of the Yearbook, new or amended rules of arbitral institutions are announced, with a reference to the websites where the rules can be obtained. This year, information is provided on Australia, Denmark, Egypt, France, Germany, Italy, the Russian Federation, the United Kingdom and the International Chamber of Commerce (ICC).

Part III announces newly enacted arbitration legislation and informs readers of other developments relevant to the practice of arbitration. In this volume, information is provided on Australia, Brazil, Cape Verde, PR China, Costa Rica, France, Ghana, Greece, Hong Kong, Liechtenstein, Mexico, Moldova, Pakistan, Qatar, Singapore, Spain, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine and the United States.

Part IV, Arbitral Awards, contains a selection of awards made under the auspices of the International Chamber of Commerce (ICC) and the Arbitration Chamber of Paris. Topics discussed in the awards include the United Nations
INTRODUCTION

Convention on Contracts for the International Sale of Goods (CISG); the UNIDROIT Principles of International Commercial Contracts; the applicable law to the validity of an arbitration clause; competence-competence of the arbitrators; conflicting arbitration and forum selection clauses; the constitutional procedures required for the formation of a contract with a State; liquidated damages and rates of interest.

The Yearbook no longer includes excerpts of awards made under the auspices of ICSID and its Additional Facility, as well as other investment awards made under bilateral investment treaties (BITs) and NAFTA, as the full texts of such awards are promptly posted on various websites. In 2006, a “Digest of Investment Treaty Decisions and Awards” by Devashish Krishan and Ania Farren was included in the Yearbook. It comprised publicly available final decisions and awards in investor-state arbitrations conducted pursuant to investment treaties and provided basic information on the decisions and awards, and the websites where they are posted, as well as subject matters. An update of the Digest by the same authors was published in Yearbook XXXIII (2008).

Part V of the Yearbook reports on court decisions on arbitration. Part V – A, reporting on the 1958 New York Convention, traditionally constitutes the bulk of the Yearbook. This Volume contains seventy-eight cases from twenty-six countries, including, for the first time, cases from Albania, Ecuador, Poland, Ukraine and the United Arab Emirates. The selection this year includes five decisions from the courts of the Russian Federation and four court decisions each from Germany and the Netherlands. Decisions from Australia, Austria, Germany, Greece, Hong Kong, India, Poland, the Russian Federation, Singapore, Spain, Ukraine and Venezuela reflect the parallel application of the UNCITRAL Model Law on International Commercial Arbitration as adopted in these jurisdictions together with the Convention. In some decisions, the relationship between the 1958 New York Convention, the 1961 European Convention and the 1975 Panama Convention is mentioned. The reporting in Part V – A includes cases from Albania, Austria, Brazil, Colombia, Ecuador, France, Germany, Greece, Italy, Netherlands, Poland, Portugal, the Russian Federation, Spain, Sweden, Switzerland, Ukraine, the United Arab Emirates and Venezuela, all translated from their original language into English.

Recurring issues in the 1958 New York Convention decisions include the availability of set-off in enforcement proceedings; the enforcement of awards that are not yet binding on the parties or have been set aside; the competence-competence of arbitrators regarding the existence and validity of an arbitration agreement; whether parties are estopped from raising a defense under the Convention that they did not raise in the arbitration; the alleged excess of
authority of arbitrators and the posting of security as a condition for granting a stay of enforcement proceedings. Problems relating to the case in which the party seeking enforcement does not supply the necessary documents at the time of filing the application were also discussed, as was the issue of whether non-signatory parties may be deemed bound to an arbitration clause or may rely thereon. This issue was examined in particular by the UK Supreme Court in its 3 November 2010 decision in the Dallah case.

Decisions rendered by courts in the United States dealt, inter alia, with the question whether an arbitration agreement was null and void on public policy grounds and with the definition of non-domestic award. The incorporation of arbitration rules in an arbitration agreement as evidence that arbitrability is to be decided by the arbitrator rather than the court was also discussed.

Part V – B, reporting on the 1961 European Convention, contains a decision of the Audencia Provincial of Barcelona, holding that interim measures of protection can be sought from the Spanish courts when (foreign) arbitration proceedings are pending or are to be commenced.

No new decisions are reported this year in Part V – C, reporting on the 1965 Washington Convention. Two decisions from the United States are reported in Part V – D on the 1975 Panama Convention. The United States Court of Appeals for the Fourth Circuit refused in RZS Holdings to set aside an ICC award rendered in the United States because the party resisting enforcement failed to prove the alleged partiality, corruption or misconduct of one of the arbitrators. In Empresa de Telecomunicaciones, the United States District Court for the Southern District of Florida rejected an objection of violation of due process and granted enforcement of a Colombian award, finding that the defendant had been duly informed of the arbitration but chose not to participate.

Up-to-date lists of Contracting States and Signatories to the respective Conventions are also provided. In addition, Part V – A also contains an Index of Cases reported in this Volume.

Part V – E, Other Court Decisions on Arbitration, contains a selection of decisions on topics that are relevant to the practice of (international) arbitration. This year, the reporting includes a decision of the Paris Court of Appeal denying an application to set aside the ICC awards rendered in the Dallah case, and the decision of the Hong Kong Court of Final Appeal in FG Hemisphere on the doctrine of sovereign immunity applicable in Hong Kong.

In Granite Rock, the Supreme Court of the United States clearly set out the framework for deciding whether parties agreed to arbitrate a specific dispute and the dispute is therefore arbitrable.
INTRODUCTION

The English Supreme Court held in *Jivraj* that arbitrators are not “employed” by the parties; as a consequence, the requirement in an arbitration clause that arbitrators be members of a religious community was not void under the UK Employment Equality (Religion or Belief) Regulations 2003. In the *Yukos* saga, the English High Court found that the decision of a Dutch court of appeal holding that the Russian court decisions annulling the awards rendered in favour of Yukos were the result of a partial and dependent judicial process estopped the defendant, Rosneft, from arguing the contrary in the English proceedings.

The selection in this Part also includes a decision of the Brazilian Supreme Court of Justice in *GE Medical Systems*, holding that an action in which the validity of an arbitration clause is challenged, pending in Brazil, does not per se prevent recognition of a foreign court decision holding that the clause is valid. Three decisions of the Presidium of the Supreme Arbitrazh Court of the Russian Federation are also reported. The Presidium found in *Al'yans* that arbitrators may rule on their own jurisdiction even where the existence of a valid arbitration agreement is disputed; in *Buryatenergo*, that an award based on a regulation that is later recognized to be unlawful may not be enforced; and in *Voskhod*, that the provisions of the Russian arbitration law allowing parties to agree on the arbitral procedure and the language(s) of the arbitration do not violate due process and are therefore not unconstitutional.

Finally, this Part reports on a decision of the Swiss Federal Supreme Court, rendered on 10 November 2010, concerning an application to set aside an award that was qualified as an interim or a partial award but in fact contained procedural orders, namely, a decision to stay arbitration until the parties paid the costs incurred by the arbitrators until that moment. The Court held that no recourse for setting aside is available against such procedural order; it further noted that arbitrators lack the power to issue a binding decision on their own costs.

A complete list of all court decisions and awards published in the Yearbook since 1976 and a Consolidated Index of Cases are available online on the ICCA website <www.arbitration-icca.org> under the Publications button.

The Yearbook concludes with the Bibliography, which this year includes works on ...............

The Yearbook’s effort to reflect as many aspects as possible of the evolving world of arbitration was supported as always by its numerous correspondents, whose assistance is gratefully acknowledged. They are individually thanked in the Introductions to the various Parts and in footnotes where appropriate.

Many thanks go to the ICCA Editorial Staff, D.ssa Silvia Borelli, managing editor, and Ms. Alice Siegel, assistant managing editor, who collected, selected, translated, excerpted and edited the materials for this volume with the able
INTRODUCTION

assistance of Ms. Helen Pin, and Ms. Lise Bosman, executive editor, who assisted in preparing this year’s Bibliography.

On behalf of ICCA, I also wish to thank the Permanent Court of Arbitration and its Secretary-General, Drs. Christiaan Kröner. For almost fifteen years, the PCA has hosted the ICCA 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 Editorial Board is presently composed of Professor Jan Paulsson, President of ICCA and General Editor, International Handbook on Commercial Arbitration; Mr. Kap-You (Kevin) Kim, Secretary-General of ICCA; Professor Martin Hunter and the undersigned as General Editor of 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 New York Convention, the European Convention, the Washington Convention and the Panama Convention.

Brussels
November 2011
Albert Jan van den Berg
General Editor

Materials for the Yearbook are to be addressed to the General Editor or to the ICCA Editorial Staff at their respective addresses as indicated below.

ICCA Publications
Prof. Dr. Albert Jan van den Berg
c/o International Bureau of the
IT Tower, 9th Floor
Permanent Court of Arbitration
Carnegieplein 2
2517 KJ The Hague
The Netherlands
E-mail: icca@pca-cpa.org

Prof. Dr. Albert Jan van den Berg
c/o Hanotiau & van den Berg
480 Avenue Louise, B.9
1050 Brussels
Belgium
E-mail: ajvandenberg@hvdb.com

Yearbook Comm. Arb’n XXXVI (2011) ix
ONLINE RESOURCES

The **ICCA website** contains constantly updated information and useful tools to make consultation of ICCA publications easier and more user-friendly.

*The ICCA website contains:*
- a presentation on ICCA and the current list of its officers and members
- the announcement of upcoming events, such as the next ICCA Congress and Young ICCA Event in Singapore on 10-13 June 2012
- a selection of recent articles by ICCA members
- a “latest news” section

*Under the “Publications” button, the reader will find:*
- the tables of contents of all volumes of the Yearbook and of the ICCA Congress Series, as well as the current table of contents of the International Handbook on Commercial Arbitration
- the Digest of Investment Treaty Decisions and Awards, by Devashish Krishan and Ania Farren, providing information on final decisions and awards in investor-state arbitrations conducted pursuant to investment treaties, updated through 30 July 2008
- a list of all court decisions and awards published in the Yearbook since 1976
- a Consolidated Index of Cases, which facilitates research of decisions applying the 1958 New York Convention by subject matter and Article of the Convention

*Also included on the website are:*
- historic materials from the archives of ICCA and its members
- resources for young arbitration practitioners and a link to Young ICCA
- full film footage of the presentations given at the XX ICCA Congress in Rio de Janeiro in May 2010
- video interviews with with Professor Pieter Sanders, one of ICCA’s founding members, and Professor Pierre Lalive, one of its first members, on the occasion of ICCA’s fiftieth anniversary

The ICCA website can be found at <www.arbitration-icca.org>. 
ONLINE INSTRUMENTS

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Materials published in the Yearbook Commercial Arbitration, the International Handbook on Commercial Arbitration and selected volumes of ICCA’s Congress Series are also available by subscription in the KluwerArbitration database at <www.kluwerarbitration.com>. All materials in this database are fully searchable through a variety of search tools.
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NOTE
TO THE READER

This Yearbook Commercial Arbitration Volume XXXVI (2011) includes online access to the complete contents of the 2010 and 2011 Yearbooks at <www.kluwerarbitration.com>.

To activate your access, visit:

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# TABLE OF CONTENTS

## VOLUME XXXVI – 2011

### Introduction
Prof. Albert Jan van den Berg, General Editor v

### Online Resources
xi

### ICCA Conference 2012
xiii

### Note to the Reader
xv

### Table of Contents
xvii

### Part I – National Reports
1

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

### Part II – Arbitration Rules
15

*New and Amended Arbitration Rules* 17

### Part III – Recent Developments in Arbitration Law and Practice
21

*Recent Developments in Arbitration Law and Practice* 23

### Part IV – Arbitral Awards
27

*Note General Editor* 29
TABLE OF CONTENTS

France
Arbitration Chamber of Paris
• Award in case no. 3089 30
• Award in case no. 9971 39

International Chamber of Commerce (ICC)
• Award in case no. 11869 47
• Final award in case no. 13009 70
• Final award in case no. 13184 96
• Final award in case no. 14020 119
• Final award in case no. 14108 135

Index of Arbitral Awards

Introduction Index-1
Index of Arbitral Awards Index-2

Part V – Court Decisions

Part V – A. Court Decisions on the New York Convention 1958 203

Introduction 205

List of Contracting States (as of 1 November 2011) 209

Index of Cases Reported in Volume XXXVI (2011)
Prof. Albert Jan van den Berg 216

Albania
• No. 1. Gjykata e Apelit, Tirana, 8 November 2007
  Italian joint-stock company, et al. v. Republic of Albania 238
• No. 2. Gjykata e Apelit, Tirana, 31 March 2009
  Turkish Limited Liability Company v. General Road Directorate, Ministry
  of Public Works, Transport and Telecommunications of the Republic of Albania 240
### Table of Contents

**Australia**
- No. 35. Supreme Court of Victoria, Commercial and Equity Division, Commercial Court, 28 January 2011 and 3 February 2011  
  *Altain Khuder LLC v. IMC Mining Inc, et al.* and  
  Supreme Court of Victoria, Court of Appeal, 22 August 2011  
  *IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC*  
  p. 242

- No. 36. Federal Court of Australia, New South Wales District Registry, General Division, 22 February 2011  
  *Uganda Telecom Limited v. Hi-Tech Telecom Pty Ltd*  
  p. 252

**Austria**
- No. 23. Oberster Gerichtshof, 1 September 2010  
  *D v. Franz J.*  
  p. 256

**Brazil**
- No. 13. Superior Tribunal de Justiça, 2 August 2010  
  *Kanematsu USA Inc. v. ATS – Advanced Telecommunications Systems do Brasil Ltda*  
  p. 258

  *Nuovo Pignone SpA v. Petromec Inc et al.*  
  p. 260

**British Virgin Islands**
- No. 3. Court of Appeal, Territory of the Virgin Islands, 20 September 2010  
  *Pacific China Holdings Ltd v. Grand Pacific Holdings Limited*  
  p. 262

**Colombia**
- No. 5. Tribunal Superior, Civil Chamber, Bogotá, 10 March 2010 and Two-Judge Panel, 21 May 2010  
  *Industria y Distribuidora Indistri S.A. v. SAP Andina y del Caribe C.A. Colombia*  
  p. 266

**Ecuador**
- No. 1. Juzgado Octavo de lo Civil, Guayaquil, 25 May 2009  
  *Daewoo Electronics America Inc. v. Expocarga S.A.*  
  p. 268

**France**
- No. 50. Cour d’Appel, Paris, First Chamber, 18 November 2010  
  *Government of the Region of Kaliningrad v. Republic of Lithuania*  
  p. 270
# Table of Contents

**Germany**
- No. 136. Oberlandesgericht, Munich, 23 November 2009 and Bundesgerichtshof, Third Civil Chamber, 16 December 2010  
  *French Seller v. German Buyer*  
  Page 273
- No. 137. Bundesgerichtshof, 29 July 2010  
  *Buyer v. Seller*  
  Page 277
- No. 138. Bundesgerichtshof, 30 September 2010  
  *Seller v. Buyer*  
  Page 279
- No. 139. Bundesgerichtshof, 30 September 2010  
  *Claimant v. Defendant*  
  Page 282

**Greece**
- No. 21. Areios Pagos, Civil Chamber D, 30 June 2009  
  *Greek Distributor Limited Liability Company v. Manufacturer Company*  
  Page 284

**Hong Kong**
- No. 25. Court of Appeal, Hong Kong SAR, 13 June 2011, 25 July 2011 and 11 August 2011  
  *Shandong Hongri Acron Chemical Joint Stock Company Limited v. PetroChina International (Hong Kong) Corporation Limited*  
  Page 287

**India**
- No. 46. High Court, New Delhi, 11 January 2011  
  *Penn Racquet Sports v. Mayor International Ltd*  
  Page 293

**Italy**
  *Third Millennium Company srl v. Guess Inc.*  
  Page 296

**Netherlands**
- No. 35. Voorzieningenrechter, Rechtbank, Dordrecht, 30 June 2010  
  *Dubai Drydocks v. Bureau voor Scheeps- en Werktuigbouw [X] B.V.*  
  Page 299
- No. 36. Voorzieningenrechter, Rechtbank, Middelburg, 3 September 2010  
  *Northern River Shipping Lines v. Kompas Overseas Inc.*  
  Page 302
- No. 37. Hoge Raad, First Chamber, 24 December 2010  
  Page 304
| No. 38. Voorzieningenrechter, Rechtbank, Amsterdam, | 9 June 2011 |
| Naonis Costruzioni s.r.l. et al. v. Krakom Advies BV | 307 |

**Poland**

- No. 1. Sąd Najwyższy, 6 November 2009
  
  **E.T. Sp. z o.o. v. T.M.D. GmbH et al.** | 310 |

**Portugal**

- No. 2. Supremo Tribunal de Justiça, Civil Section, 19 March 2009
  
  **S.A. (Belgium) v. B Sociedade Nacional, S.A.** | 313 |

**Russia**

- No. 29. Supreme Arbitrazh Court of the Russian Federation, 22 March 2010
  
  **OAO Company Neftyanaya Company Rosneft v. Neftyanoy Terminal Belokamenka** | 315 |
- No. 30. Presidium of the Supreme Arbitrazh Court of the Russian Federation, 5 October 2010
  
  **AB Living Design v. Sokos Hotels Saint Petersburg** | 317 |
- No. 31. Presidium of the Supreme Arbitrazh Court of the Russian Federation, 13 December 2010
  
  **Lugana Handelsgesellschaft mbH v. OAO Ryazan Metal-Ceramic Instrument Factory** | 319 |
- No. 32. Federal Arbitrazh Court, Northwestern District, 10 March 2011
  
  **Odfjell SE v. OAO Northern Machine Building Enterprise** | 321 |
- No. 33. Arbitrazh Court, Kemerovskaya Region, 20 July 2011
  
  **Ciments Français v. Holding Company Sibirsky Cement OFSC** | 325 |

**Singapore**

- No. 11. High Court, 14 October 2010
  
  **Galsworthy Ltd v. Glory Wealth Shipping Pte Ltd** | 329 |

**Spain**

- No. 70. Audiencia Provincial, First Section, Soria, 17 September 2010
  
  **Ventus Alliance S.R.O. v. Respondent** | 332 |
<table>
<thead>
<tr>
<th>Country</th>
<th>Case Details</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sweden</strong></td>
<td>No. 8. Högsta Domstolen, 12 November 2010</td>
<td>334</td>
</tr>
<tr>
<td></td>
<td>RosInvestCo UK Ltd v. The Russian Federation</td>
<td></td>
</tr>
<tr>
<td><strong>Switzerland</strong></td>
<td>No. 41. Tribunal Fédéral, 28 July 2010</td>
<td>337</td>
</tr>
<tr>
<td></td>
<td>X SA v. Y</td>
<td></td>
</tr>
<tr>
<td></td>
<td>No. 42. Bundesgerichtshof, 4 October 2010</td>
<td>340</td>
</tr>
<tr>
<td></td>
<td>X AG v. Y AS</td>
<td></td>
</tr>
<tr>
<td></td>
<td>No. 43. Bundesgerichtshof, 25 October 2010</td>
<td>343</td>
</tr>
<tr>
<td></td>
<td>X Holding AG et al. v. Y Investments NV</td>
<td></td>
</tr>
<tr>
<td></td>
<td>No. 44. Bundesgerichtshof, 14 February 2011</td>
<td>346</td>
</tr>
<tr>
<td></td>
<td>X B.V. v. A</td>
<td></td>
</tr>
<tr>
<td><strong>Ukraine</strong></td>
<td>No. 1. Court of Appeal, City of Kiev, 17 September 2010 and Supreme Court of</td>
<td>349</td>
</tr>
<tr>
<td></td>
<td>Ukraine, 24 November 2010</td>
<td></td>
</tr>
<tr>
<td></td>
<td>National Joint Stock Company Naftogaz Ukrainy v. RosUkrEnergo AG</td>
<td></td>
</tr>
<tr>
<td><strong>United Arab Emirates</strong></td>
<td>No. 1. Court of First Instance, Fujairah, 27 April 2010</td>
<td>353</td>
</tr>
<tr>
<td></td>
<td>Shipowners v. Charterers</td>
<td></td>
</tr>
<tr>
<td></td>
<td>No. 2. Court of First Instance, Dubai, Plenary Session, 12 January 2011</td>
<td>355</td>
</tr>
<tr>
<td></td>
<td>Maxtel International FZE v. Airmech Dubai LLC</td>
<td></td>
</tr>
<tr>
<td><strong>United Kingdom</strong></td>
<td>No. 92. Supreme Court, 3 November 2010</td>
<td>357</td>
</tr>
<tr>
<td></td>
<td>Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Affairs, Government of Pakistan</td>
<td></td>
</tr>
<tr>
<td></td>
<td>No. 93. High Court of Justice, Queen’s Bench Division, Commercial Court, 27</td>
<td>363</td>
</tr>
<tr>
<td></td>
<td>July 2011</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Dowans Holding SA et al. v. Tanzania Electric Supply Co Ltd</td>
<td></td>
</tr>
</tbody>
</table>
## TABLE OF CONTENTS

### United States

- No. 713. United States District Court, Southern District of New York, 23 February 2010

- No. 714. United States Court of Appeals, Fifth Circuit, 18 March 2010 and United States District Court, Eastern District of Louisiana, 28 March 2011
  *Anthony Todd v. Steamship Mutual Underwriting Association (Bermuda) Limited* 370

- No. 715. United States District Court, District of Columbia, 7 June 2010 and United States Court of Appeals, District of Columbia Circuit, 11 March 2011
  *The Argentine Republic v. National Grid PLC* 375

- No. 716. United States District Court, Southern District of New York, 10 September 2010
  *Bogdan Dumitru v. Princess Cruise Lines, Ltd.* 378

- No. 717. United States Court of Appeals, Ninth Circuit, 28 September 2010
  *Polimaster Ltd. et al. v. RAE Systems, Inc.* 381

- No. 718. United States District Court, Southern District of Florida, Miami Division, 7 October 2010
  *Karla Monica Orozco v. Princess Cruise Line, Ltd. d/b/a Princess Cruises* 384

- No. 719. United States District Court, Southern District of New York, 12 October 2010
  *NTT DoCoMo, Inc. v. Ultra d.o.o.* 387

- No. 720. United States District Court, Southern District of New York, 19 October 2010, United States Court of Appeals, Second Circuit, 6 January 2011 and United States District Court, Southern District of New York, 8 February 2011
  *Dedon GmbH et al. v. Janus et Cie* 389


- No. 722. United States District Court, Southern District of New York, 1 November 2010
  *Glencore AG v. Bharat Aluminum Company Limited* 398
TABLE OF CONTENTS

- No. 723. United States District Court, District of Hawaii, 2 November 2010  
  400

- No. 724. United States District Court, Southern District of New York, 14 December 2010  
  *FR8 Singapore Pte. Ltd. v. Albacore Maritime Inc. et al.*  
  403

- No. 725. United States Court of Appeals, Fourth Circuit, 15 December 2010  
  *AO Technoexport v. Globe Nuclear Services and Supply GNSS, Limited, d/b/a Global Nuclear Services and Supply, Limited*  
  407

- No. 726. United States District Court, Southern District of Texas, Houston Division, 4 January 2011  
  *QPro Inc. v. RTD Quality Services USA, Inc.*  
  412

- No. 727. United States District Court, District of Columbia, 21 January 2011  
  *International Trading and Industrial Investment Company (f/k/a International Trading and Investment Company) v. DynCorp Aerospace Technology (US) et al.*  
  415

- No. 728. United States District Court, District of Columbia, 21 January 2011  
  *Republic of Argentina v. BG Group Plc*  
  420

- No. 729. United States District Court, Eastern District of North Carolina, Northern Division, 21 January 2011  
  *Blackwater Security Consulting, LLC et al. v. Richard P. Nordan, as Ancillary Administrator for the Separate Estates of Stephen S. Helveston, Mike R. Teague, Jerko Gerald Zovko, and Wesley J.K. Batalona*  
  425

- No. 730. United States District Court, District of Oregon, Portland Division, 31 January 2011  
  *ESCO Corporation v. Bradken Resources Pty Ltd.*  
  428

- No. 731. United States District Court, Southern District of New York, 16 February 2011  
  *Ameropa AG v. Hari Ocean Co. LLC*  
  433

  *Camilo Costa et al. v. Celebrity Cruises, Inc.*  
  435
| No. 733. United States District Court, Southern District of California, 28 February 2011 | MediVas, LLC et al. v. Marubeni Corp. et al. |
| No. 734. United States District Court, Southern District of New York, 3 March 2011 | The Republic of Iraq, including as Parens Patriae on Behalf of the Citizens of the Republic of Iraq v. ABB AG et al. |
| No. 736. Supreme Court of New York, Appellate Division, First Department, 10 March 2011 | Sojitz Corporation v. Prithvi Information Solutions Ltd |
| No. 739. United States District Court, District of Columbia, 28 March 2011 | DRC, Inc. v. Republic of Honduras |
| No. 740. United States District Court, Southern District of New York, 29 March 2011 | Zeevi Holdings Ltd. v. The Republic of Bulgaria |
TABLE OF CONTENTS

- No. 744. United States District Court, Eastern District of Missouri, Eastern Division, 22 June 2011
  *A.O.A. et al. v. Doe Run Resources Corporation et al.* 478

- No. 745. United States District Court, Northern District of California, 6 July 2011
  *Nokia Corporation et al. v. AU Optronics Corporation et al.* 482

- No. 746. United States Court of Appeals, Ninth Circuit, 26 July 2011
  *Cape Flattery Limited v. Titan Maritime, LLC, a Crowley KSC Company, d/b/a Titan Salvage* 485

- No. 747. United States District Court, District of Columbia, 3 August 2011
  *Continental Transfert Technique Limited v. Federal Government of Nigeria et al.* 488

- No. 748. United States District Court, Southern District of New York, 3 August 2011
  *Thai-Lao Lignite (Thailand) Co., Ltd. et al. v. Government of the Lao People’s Democratic Republic* 491

Venezuela
- No. 4. Tribunal Supremo de Justicia, 3 November 2010,
  *Astivenca Astilleros de Venezuela, C.A. v. Oceanlink Offshore III AS* 496


List of Contracting States (as of 1 November 2011) 501

Commentary on the European Convention 1961
  *Dominique Hascher* 504

- No. E26. Audiencia Provincial, Barcelona, 4 March 2010
  *Fisichella Motor Sport International SpA v. Héctor* 563
| List of Contracting States and Signatories (as of 1 November 2011) | 567 |

| Part V – D. Court Decisions on the Panama Convention 1975 | 575 |
| List of Contracting States (as of 1 November 2011) | 577 |

- No. P27. United States District Court, Southern District of Florida, 2 November 2009  
  ETB de Telecommunicaciones de Bogota S.A. E.S.P. v. Mercury Telco Group, Inc.  
  579
- No. P28. United States Court of Appeals, Fourth Circuit, 16 June 2010  
  RZS Holdings AVV v. PDVSA Petroleo S.A. et al.  
  582

| Part V – E. Other Court Decisions on Arbitration | 585 |

**Brazil**
- Superior Tribunal de Justiça, 16 February 2011  
  GE Medical Systems Information Technologies Inc v. Paramedics Electromedicina Comercial Ltda  
  587

**France**
- Cour d’Appel, Paris, First Pole, First Chamber, 17 February 2011  
  Government of Pakistan, Ministry of Religious Affairs v. Dallah Real Estate and Tourism Holding Company  
  590

**Hong Kong**
- Court of Final Appeal of the Hong Kong Special Administrative Region, 8 June 2011  
  Democratic Republic of the Congo et al. v. FG Hemisphere Associates LLC  
  594

**Russian Federation**
- Constitutional Court of the Russian Federation, 19 October 2010  
  Limited Liability Company Voskhod v. Respondent  
  598
TABLE OF CONTENTS

- Presidium of the Supreme Arbitrazh Court of the Russian Federation, 23 November 2010
  OOO Al’yans-3 v. OOO Leasing Company URALSIB 600

- Presidium of the Supreme Arbitrazh Court of the Russian Federation, 14 December 2010
  Open Joint-Stock Company Interregional Distribution Network Company of Siberia – Buryatenergo v. Limited Liability Company Rusenergosbyt 602

Switzerland
- Bundesgerichtshof, First Civil Law Chamber, 10 November 2010
  A SA et al. v. L et al. 604

United Kingdom
- High Court of Justice, Queen’s Bench Division, Commercial Court, 14 June 2011
  Yukos Capital S.a.r.l. v. OJSC Rosneft Oil Company 607
- Supreme Court, 27 July 2011
  Hashwani v. Jivraj 611

United States
- Supreme Court of the United States, 24 June 2010
  Granite Rock Co. v. International Brotherhood of Teamsters et al. 615

Part VI – Bibliography 619

I. General 621
II. Countries 000
III. Journals on Arbitration 000

List of ICCA Officers and Members 000