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CONTACT US:
146, Avenue Louise
B-1050 Brussels
Belgium
Fax: +32 2 646 24 31

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AIA Recommends to Attend

European Mediation Training for Practitioners of Justice

LOCATION: Brussels, Belgium

DATE: August 19-31, 2013

Limited number of places (first come first served)

See more details below and on www.emtpj.eu



EMTPJ 2013

After three consecutive years of success, the Association for International Arbitration (AIA) is proud to announce the fourth edition of its unique European Mediation Training for Practitioners of Justice (EMTPJ).

AIA launched the EMTPJ project in 2010, with the support of the European Commission and in collaboration with the HUB University of Brussels and Warwick University. It presents an opportunity for participants from around the world to get together and become trained and specialised as a mediator specialising in cross-border disputes under Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters.

EMTPJ participants can be experienced mediators (e.g. with over 10 years of experience) or beginners who want to follow an intensive 2 week training program to become a mediator specialized in civil and commercial cross-border matters.

EMTPJ is recognized by the Belgian Federal Mediation Commission, as well as by a large number of other regulative bodies and mediation providers in and beyond Europe.

EMTPJ is a 100-hour course comprising 11 days of intensive training and one assessment day at the end of the program. The training is conducted in English and the maximum number of attendees is limited to 30 people. The program is divided in two parts. One part focuses mainly on theoretical issues and aims to introduce participants to the second part of the course, which provides intensive practical training.

The faculty of EMTPJ includes great minds in the field of mediation from around the world, such as Mr. Johan Billiet, Dr. Paul R Gibson, Ms. Linda Reijkerkerk, Ms. Lenka Hora Adema, Mr. Philippe Billiet and Mr. Willem Meuwissen.

EMTPJ alumni highly recommend this course to all legal practitioners. One of the former participants said that in only two intensive weeks he acquired all the necessary knowledge to start up a mediation practice. He also described the trainers as "exceptionally qualified and experienced multinational persons that pose wide background and knowledge on the matter of mediation and can turn theory into practical training".

For more details and for all questions regarding the possibility to attend EMTPJ course or only a part of it, please contact: administration@arbitration-adr.org.

To get more information about EMTPJ program, schedule and lecturers, and to register for the course, please visit the website www.emtpj.eu

Gazprom reduces prices for gas for Poland

By Matthew Nowak

Poland's gas monopolist PGNiG reached a settlement with Russia's Gazprom on 5 November 2012 on the reduction of gas price and terminated arbitration over the price issue at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

Both companies agreed to sign an amendment to the contract to adjust price terms of Russian gas supplies via the Yamal-Europe gas pipeline, after taking into account current market prices of gas and oil products.

The state-owned PGNiG is Poland's largest petroleum company dealing with oil and gas field development, energy resources production, storage and transportation, oil and gas transmission network construction and expansion, as well as natural gas exports and imports.

Formal negotiations regarding the changes of gas prices started in April 2011 when the Polish company lodged a motion alleging that significant changes arose on the European gas market. On top of that the Polish contract had to reflect the level of market prices in the European Union in contracts with Gazprom.

In early November 2011, PGNiG initiated an arbitration procedure in a dispute with Gazprom regarding the gas prices. The Polish company chose its own arbitrator in the dispute and in accordance with the rules of the procedure adopted by the parties, requested Gazprom to appoint an arbitrator. The arbitrators then jointly chose a chairman who was supposed to lead the arbitration procedure.

Renegotiations of contracts, and - in the absence of an agreement - arbitration, are not rare in international trade relations. To understand the nature of the dispute, we should consider carefully its legal aspects. First of all, changes in the pricing formula which PGNiG seeks. This is not the first time when the provisions of the agreement have been changed. The previous contract from 25 September 1996 was revised several times due to the changes in the content of the agreement from 25 August 1993. It is possible to change the contract even after reaching an agreement between the parties before the SCC. In recent years the structure of natural gas market in Europe and in the world has undergone significant changes which, due to the widespread use of natural gas liquefaction technology for the transportation and exploitation of shale gas. This kind of situation is a condition to renegotiate the contract, and if the negotiations fail - the parties should go to arbitration. An additional factor favoring arbitration is EU antitrust rules. There is no doubt that Gazprom is a

gas monopolist or at least it resorts to monopolistic practices, primary evidence would be the formal steps taken in autumn 2012 by the European Commission (EC) against the company (including number of searches of offices and procedures concerning monopolistic practices). The EC directly indicated that the activities of Gazprom itself in the European market may violate antitrust rules, which speaks to the validity of arbitration as a form of amicable settlement of the dispute.

It should be noted that average prices of gas in Western Europe, apart from the spot prices which are on the level of 360 dollars for 1 thousand cubic meters, arise from long term contracts and are within 400-420 dollars for 1 thousand cubic meters. In Poland the price for gas is almost over 500 dollars for 1 thousand cubic meters.

This is the latest in a series of settlements that Gazprom has reached in order to avoid binding arbitration. In June 2012 Gazprom reached an agreement with the German company E.ON to lower prices of gas sold to Germany, thus avoiding arbitral proceedings. Commentators stated that such agreement was not beneficial for Poland and Gazprom speculated on prices for more than 10%. On 24 October 2012, the Czech company RWE won arbitration and was awarded compensation that Gazprom would have to pay for the accepted gas (clause "take or pay"), calculated by Gazprom for half a billion dollars. Additionally, as a result of arbitral proceedings the prices for gas in future contracts are expected to be lower.

Three months before, an arbitration tribunal in Stockholm decided that Lithuania did not have to pay Gazprom any compensation in connection with the planned reform of the gas market in Lithuania. Such outcome was the result of the decision of the Lithuanian government in early October 2012 to submit to the tribunal in Stockholm a claim for payment by the Russian party of nearly 1.5 billion dollars.

With the new agreement Gazprom & PGNiG, 18 million Polish consumers - individuals and businesses - should pay from January lower gas bills. New prices have not been disclosed yet. President of PGNiG Grazyna Piotrowska-Oliwa said only that the reduction was greater than 10 percent. She also announced that in mid-November 2012 PGNiG would submit an application to the Energy Regulator Office on a new, lower gas tariffs.

The agreement also means that the strategic state-owned partnership will be saving billions of zlotys, regain profitability and will be able to significantly increase investment in exploration and production of natural gas, said the Treasury Minister Mikolaj



Budzanowski. Gazprom will pay the amount of the inflated fees that Polish side incurred of the initiation of the arbitral procedure. PGNiG said that the agreement signed this year would increase group earnings before interest, taxes, depreciation and amortization of 2.5-3 billion zlotys. According to experts, in the next year PGNiG's expenses on gas imports from Russia should drop by 1.5 billion zlotys.

American Express v. Italian Colors and *Oxford Health Plans v. Sutter*: Arbitration and Class Proceedings at the United States Supreme Court

By Paul Frankenstein

In recent years, the United States Supreme Court ("Court") made two key rulings about class-action litigation and arbitration in the United States: first, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S.Ct. 1758 (2010) ("*Stolt-Nielsen*") and second, *AT&T Mobility LLC v. Conception*, 131 S. Ct. 1740 (2011) ("*AT&T Mobility*"). In *Stolt-Nielsen*, the Court held that the Federal Arbitration Act ("FAA") mandates that class arbitration requires clear authorization from the parties, while *AT&T Mobility* held that state laws that barred enforcement of arbitration agreements which forbade class arbitration were pre-empted by the FAA.

In this term, the Court is again addressing the interplay of class-action litigation and arbitration. In *American Express Co. v. Italian Colors Restaurant* ("*American Express*"), the Court is being asked to address whether federal courts can invalidate arbitration agreements on the ground that they do not allow federal-law claims to be class arbitrated; while *Oxford Health Plans LLC v. Sutter* ("*Oxford Health Plans*") asks the Court to determine whether language in an arbitration clause that does not specifically mention class arbitration can be construed as authorization for class arbitration.

American Express, which is due to be argued in front of the Court in February 2013, can be thought of in some ways as being the direct sequel to *AT&T Mobility*. In *AT&T Mobility*, the court was presented with a state law that forbade arbitration agreements prohibiting class arbitration. In *American Express*, the court is faced with a lower-court decision that invalidates an arbitration clause that prohibits class arbitration when the dispute in question involves a federal, not a state, claim.

The facts of *American Express* are as follows: a group of small businesses, with the restaurant Italian Colors as the lead plaintiff, sued American Express, alleging that American Express, as a condition of accepting premium and corporate charge cards, required merchants to also accept American Express-branded mass market credit cards. American Express also

allegedly charged much higher interchange fees for mass-market credit cards than Visa, MasterCard, and Discover, who are American Express's competition in the mass-market credit card market. The small businesses further alleged that American Express had a monopoly in the premium and corporate charge card market. Because American Express had a premium and corporate card monopoly, the businesses argued that the requirement that merchants also take American Express mass-market credit cards was illegal tying under federal antitrust law.

Proving illegal tying under federal antitrust law is a complex and costly endeavor. The businesses in this case estimated that the cost of conducting a market survey that would empirically demonstrate their claims would be an order of magnitude more expensive than the amount of actual damages that any single claimant could demonstrate. This, then, is the kind of fact pattern for which class-action litigation was intended: where a large pool of potential plaintiffs would not be able to bring individual actions due to economic factors. However, American Express's standard contract includes an arbitration clause that expressly prohibits class arbitration.

The argument for the small businesses is essentially that because individual arbitration, as required by the arbitration clause, is economically unfeasible, they are effectively denied the opportunity to vindicate their rights under federal antitrust law.

At the trial court level, the merchants were ordered by the court to go to arbitration, individually, on the ground that the question of whether or not the parties' right to vindication was actually extinguished by individual arbitration, and thus whether or not the arbitration clause was enforceable, was a question for the arbitrator to decide.

The trial court's order was reversed on appeal by the US Second Circuit, which found that the question of whether or not the arbitration clause was enforceable was not a question for the arbitrator but rather a question for the court. The Second Circuit then went further and found that under the specific facts of the case that the small businesses had, in fact, demonstrated that the fiscal burden of proving their cases individually would be prohibitive. There was thus a conflict between the rights granted under federal antitrust law and the FAA's presumption of validity of arbitration clauses.

The Second Circuit ultimately noted that under *Stolt-Nielsen*, the express prohibition in the arbitration clause against class arbitration barred a court or an arbitrator from ordering class arbitration. The appellate court also noted that the substantive federal



law on arbitration found that arbitration of federal claims was appropriate when prospective litigants were able to express their rights through arbitration. Because the arbitration clause would, in the view of the court, prevent the litigants from vindicating their rights under federal antitrust law, then arbitration would not be the appropriate venue; therefore, in order to preserve the rights of the small businesses, the Second Circuit held that the arbitration clause was unenforceable. The Second Circuit did reconsider its opinion twice, due to the Supreme Court's opinions in *Stolt-Nielsen* and *AT&T Mobility*, but it found that those two cases did not change their holding.

American Express appealed to the Supreme Court, which granted certiorari in November 2012, with arguments scheduled for February, 2013.

On the face of it, there seems to be a basic tension between the overriding presumption that arbitration agreements should be enforced, and a fact-based argument that enforcement of this particular arbitration award in this case would prevent parties from exercising their rights.

There are slippery-slope arguments on both sides of the dispute: if the court finds for Italian Colors and its co-plaintiffs, then dissatisfied plaintiffs who wish to avoid arbitration may be able to do so by simply claiming that arbitration would rob them of their right to vindicate their federal statutory rights. Conversely, if the court finds for American Express, then defendants who wish to avoid class-action lawsuits could simply mandate individual arbitration.

But there is a deeper argument—an argument about **the role of fairness in arbitration**. It's settled law that an arbitration award can be overturned if the parties are not provided the opportunity to present their case. But what if the actual form of the proceeding itself would abridge a party's right to be heard? And who should make that determination? Should that be part of an arbitrator's role? Or should that be part of the court's gatekeeping function?

Oxford Health Plans, which is scheduled to be argued in front of the Supreme Court in March 2013, can be seen as a direct sequel to *Stolt-Nielsen*. In *Oxford Health Plans*, Dr. John Sutter, acting as lead plaintiff for a class of more than 16,000 doctors, filed a class-action lawsuit in New Jersey state court, alleging that Oxford Health Plans had improperly delayed payments, downgraded claims, and denied payment on procedures by bundling them with other procedures.

Oxford filed a motion to dismiss, citing an arbitration clause in their standard agreement that read in part, "No civil action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with

one arbitrator." The New Jersey state trial court ruled in favor of Oxford's motion to dismiss, and referred the case to arbitration.

Once in arbitration, Dr. Sutter argued that the arbitration should proceed as a class proceeding; Oxford opposed that argument. The sole arbitrator, in a carefully drafted partial decision, found that he could not order class arbitration without the consent of the parties; however, he concluded that the parties had, in fact, consented to class arbitration in the arbitration clause.

His logic was fairly straightforward: the arbitration clause prohibited any civil action in a court of law, and instead, vested arbitration with jurisdiction over all civil actions. As a class-action lawsuit is plainly a type of civil action, and all civil actions must be brought in front of an arbitrator, then, under the terms of the arbitration clause, a class-action proceeding can be brought in front of an arbitrator.

Oxford appealed the partial decision to the federal district court, which refused to overturn the partial decision. A few years later, in 2010, Oxford asked the arbitrator to reconsider his earlier decision in light of *Stolt-Nielsen*. The arbitrator did so, and again concluded that the arbitration clause allowed for class arbitration. Oxford then again returned to district court, which again declined to overturn the arbitrator's decision. Oxford subsequently appealed to the US Third Circuit, which upheld the lower court's ruling. After losing at the Third Circuit, Oxford appealed to the Supreme Court, which granted certiorari in December 2012.

It should be noted that Oxford had originally wanted to take the dispute to arbitration, but once actually in arbitration and finding itself displeased with the arbitrator's rulings, Oxford then attempted to use the courts to avoid the consequences of going to arbitration.

This case, like its predecessor *Stolt-Nielsen*, raises a number of interesting issues relating to the gatekeeper role of the courts and the role the courts play in reviewing awards. While courts give arbitrators a great deal of deference when reviewing awards on factual and legal findings of substance, how much deference should they give when looking at whether or not the arbitrators exceeded their mandate? Will courts be required to make a finding on whether or not an arbitration clause permits class arbitration prior to referring a matter to arbitration? How broadly should imprecisely worded arbitration clauses be interpreted?

The Supreme Court is expected to hand down their decisions in these cases sometime during the late spring or the summer of 2013.



Book Review: Cost and Quality of Online Dispute Resolution: A Handbook for Measuring the Costs and Quality of ODR

By Matthew Nowak



The book "Cost and Quality of Online Dispute Resolution: A Handbook for Measuring the Costs and Quality of ODR" by Martin Gramatikov (Ed.) discusses the status quo of Online Dispute Resolution (ODR) in the European Union. The book outlines the results of the EMCOD project which developed an approach for adapting the costs and quality of ODR process. The book was created by a team of experts from the ODR industry for providers and users of the ODR services as also for policy makers which would like to innovate the field of dispute resolution.

The Internet has become an important area for people to do business, communicate, shop, travel and learn. More and more people consider the internet as a part of their life. Internet enterprises such as eBay or Amazon deal with millions of cases each year regarding all kinds of disagreements using smart online dispute resolution tools. For example, in the Netherlands people already have the possibility to arrange their divorce through advanced online mediation tools.

The book is structured into three main sections. The first section contains an Introduction, followed by a section of nine chapters and ended by EMCOD Questionnaires.

The introduction describes the basic topic of online dispute resolution with the accent on the popularity it has been gaining through recent years. It must be noted that more and more transactions are made through the use of the internet, and they may vary from small purchases to large transfer of funds. Another important fact is that in 2011 there were more than 2 billion internet users. Without the doubt the Internet is changing our lives and ODR will play an increasing role in the way people address their disagreements.

The next section is divided into nine chapters, all of which are written by ODR experts from around the world. A range of topics regarding ODR is discussed. The first chapter addresses a brief but dynamic history of the ODR and the debates that surrounded its emergence. There is a suggestion made that ODR

starts with the re-engineering of existing ADR practices.

Chapter two contains ODR definitions and clarifies the notion of ADR. Three major types of ODR are presented: arbitration, mediation and conciliation/negotiations.

Chapter three is a discussion of the trans-border dimensions and potential of ODR. The characteristic of disputes which are resolved online is that factual and legal aspects aren't overly complicated and the value at stake is relatively small. Chapter three is written by two authors, P. Pecherzewski & P. Rodziewicz both of which conclude that ODR is efficient in cross-border issues.

Chapters four and five outline recent developments, regulations, legislation and directives of the European Union (EU). The conclusion is simple: ODR is present in the legislative work of the EU, though this field is not given the priority that would foster its development in the future.

Chapter six discusses the difference between "online" and "offline" communication. The author recommends five strategic "online" ODR processes (structure the dispute resolution process; support a cooperative dialogue; provide a safe environment; act as a neutral information provider; and develop a solution for niche groups while learning from the masses).

The last three chapters of section two are a basic outline and explanation of methodology (EMCOD tool) for assessing costs and quality of ODR. Main topics discussed are costs, quality and the outcome of the usage of ODR.

The last section comprises three questionnaires regarding the assessment of costs and quality of ODR which are elaborated further to Chapters seven to nine of section two.

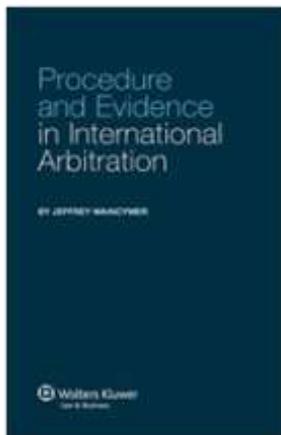
The book "Cost and Quality of Online Dispute Resolution: A handbook for Measuring the Costs and Quality of ODR" is of great value for all interested in ADR and ODR. Online dispute resolution, without doubt, is a subject which should be carefully studied by everyone to feel comfortable and safe in the electronic world.

For further information about the book and where to purchase it, please visit the Maklu website: [http://](http://www.maklu.be/)

www.maklu.be/MakluEnGarant/BookDetails.aspx?id=9789046604731



Book Review: *Procedure and Evidence in International Arbitration* by Jeffery Waincymer by Paul Frankenstein



Jeffery Waincymer, professor of law at Monash University, Melbourne, Australia, recently published the book *Procedure and Evidence in International Arbitration*, published by Wolters Kluwer. Professor Waincymer has been teaching in Australia for nearly 30 years, with a primary focus on international trade law and dispute resolution.

While the title of his new book is unassuming, the book itself is anything but unassuming. It is a mammoth volume, coming in at just under 1400 pages. The book doesn't only cover procedure and evidence; it is divided into three sections, covering policy and principles, arbitration procedure, and arbitration awards, respectively.

The first section, which reviews arbitration policy and principles, would make an outstanding contribution to the literature as a standalone book. It starts with the various policy considerations that drive arbitration, including fairness, efficiency, cost, and finality. It discusses the tension that arises between policy objectives that have orthogonal objectives, such as the conflict between fairness and efficiency. In addition, he delves deeply into the question of the powers, rights, and duties of arbitrators, looking at the nature of the underlying relationship between arbitrators and the parties in a proceeding as well as ethical concerns.

The second section, which consists of the bulk of the book, addresses the questions of procedure and evidence. Starting with the basic framework of arbitration—arbitration agreements, national arbitration laws, and arbitration rules, this section goes on to discuss the presentation of claims, selection and challenge of arbitrators, and some basic procedural standards that are common in arbitration. The always thorny topic of complex arbitration gets its own chapter, exploring multi-party, multi-contract arbitrations as well as parallel proceedings, class arbitration, bankruptcy and third-party funding.

The following chapter on preliminary, interim and dispositive determinations runs the gamut from

discussion of jurisdictional challenges to interim measures, security for costs, anti-suit and anti-arbitration injunctions, pre-arbitral procedures (including the still-controversial topic of emergency arbitrators), and the related topics of *lis pendens* and *res judicata*.

One of the most significant parts of the book is comprised of the chapters on evidence. The book covers general approaches to the problem of evidence, and then goes on an in-depth study of the issues involved in documentary evidence, oral evidence, and expert witnesses.

The section on procedure and evidence wraps up with a lengthy look at the always tricky subject of choice of law.

The final section of the book deals with the award and associated issues. Here, Professor Waincymer discusses remedies, interest, and valuation, before moving on to costs. The last chapter in the book deals with the last stage of any arbitration proceeding: the award itself. Both substance and form are covered, as well as the issues of unanimous, majority, and dissenting opinions; non-judicial scrutiny, correction, and interpretation.

This book has been a monumental undertaking, and it is a monumental accomplishment. It should be a valuable resource for any arbitration practitioner—arbitrator and counselor alike—and deserves a place on the arbitration bookshelf next to Born or Redfern and Hunter.

For more information about the book, please visit the publisher's website at <http://www.kluwerlaw.com/Catalogue/titleinfo.htm?ProdID=904113168X>

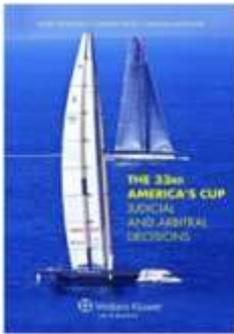
AIA Members receive a 10 % discount!

Book Review: The 33rd **America's Cup:** Judicial and Arbitral Decisions

By Matthew Nowak

The book "The 33rd America's Cup: Judicial and Arbitral Decisions" by Henry Peter (Ed.), Hamish Ross and Graham McKenzie is the continuation of the earlier publications on the 31st and 32nd America's Cup by Wolters Kluwer Law & Business. The book offers commentary (decision texts included) on the judgments of various Courts and other dispute resolution bodies delivered during the tumultuous 33rd America's Cup. This book practically is the only complete source of all records and documents





with added benefit of commentary.

The book consists of five chapters: (Chapter 1) Introduction, (Chapter 2) CNEV's Challenge, (Chapter 3) GGYC's Challenge – Deed Match, (Chapter 4) Settlement, (Chapter 5)

Management and Future of the America's Cup. The structure of the book is a direct result of the controversies which arose during the 33rd edition of the America's Cup in Valencia, Spain.

The book opens with a general introduction and the background of America's Cup is presented. It discusses the history of the first "Deed of Gift" from 1887 until now.

The next chapter contains a commentary followed by all documents which apply to arbitral and further court proceeding launched by the Spanish Yacht Club "Club Nautico Español de Vela" (CNEV). It comprises all the documents as well as arbitral awards and US Court decisions regarding the controversy with the Golden Gate Yacht Club (GGYC) and the successful attempt to nullify CNEV's challenge.

Chapter 3 encompasses all documents which were deemed to be useful to the 33rd America's Cup and upholding of the validity of GGYC's challenge. This chapter is divided into two sub-chapters. The first one contains commentaries and decisions regarding the GGYC and Société Nautique de Genève (SNG). The second sub-chapter describes the decision issued by the International Jury of the 33rd America's Cup.

The following chapter contains all the commentary and documents regarding the final settlement between the parties.

The last chapter of the book provides information and documentation regarding the America's Cup intellectual property, management and possible suggestions and amendments to the Deed of Gift.

Readers that are interested in sport arbitration will find this book fascinating. It is also excellent guidance for dispute resolution at other major international sporting events.

For more information about the book and where to purchase it, please visit the Wolters Kluwer website: <http://www.kluwerlaw.com/Catalogue/titleinfo.htm?ProdID=9041138161>

AIA Members receive a 10 % discount!

AIA Recommends to Attend ICC's 4th International Mediation Conference



The one-day conference entitled "Stay in Control! Managing risks, time and costs of commercial disputes with smart ADR", will kick off ICC's 2013 Mediation Week, which will run from 7-13 February.

The conference, a sell-out event every year since its inception, will provide insight into how to maintain control over commercial disputes through choice of the best dispute resolution procedure, efficient collaboration with outside counsel and internal implementation of a mediation-based approach to dispute resolution. With a special focus on mediation, the conference will provide participants with the know-how to select an appropriate dispute resolution mechanism and create a dispute resolution roadmap for their companies.

Speakers will include representatives from ABB, British American Tobacco, Bombardier, E.ON, Northrop Grumman, Orange, and others.

Over 100 participants are expected to attend. Reduced rates are available for members of the following conference supporters: the American Bar Association, Association of Corporate Counsel Europe, Corporate Counsel International Arbitration Group, the Round Table Conflict Management and Mediation of the German Economy.

"The annual ICC International Mediation Conference is a must-attend event for in-house counsel. The topics discussed are on the cutting edge of commercial dispute resolution and the opportunity to exchange know-how with colleagues around the world is unique," said Christine Guerrier, VP Disputes Resolution and Litigation, Thales, France.

King & Spalding, KPMG, Taylor Wessing, Winston & Strawn, Diales and the John Hardy Group are event sponsors.

Comprising the ICC International Mediation Conference and Mediation Competition, ICC's 2013 Mediation Week promises discussions on new developments in ADR and the chance to meet with peers from more than 40 countries.

Further information and a full conference programme are available from ICC's website: <http://www.iccwbo.org/training-and-events/competitions-and-awards/mediation-competition/>

