Dossiers
ICC Institute of World Business Law

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Arbitration-
Money Laundering, Corruption and Fraud

Edited by Kristine Karsten and Andrew Berkeley

The world business organization
Arbitration, money laundering, corruption and fraud

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ICC AT A GLANCE
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Foreword

By Serge Lazareff
Chairman, ICC Institute of World Business Law

What a pleasure! At last the Institute is resuming its publications, a tradition successfully established by the ICC Institute’s founder, Professor Pierre Lalive. We intend to publish yearly the proceedings of our Annual General Meeting, as well as a second publication, the best of. We will in our regular programmes – PIDAs and IAAPs – select for publication certain of the papers submitted by our speakers. Of course, all of them are good, but we shall try to offer a range of studies covering topics of interest – particularly current ones.

Our first publication is therefore devoted to our November 2002 Annual General Meeting. “Arbitration, money laundering, corruption and fraud” was approved by the Institute Council as a topic and we decided to set up a working group to study this very delicate question. When the group, led by Andrew W.A. Berkeley and Kristine Karsten, including Bernardo Cremades and Antonio Crivellaro, presented the results of their reflections, the Council found the matter so rich and dense that we all agreed to dedicate the next Annual Meeting, the most prestigious annual event of the Institute, to this matter. Indeed, it would have been a pity not to spread the ideas expressed by this group, as this knowledge and expertise had to be shared and publicized. In addition to these valuable speakers from the group, we decided to call on “external” prestigious experts: Alan Jenkins, Mark Pieth, Giorgio Sacerdoti, Arthur Harverd and Allan Philip. I would like to take this opportunity to thank them all for the remarkable work they did, and the tremendous input they gave to this Annual Meeting.

One of the aims of this conference was to create doctrine, rather than merely to compile information that already existed. We found that the papers and discussions centered around the duty of the arbitrator when money laundering is suspected, the duty of the parties, but also duty to society in general. Laws today tend to implicate lawyers in the reporting of not only offenses which clearly have been committed, but also suspected offenses. This raises the fundamental
question of the freedom of the lawyer and of the arbitrator. Is counsel to report somebody coming to him for advice? Is the arbitrator, entrusted with a sacred mission of rendering an award, bound to report a case if he has only a suspicion that something is wrong? These are essential questions in the society of today and I am certain that you will find the answer in the present publication – may I repeat, our first in a long time.

I am convinced it will throw new light on the subject, and hope that every reader will enjoy these pages as much as we enjoyed working on them.

I look forward to meeting all of you, readers and speakers, at our 23rd Annual General Meeting, which will be held on 1 December 2003 in Paris on the topic of “Arbitration and oral evidence.”
Contributors

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Introduction

By Kristine Karsten and Andrew Berkeley
Co-editors

This collection of papers results from the proceedings of the 2002 Annual General Meeting of the ICC Institute of World Business Law, held at ICC Headquarters in Paris, on the topic of arbitration in the face of money laundering, corruption and fraud. 95 lawyers, other professionals and businessmen attended to hear the ten speakers and participate in the lively discussion sessions, which showed both the interest and sophistication of the audience. We reproduce here the text of the contributions and a selection of the questions and comments. The Editors and the ICC, as an institution, are most grateful to all of the speakers and participants.

With this publication, the Institute of World Business Law, under the Presidency of Serge Lazareff, resumes its tradition of making available in book form the thinking of its distinguished members and participants on topics of interest and importance in law and business—especially in the international field. In his foreword, Mr. Lazareff says that he hopes that the Institute will have contributed to the formation of “doctrine” on the treatment of corruption, fraud and money laundering in arbitration. Certainly, the editors believe, there are incisive and well considered statements in all of the papers and it may be that there are points of coalescence about arbitration practice when it has to deal with the evils that are the subject of this book. But, this area is rapidly evolving. Indeed, to borrow a phrase from the magisterial paper by Professor Cremades, we in the business and legal worlds are today faced with “a cascade of norms.” Laws, treaties, conventions and codes of conduct proliferate. Their authors and promulgators range in skill and learning from the heights of Professor Pieth and Professor Sacerdoti, who were instrumental in the formulation of the influential and successful OECD Convention of 1998, to those who, rather mindlessly, call for “an intensification of the war against corruption” without considering the efficacy of what they propose or its unintended side effects on legitimate enterprise and traditional rights and
freedoms. Further evolution of the legal environment being inevitable, it is doubtful that a definitive body of doctrine as to how arbitrators should deal with money laundering, fraud and corruption can yet be settled.

Nonetheless, the ICC Institute can make an important contribution. Since ICC is among the most well-known of international business organizations, its reflections should be based on an objective and thorough examination of the current environment and directed to the efficiency, well-being and integrity of business. Further, since both legislators (domestic and international) and the general world are not well informed about the process of arbitration, the scientific authority of the papers in this collection will, we hope, have a beneficial influence.

It may be of assistance to the reader if we say something about the method adopted in putting together the program on which this book is based. The first part of the program, and thus of this book, is devoted to context. We start with two practicing lawyers, Kristine Karsten and Alan Jenkins, who describe, respectively, the nature of the problems which they and other professionals face and the solutions which they adopt in their daily business. As is clear from their two papers, the activities of money launderers and fraudsters, in particular, are increasingly sophisticated and pernicious and the actions that can and must, in the emerging regulatory environment, be taken by professionals to detect and combat such activities are also increasingly sophisticated.

In this first section, we also present the papers by Professors Pieth and Sacerdoti—eminent criminal law and international law specialists, respectively. Especially interesting is Professor Pieth’s conclusion that an international public policy banning bribery is emerging and his challenge, as one of the architects of that new order, to arbitrators about how they are going to reflect it in their practice. He concedes that the decisions will be difficult. Professor Sacerdoti gives a thorough analysis of one of the most highly successful international instruments, the OECD Convention, and ends with suggestions about new areas of activity for the OECD work group, and notably the treatment of foreign subsidiaries and the working of off-shore financial centers, which are of relevance to many international arbitrations.

In the second part, we concentrate directly on the problems raised for arbitrators by money laundering, fraud and bribery. The section opens with a significant paper by Bernardo Cremades and David Cairns. Drawing on Professor Cremades’