Dear Members

We hope you will enjoy this Summer’s bumper edition of our YIAG e-newsletter, which captures our events and activities since December 2010. As always, we wish first to welcome the 417 new YIAG members who have joined our membership since our last e-newsletter. As we wrote in December, 2010 was an extremely busy time for YIAG. We are delighted to report that 2011 has already proved to be another exciting year. In March, YIAG held a ‘Tynney-style’ topics based symposium for the first time in Seoul. Two weeks later, YIAG headed to the Middle East and to Dubai, where it hosted (with CIarb, ICDR, Y & I and ICC YAF) a lively regional roundtable discussion. In May, YIAG returned to its old stomping ground at Tynney Hall for its annual Summer symposium, and - as ever - the conference hall was packed to capacity. At the evening dinner, Hussein Haeri was formally awarded 1st Prize for his winning Gillis Wetter Memorial Prize Essay. May also saw YIAG return to Singapore for a roundtable organised to coincide with the Singapore International Arbitration Forum for 2011. Within weeks, YIAG had crossed the globe (yet again) for the annual ITA Dallas Roundtable, and just 24 hours later we were in Warsaw for a joint event co-hosted with the Lewiatan Court of Arbitration.

Seoul – 3 March 2011
Dubai – 16 March 2011 (with CIarb, ICDR, Y & I and ICC YAF)
Tynney Hall – 6 May 2011
Singapore – 31 May 2011
Dallas – 15 June 2011 (ITA roundtable)
Warsaw – 16 June 2011

YIAG activities in the next few months include our annual symposium at Luton Hoo (September), followed at the end of 2011 with our first training event to be held in Mexico City. We look forward to seeing you there!

In the meantime, we wish you all a very pleasant (and dry!) Summer.

Amir, Andy, Kate and Marie
YIAG co-Chairs
RECENT YIAG EVENTS

Seoul - 3 March 2011

In March, YIAG held its first ever symposium in Seoul at The Shilla. With more than 40 participants from Seoul, the wider region and Europe, the discussions were as lively as ever. Topics covered included Seoul’s growing position as a leading regional seat of arbitration, the role of institutions in the scrutiny of arbitral awards, the pros and cons of a unified ethics code for advocacy in international arbitrations and - what is becoming a recurring theme at YIAG events - how to secure that first all-important appointment as arbitrator. After the symposium, all attendees gathered for drinks and canapés, where they continued their discussions. Our thanks go to John Rhie and Calvin Chan, both YIAG regional representatives, for their efforts in rallying a strong attendance. YIAG looks forward to a return to Asia soon.

Dubai - 16 March 2011

In March YIAG co-presented a conference, with the CIArb, ICDR,Y&I and ICC YAF titled ‘Young people in Arbitration’. Speakers included James Abbott, Essam Al Tamimi, Claire Clutterham, Dr Karim Hafez, Sami Houerbi, Stephen Jagusch, Sapna Jhangiani, Yulia Khvan, Graham Lovett, Christopher Mainwaring-Taylor, Reza Mohtashami and Noradele Radjai. The event was well-attended, with over 100 delegates in total. Some of the highlights from the first panel included Essam Al Tamimi giving a view of enforcement in the UAE, Karim Hafez talking about recent events in the Arab world (particularly Egypt) and their impact on arbitration (particularly investment arbitration) and Stephen Jagusch setting out his list of tips to young arbitrators (to which other panel members added). In the second panel, Claire Clutterham argued for the UAE as an arbitration seat, Noradele Radjai argued for Bahrain, and Sapna Jhangiani argued for the DIFC, which generated a good discussion, not least about enforceability, which is of course an important factor when choosing a seat and is a particular concern in the region. Following the conference, delegates enjoyed drinks overlooking the Burj Khalifa and Dubai fountains (in true Dubai style, the tallest building and fountains in the world!). Our thanks to Sapna Jhangiani and Amani Khalifa, our YIAG Regional Representatives for the
Middle East and North Africa, for participating in this event. We look forward to collaborating with fellow young practitioner groups on more events in the future.

**ITA-CeCAP Americas Roundtable - Panama City, Panama – 13 April 2011**

The Institute for Transnational Arbitration (ITA) and the Centre for Conciliation and Arbitration of Panama (CeCAP) hosted the 4th Americas Roundtable co-organized with YIAG, ICC YAF and ICDR Y&I.

On the opening of the event, Alfredo De Jesús O., YIAG’s Regional Representative for Latin America (Spanish speaking jurisdictions) presented our group, its activities and plans for the future to the approximately 60 participants who attended the conference. Liliana Sánchez O. (CeCAP), Cecilia Flores Rueda (ITA), Katherine González Arrocha (ICC-YAF) and Luis M. Martinez (ICDR Y&I) also presented their respective institutions and welcomed the participants and described the objectives of the event.

The first panel, chaired by Cecilia Flores Rueda (Mexico), and composed by Rinee Juliao Ruiz (Panama), Salvador Fonseca (Mexico) and Eric Alexander Britton (Panama), focused on the techniques for “Ensuring an Effective Arbitration Agreement” and confronted the new IBA Guidelines for Drafting International Arbitration Clauses with some Latin American experiences. The second panel, chaired by Alfredo De Jesús O. (Venezuela), discussed the importance of the place of arbitration (“The Place of Arbitration: is it still that important?”) and the different trends towards the autonomy of international arbitration from national legal systems. This panel was composed by Montserrat Manzano (Mexico), Paolo del Aguila (Peru) and Humberto Saenz Marinero (El Salvador). The interventions were followed by a very lively debate. The roundtable was a great success and a great opportunity for the YIAG to meet again with the Latin American arbitration community.

We would like to thank Salvador Fonseca of Chadbourne & Parke (Mexico City) for his support of YIAG in the organization of this conference. The event was co-sponsored by Chadbourne & Parke S.C., the Chartered Institute of Arbitrators (CIArb) and Fabrega, Molino & Mulino.

We would also like to thank David Winn and Cecilia Flores Rueda of the ITA and Liliana Sánchez O. and Rinee Juliao Ruiz of the CeCAP for their enthusiasm, support and hospitality.

Alfredo De Jesús O - Venezuelan Arbitration Committee
Tylney Hall - 6 May 2011

YIAG was delighted to return to the spectacular surroundings of Tylney Hall for its, now twice-yearly, flagship symposium in May 2011. As ever, our event was heavily oversubscribed and more than 70 participants attended. Co-Chairs Andy Moody, Amir Ghaffari and Kate Davies were joined by Chris Parker (Herbert Smith) and Jeff Sullivan (Allen & Overy), who stepped in for co-Chair Marie Stoyanov. Our thanks go to both Chris and Jeff. The topics discussed included the pros and cons of ‘hot tubbing’ expert witnesses, the proper approach to the allocation of costs, bribery in the context of arbitration and the question of whether the IBA Rules are now commonly applied properly. A special mention goes to Mark Beeley (Vinson & Elkins) for his Shakespearean - and topical - question which sparked a particularly lively debate: “Delinquent tribunals - to chase or not to chase, that is the question? Should you bib the tiger or let sleeping dogs lie?”. After the symposium, all attendees gathered in the picturesque setting of Tylney Hall’s grounds for drinks and canapés.

Andy Moody, Jeffrey Sullivan, Kate Davies and Amir Ghaffari

The delegates
Singapore - 31 May 2011

In May 2011, YIAG held a discussion and Tynlney Hall style debate at the offices of Wong Partnership in Singapore to coincide with the SIAC Charity Dinner and SIAF 2011 events. The turnout was excellent, with around 55 attendees. Matthew Gearing, former YIAG co-Chair and partner in Allen & Overy’s Hong Kong office, introduced the event with an interesting summary of and discussion on emergency arbitrator procedures. In particular, Matt pointed to potential problems relating to jurisdiction and enforcement. This produced some lively debate, not least from the many SIAC counsel and staff who were present and who shared some of their most recent (and positive) experiences of the new emergency arbitrator procedure in practice.

The general debate which followed was moderated by YIAG co-Chair Kate Davies and by Koh Swee Yen of Wong Partnership and by Andrew Chan of Allen and Gledhill. Topics discussed included the proper scope of pre-appointment arbitrator interviews, issues relating to arbitrator nationality and whether Singapore or Hong Kong will succeed as the “hub” of choice for the Asia region. The event was followed by an opportunity for people to meet more socially and network over dinner on the beautiful Fullerton Bay waterfront (attended by around 30 people). We are very grateful to Matt and to Swee Yen and Andrew for contributing their time and for their efforts in making YIAG Singapore 2011 a successful event.

Dallas - 15 June 2011

Baiju Vasani, one of YIAG’s North America Regional Representatives, represented YIAG at the Institute for Transnational Arbitration’s (ITA) 6th Annual Roundtable in Dallas, TX, USA on June 15. The event, taking place the day before the ITA’s 22nd Annual Workshop, included representatives of a number of young international arbitration groups, including YIAG, and various other speakers from North America, Latin America and Europe. The topic of the Roundtable focused on the question of written and oral evidence, ranging from the value of fact witness statements that may have been written by legal counsel, to the benefits of expert conferencing (hot-tubbing), to the preferred tone and style of written pleadings. The event was attended by over 90 participants, including in-house counsel, private practitioners and seasoned arbitrators, many of whom gave their views from the floor in an (LCIA-style) open-mic format. Overall, a great success of which YIAG was delighted to be a part!

Warsaw - 16 June 2011

The Briefing was held on 16 June 2011 in Warsaw, as a supporting event to the Austrian/Polish Twin Conference on 17 June. The event generously supported by the Lewiatan Court of Arbitration and Wardyński & Partners.

Discussions included a review of international legal principles, debate on current news and practical issues relating to arbitration and Poland.

The President of the Lewiatan Court of Arbitration, Dr. Beata Gessel-Kalinowska vel Kalisz, gave the welcome and opening remarks. The conference topics were presented by: Marie Stoyanov (Freshfields Bruckhaus Deringer LLP, Paris, YIAG Co-Chair), “Framework of international commercial arbitration: legal setting, arbitration agreement, applicable law and arbitral tribunal”; Friederike Schäfer (Torggler Rechtsanwälte OG, Vienna), “Arbitral proceedings from beginning to end: some crucial steps of commercial arbitration”; Monika Hartung (Wardynski & Partners, Warsaw) and Przemko Krzywosz (P.P.Krzywosz Kancelaria Prawna, Warsaw), “Arbitration in Poland today: update on the statute and recent case law Counsel’s and Arbitrator’s perspective”; Gunnar Pickl (Dorda Brugger Jordis, Vienna), “Standards in international arbitration: Practice and tools”; Agnieszka Różalska-Kucal (Lewiatan Court of Arbitration, Warsaw), “Setting aside of arbitral awards in Poland” and Małgorzata Surdek (CMS Cameron McKenna, Warsaw, Poland), “Enforcement of arbitral awards in Poland”.

The seminar, which on the basis of the number of attendees can be declared a great success, was followed by a networking cocktail reception with the participants and speakers of the Austrian/Polish Twin Conference.

Agnieszka Różalska-Kucal - Lewiatan Court of Arbitration, Warsaw
REPORTS FROM YIAG MEMBERS

As in the past, we have received numerous excellent contributions from YIAG members. We will continue to do our best to include as many as we can in each E-Letter, taking into account the geographical balance and required mix between recent case law and new or amended arbitration legislation. Please send your contributions - consisting of notes of between 4 and 6 paragraphs relating to recent interesting developments in the field of international arbitration in your jurisdiction - to your regional representative or YIAG co-Chair.

[Please note that the reports in this section are not intended to be comprehensive and should not be used as a primary source of legal research. The views expressed in the notes published in the YIAG E-letter are those of the individual authors and are not expressed on behalf of YIAG or the LCIA.]

ARGENTINA

Fabricio Fortese – Abogado, Argentina

The Annulment of an International Arbitration Award

I. Introduction

The Supreme Court of Argentina has established the general principle that if the parties have freely agreed to recourse to arbitration to resolve their disputes, they should not be allowed to seek a judicial review of a decision adverse to their interests. However, according to some procedural legislation, courts are allowed to exercise an extrinsic control of the forms but not the merits of the award.

Although Argentina is a signatory State of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1989, the country has not yet developed an express arbitration act or specific set of rules. For this reason, challenges of arbitration awards over which Argentinian courts are called to exercise supervisory (or primary) jurisdiction, are dealt with by procedural provisions such as the National Civil and Commercial Procedural Code (CCPC), Book VI.

In deciding challenges for the annulment of awards, the Supreme Court has set aside arbitral decisions that (i) have involved matters beyond the scope of the arbitration agreement, (ii) or where the constitution of the arbitral tribunal was not in accordance with the parties’ agreement, (iii) or where the arbitrators have decided without considering the parties’ statements, (iv) or failed to decide on points proposed by the parties, provided that this omission affects the right of the party and the silence is essential to the adequate solution to the case.

II. Summary of Outbank v American Restaurants

Outbank Steakhouse International (Outbank) and American Restaurants Inc. (American Restaurants) entered into a franchise agreement under which American Restaurants was authorised to run a restaurant in Buenos Aires, Argentina, including the use of the trademark license.

Different controversies between the parties led the franchiser (Outbank) to terminate the contract, decision that was not agreed by American Restaurants who initiated an arbitration proceeding for compensation.
Once the arbitration award was rendered, Outbank filed a petition for its annulment before the National Commercial Court of Appeal in Argentina. The court decided against American Restaurants based on the grounds that the award had departed from (i) the party autonomy expressed in the arbitration agreement, (ii) the applicable arbitration procedural rules and (iii) it had violated the right to a due process as enshrined in the National Constitution.

III. The dispute before the Court of Appeal

The arbitration agreement provided for a 3-member arbitral tribunal. One arbitrator appointed by each party and a third member appointed jointly by the two co-arbitrators. Should the co-arbitrators not reach an agreement on the third member, either co-arbitrator would need to request the ICC to appoint the final member of the tribunal. The exception being that, if one of the parties fails to appoint its arbitrator, the only selected arbitrator would act as a sole arbitrator.

When the dispute arose, each party appointed one arbitrator and the seat of the arbitration was set to be Buenos Aires, Argentina.

Although Dr Siseles (appointed by American Restaurants) addressed repeated communications to Dr. Cueto Rua (appointed by Outbank), with the aim of agreeing on the appointment of the third arbitrator, he never received correspondence from the co-arbitrator.

It was due to that silence, and in a twisted interpretation of the arbitration agreement, that American Restaurants deemed appropriate to authorize Dr Siseles to act as sole arbitrator, who in fact assumed that role and rendered an award imposing Outbank to pay American Restaurants the amount of US$ 97,997,450.

IV. The decision

a. When the case reached the Court of Appeal, the same decided in favour of Outbank, setting aside the award. In doing so, the Court of Appeal relied upon the National Civil and Commercial Procedural Code, Article 760, which provides for a general ground to annul an award based on “fundamental faults of the procedure”.

In its decision the Court of Appeal reasoned that the arbitration clause in the franchise contract constituted an agreement between Outbank and American Restaurants, that must be understood as the law to which they were committed to rely upon in case of any dispute. This sees its ground in the Argentinian Civil Code, Article 1197, due to which covenants made in contracts constitute for the parties a rule that must be obeyed as the law itself.

It was thus the agreed procedure to appoint the three-member tribunal the one that inexorably should have been followed and adhered to. The arbitrator’s departure from the arbitration agreement sealed the luck of its award condemning it to fail the validity test by the judiciary.

b. With regard to Outbank’s failure to challenge at an earlier stage the irregular composition of the tribunal (as per American Restaurants’ statement of defence) the Court held that this omission “does not validate an irregular procedure and, above all, the judicial process that brings us together is the result of an action for annulment directed against Dr. S. sole decision which, if considered valid, could have the value of a final and enforceable decision.”

The outcome of case could have been different should Outbank (i) have been involved in the different stages of the arbitration proceedings but (ii) without filing a challenge against the composition of the tribunal. This can be suggested because, although according to CCPC Article 760 the right to seek the annulment of an award based on an essential (serious) fault on the proceedings cannot be waived, other rules of law should also be included in the analysis, such as the estoppel doctrine and the principle according to which ‘a waiver cannot be assumed and its proofs must be interpreted narrowly’.

c. Having interpreted the Court that the departure from the parties’ agreement amounted to an essential fault in the proceedings that allows the annulment of the award is perfectly in line with the New York Convention (article V1(d) and the Model Law (article 34 (2)(a)(iv).
The above could have been sufficient ground for setting aside the award. However, the Court went a step further as it also held that “any proceedings for the resolution of a dispute –and Arbitration is one- must be consistent with the “procedural guarantees established in the National Constitution (articles 17 and 18, and related provision of international treaties with constitutional hierarchy).”

The Court also held that “it could not be accepted that "Outback" has consented the irregularity in the constitution [of the tribunal], or that it has been tacitly corrected. Indeed, there is no doubt that the vices that beset both the performance of Dr. S. and its "arbitration decision" caused irreparable damage to the claimant in the present case, who could not be economically affected after legal proceedings that did not comply with the minimum procedural guarantees required by arts. 17 and 18 of the Constitution.”

A different decision could lead to accept that it would be legally valid to waive the right to be judged by a lawfully constituted tribunal. In this sense, the Supreme Court of Justice in Argentina has held that the waiver of the right to appeal an arbitration award cannot be extended to those cases in which it is unconstitutional, illegal or unreasonable.

Since the irregularity in the composition of the arbitral tribunal affected Outbank’s right to a due process as guaranteed in the National Constitution, the Court did not recognize legal validity to the arbitrator’s decisions, holding that “the de facto–not de jure- decisions made by Dr. S. are, no valid legal acts, but simple facts that are deprived of legal effectiveness under the franchise agreement and the ICC rules.”

d. Finally, it is to be observed that by deciding the annulment of the award and due to Article V(1)(e) of the New York Convention, the Court of Appeal precluded the enforcement of the award not only in Argentina but also in all other signatory States of the Convention. This is because the effect of the judicial decision setting aside an international award by the court of origin is applied erga omnes.

Having the irregular composition of the tribunal been understood by the Court of Appeal as a violation of the due process (guaranteed by the National Constitution), the silence of the aggrieved party towards it cannot be interpreted as a waiver to the right to challenge the award. Therefore, it is to be observed that in Argentina the failure to comply with the parties’ agreement in connection with the procedure for the composition of the arbitral tribunal could be interpreted as rule not akin to other procedural objections but a non-waivable procedural guarantee.


2 The Argentinian Supreme Court of Justice held that rights may be waived expressly or tacitly, the latter occurring when the party freely performs acts that are understood as a compliance with the provisions alleged to cause the offence, which prevents the party from filing subsequent challenges based on that same ground. CSJN, Cabrera Geronimo R. y otro v P.E.N. (2004), La Ley, Supl. Esp. 13.07.2004


4 Unless the country where the enforcement is sought has not accepted Article V(1)(e) of the Convention.
Chevron-Lago Agrio Litigation Update

In February, an Ecuadorian court awarded US$17 billion in favour of local indigenous tribes in Lago Agrio against Chevron. The plaintiffs alleged that Chevron was responsible for environmental impacts in the Lago Agrio area of the Amazon rainforest, by failing to clean up oil spills from wells it drilled in the 1970s. Chevron's enduring battle to block enforcement of the Lago Agrio judgment continues. Pre-emptive orders of both the New York court and the Permanent Court of Arbitration (PCA) have now blocked enforcement of the Ecuadorean judgment against Texaco (later acquired by Chevron). Chevron recently appealed the judgment.

US Proceedings
As Chevron has no assets that could be seized in Ecuador, the plaintiffs looked to the United States and other countries where Chevron operates. On March 7, the Southern District of New York issued an interim injunction order against the Lago Agrio plaintiffs. The order restrains the plaintiffs’ enforcement of the judgment outside Ecuador, pending determination of the US claim.

Weeks before the Ecuadorian judgment, Chevron filed a civil lawsuit under the Racketeer Influenced and Corrupt Organizations Act (RICO) and other laws against the Lago Agrio plaintiffs’ trial lawyers and consultants. In that countersuit, Chevron claimed that the Lago Agrio trial was tainted by fraud, which included a public relations campaign directed against Chevron. The case attracted widespread publicity following accusations of corruption and bribes of Ecuadorian judges, and the 2009 release of Crude, a film about the alleged environmental damage.

Chevron-Ecuador BIT arbitration claim
Chevron also continues to seek recourse through arbitration against Ecuador under the US-Ecuador bilateral investment treaty.

Discovery Granted
Chevron continues with applications for discovery under Section 1782 of the US Code. Section 1782 applications are powerful discovery tools, which allow a litigant in an international arbitration to obtain testimony and documentary evidence through American courts. Chevron has been largely successful in obtaining evidence under those proceedings and, in particular, obtained hours of “outtakes” of the Crude documentary. The outtakes are said to reveal the plaintiffs’ legal strategy and include ex parte meetings with a court-appointed expert, and the production has been highly beneficial for Chevron.

The protracted litigation between Chevron and Ecuador now spans almost two decades. These proceedings continue to create new law and to push the boundaries of domestic court interaction with international arbitration.

US and Canadian Supreme Courts Rule on the Enforceability of Consumer Arbitration Clauses
Recent decisions from North America’s two top courts have considered the effect of arbitration clauses in mobile phone contracts. The Supreme Courts of Canada and the United States both addressed the same issue, the enforceability of arbitration and class action waiver clauses. Remarkably, each court dealt with the interaction of these clauses in light of consumer protection legislation, and came to the opposite conclusion.
Canada

In March, the Supreme Court of Canada, in Seidel v. TELUS Communications Inc. confirmed the application of the competence-competence principle, for courts to give effect to a mediation-arbitration ("med-arb") clause. However, in light of British Columbia's specific consumer protection statute, which precluded enforcement of the arbitration agreement and class action proceedings, the Supreme Court of Canada confirmed that class proceedings could proceed.

TELUS applied to stay the court proceedings initiated by the proposed representative plaintiff, on the basis that she was contractually bound to mediate and arbitrate the dispute, and had waived class action proceedings against TELUS. British Columbia's Business Practices and Consumer Protection Act provides a statutory right to maintain a civil action in the local court.

In Canada, the provinces are free to exclude consumer cases from arbitration. The issue before the Supreme Court of Canada was whether the Province of British Columbia's legislation set aside the parties' agreement to arbitrate in consumer contracts of adhesion. The Supreme Court of Canada upheld the validity of the provincial statute, disallowing the arbitration clause and permitting consumers to maintain the class action.

United States

In April, the US Supreme Court also addressed the very same issue in AT&T Mobility v Concepcion. While the US Supreme Court came to the opposite conclusion to that of Canada's Supreme Court, the decision was predicated on a different legal basis.

AT&T's mobile phone contract also contained an arbitration clause and a clause waiving class proceedings. The plaintiffs alleged being defrauded in a promotion advertising a phone services contract which provided two 'free' mobile phones, but which ultimately gave rise to a $30 charge in sales tax. AT&T moved to dismiss the class action, on the basis that the parties agreed to an individual arbitration process. California state contract law bars, as unconscionable, clauses prohibiting class proceedings in consumer contracts of adhesion.

The US Supreme Court ruled that the Federal Arbitration Act prohibited the operation of California’s state law, and thereby enforced the arbitration clause. At the same time, however, the US Supreme Court upheld AT&T’s clause that waived class arbitrations. Justice Scalia, for the majority, wrote that “requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration.” However, in the marginally-split minority, Justice Breyer wrote that class arbitrations are “appropriate ways to resolve claims that are minor individually, but significant in the aggregate.”

The US Supreme Court decision in Concepcion creates a presumption that arbitration clauses in consumer contracts of adhesion will be enforceable. The Supreme Court of Canada’s decision in Seidel, however, still stands for the position that, absent such a specific statutory prohibition of arbitration clauses, such clauses remain enforceable in Canada. The decisions of the US and Canadian Supreme Courts are based on different legal principles. State legislatures do not have the same range of jurisdiction as that constitutionally enjoyed by Canadian provinces, and such state legislation precluding arbitration clauses and class action waivers would be pre-empted by the US Federal Arbitration Act. Although the Supreme Courts reached opposite conclusions, the underlying presumption in favour of arbitration remains the same for both Canada and the United States.
Better the arbitrator you know than the one you don’t?

It is often said that one of the many benefits of arbitration is that parties can choose their decision maker(s). In international arbitrations, where three-member tribunals are common, each party usually appoints one arbitrator and a third arbitrator is named by either the two appointed arbitrators or the arbitral institution managing the arbitration, if any. In the case of a one-member tribunal, the parties usually agree on the sole arbitrator.

Needless to say, many questions may arise in this initial, crucial phase of an arbitration. What happens, for example, if a party consistently appoints the same arbitrator? The appearance of bias or lack of independence in situations of recurring or repeat appointments raises problems that are of growing concern in the arbitration community. How many times can an arbitrator be appointed by the same party and still be said to be impartial? Twice? Three times? Does it matter whether the parties have mutually agreed on the appointment or if the person is a “party-appointed” arbitrator? Should arbitrators refuse appointments from parties that have appointed them in the past? Should they disclose the details of all prior appointments?

Decision-maker impartiality and independence is a core requirement of procedural fairness. A party may therefore request that an arbitrator be disqualified if it believes there is an objective, justifiable doubt as to an arbitrator’s independence or impartiality. Although most arbitration rules include a requirement that arbitrators be “independent of the parties” (Article 7 of the ICC Rules of Arbitration, for example), few, if any, provide further guidance.

The IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) are recognized as the pre-eminent set of guiding principles for assessing arbitrator independence. Part I of the IBA Guidelines provides seven “general standards” regarding impartiality, independence and disclosure. Part II sets out “Application Lists”: three colour-coded “lists of specific situations that... do or do not warrant disclosure or disqualification of an arbitrator.” These guidelines help decide when, what and if any information should be disclosed by an arbitrator to the parties. Although often referenced in arbitral decisions, the IBA Guidelines are not binding (unless the parties state otherwise) and do not have any force of law. In fact, some parties use the ambiguity surrounding the applicable conflict of interest rules to delay proceedings or unfavourable awards.

Of particular interest is a recent decision on a challenge that was part of an important case – Universal Compression International Holdings, S.L.U. v Bolivarian Republic of Venezuela (Universal v Venezuela) – heard under the auspices of ICSID (International Centre for Investment Disputes). The claimant, Universal, made the challenge against arbitrator Professor Brigitte Stern on the basis that Professor Stern had been appointed by Venezuela in at least three other pending ICSID cases, all of which dealt with foreign investors in the service industry that, like Universal, alleged that Venezuela had expropriated their property. In two of those cases, Stern had been named by the same counsel for Venezuela as in the case at issue. Universal claimed that Stern had failed to disclose these prior appointments, which raised further doubts as to her independence. Venezuela, in turn, challenged the arbitrator appointed by Universal, Professor Guido Santiago Tawil, because of his alleged close professional ties with several members of counsel for Universal.

The challenges to arbitrators Stern and Tawil were dismissed. The decision was formally issued by ICSID’s Chairman of the Administrative Council, World Bank President Robert Zoellick (but was very likely drafted by the ICSID Secretary-General, Meg Kinnear). This decision has significantly raised, and clarified, the bar for disqualification of an ICSID arbitrator.
Under the ICSID Convention, persons designated to serve as arbitrators must exercise “independent judgment” and may be disqualified “on the account of any fact indicating a manifest lack” of such judgment. According to the *Universal v Venezuela* decision, the term “manifest” means “obvious” or “evident.” As a result, a “relatively high burden of proof” lies on the party moving to disqualify an arbitrator. A simple belief that an arbitrator lacks independence or impartiality is insufficient to disqualify him or her; facts must be proven by “objective” evidence. In the case at hand, having failed to adduce evidence sufficient to meet this standard, both proposals to disqualify were rejected as being too “speculative.”

Although multiple appointments within a three-year period is included in the IBA Guidelines’ “orange list” of situations that may give rise to justifiable doubts as to an arbitrator’s impartiality, Stern’s various appointments by Venezuela, on their own, were found not to amount to objective evidence that she suffered from a “manifest” lack of independent and impartial judgment. The decision notes that “Stern has been appointed in more than twenty ICSID cases, evidencing that she is not dependent – economically or otherwise – upon Respondent for her appointments in these cases.” As for Tawil, it was not “evident” that the mere fact of a relationship between him and counsel for Universal, gave rise to a “manifest” lack of impartiality, especially considering that this situation is included in the IBA Guidelines’ “green list” of acceptable relationships that do not require any disclosure. Taken together, this suggests that the IBA Guidelines are to be applied with robust common sense and without an unduly formalist interpretation.

The decision’s reference to the scope of the duty to disclose is also insightful. To ensure that parties have complete information and that the appointment process is as transparent as possible, arbitrators should include in their letter of acceptance to the parties details of all prior appointments by an appointing party as well as details of any professional relationships with a party’s counsel, including, “out of an abundance of caution,” information that is already in the public domain. However, in assessing whether an arbitrator’s failure to disclose such appointments results in a manifest lack of independence or impartiality, the public availability of that information – such as, in this case, the public knowledge of Stern’s appointment by Venezuela in other ICSID cases – ought to be taken into account.

This decision comes on the heels of two earlier ICSID decisions on requests to disqualify Arbitrator Stern due to her repeated appointments by Venezuela. In both cases, it was held that something in addition to multiple appointments was needed to disqualify an arbitrator. Taken together, these decisions lend justification to the argument that limiting the number of times an arbitrator may be appointed by a party restricts that party’s choice and its right to select the best possible arbitrator for any given case. This applies not only to international investment arbitration, but also to other specialized or industry-specific arbitrations (construction arbitration and insurance arbitration, to name but two). If one of the benefits of arbitration is the ability to choose one’s decision maker, then the possibility of repeat appointments is a necessary corollary. And so be it.

The real question is whether there is reason to fear that an arbitrator will favour the party that named him or her if there is, for example, a possibility that he or she will be reappointed by that party in the future. Probably not. Arbitrators deserve a little more of our confidence, and a little less of our cynicism.

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Supreme Court of Canada splits on upholding Arbitration Clause in Consumer Contract

Whether mandatory arbitration clauses that effectively or explicitly bar class proceedings are allowable and enforceable in consumer contracts has been the subject of much judicial comment in both Canada and the United States. Arbitration clauses precluding class actions remain allowable in both countries following the recent release of two Supreme Court decisions, AT&T Mobility LLC v. Concepcion et ux. from the United States Supreme Court and Seidel v. TELUS Communications Inc. from the Supreme Court of Canada.

In the Seidel decision, the Court divided narrowly (5-4) on the question of whether or not an arbitration agreement in a mobile phone contract required the consumer’s claim to be resolved by arbitration. Although the Court was expected to rule on the larger issue of whether such an arbitration agreement would act as an effective bar to class proceedings in general, the majority instead framed its analysis within the narrower context of British Columbia’s Business Practices and Consumer Protection Act (BPCPA).

The AT&T Mobility decision, by contrast, addressed the issue of whether a mandatory arbitration agreement which expressly prohibited class arbitrations was unconscionable. The district and circuit courts in California ruled that the agreement was unenforceable because it was unconscionable under California state law. The US Supreme Court reversed, holding that the arbitration clause barring class arbitration was not unconscionable and that California state law was preempted by the Federal Arbitration Act.

The Seidel decision

Michelle Seidel, a TELUS customer, brought an application to have her claim against TELUS certified as a class proceeding. Ms. Seidel’s contract with TELUS contained an arbitration agreement, by which Ms. Siedel had waived any right to bring a class proceeding. Before the action was certified, TELUS applied to stay the action and have it referred to arbitration, following the Supreme Court’s decisions in Dell Computer Corp. v. Union des Consommateurs and Rogers Wireless Inc. v Muroff. The BC court decisions were complex, but ultimately resulted in the BC Court of Appeal staying the class certification application. Ms. Seidel appealed to the Supreme Court of Canada.

In Seidel both the majority and dissenting judges agreed that absent legislative provisions to the contrary, Canadian courts will generally give effect to the terms of a commercial contract freely entered into (even a contract of adhesion), including an arbitration clause. But the majority, in a judgment strongly criticized by the dissenting members of the Court, concluded that the arbitration agreement in the TELUS standard form contract was unenforceable because it purported to waive rights and benefits conferred by the BPCPA, contrary to the mandatory provisions of the BPCPA. The majority ruling bifurcated the case into two streams, lifting the lower courts’ stay of proceedings in respect of the claims pursuant to the BPCPA, but maintaining it for the other claims.

In strong dissenting reasons, four judges held that the dispute was required to be resolved by arbitration in accordance with the parties’ arbitration agreement, emphasizing the importance of the competence-competence principle in Canadian law, the underlying influence of the New York Convention and Model Law on British Columbia’s domestic Commercial Arbitration Act (CAA), and maintaining that access to justice is fully preserved by a private arbitration process.

Importantly, although it was framed by the majority as a question of statutory interpretation, the majority and dissenting judges appear to have disagreed as to whether the objectives of the BPCPA are capable of being met by
private arbitration. The majority emphasized that the BPCPA is a public interest remedy, that private arbitration with its confidential aspects is antithetical to the purpose of the consumer protection bent of the BPCPA (which includes denouncing wrongdoers), and that private arbitration cannot offer the remedy sought by Seidel (i.e. a remedy between TELUS and the world, not just between Seidel and TELUS).

The dissenting judges, on the other hand, observed that the remedy is the end result, and noted that the same ends can be obtained through the private arbitration process as through the court system. The dissenting judges observed that the remedies sought by Ms. Seidel (including an injunction or a declaration) can be obtained through the arbitration process—and that arbitrators have jurisdiction to make any award a court could make whether in contract, tort, equity or by statute. Indeed, in British Columbia, arbitrators have broad remedial powers including injunctions and other equitable remedies.

The dissenting judges also noted that the majority's concern about the confidentiality and lack of publicity of the award was misplaced. Although the arbitration agreement states that the dispute must be determined by private and confidential arbitration, there was no requirement that the arbitration award itself be private and confidential—Ms. Seidel could apply to the public court system to enforce the award; in fact, the arbitrator could order TELUS to advertise the particulars of any order or award granted against it to the public at large.

Observations

In a similarly narrow majority opinion of the US Supreme Court in AT&T Mobility, which is a useful counterpoint to Seidel, the Court also considered procedural advantages and disadvantages of arbitration, but in the context of bilateral verses class arbitration. In AT&T Mobility the court considered the key advantage to arbitration to be its efficiency—highlighting the fact that its procedural informality could reduce the length of proceedings and their cost. Class arbitration, by contrast, would undermine these benefits because it requires procedural formality, and is more complex and time consuming. It is interesting to note that the procedural informality, viewed as a benefit of bilateral arbitration in AT&T Mobility, was viewed as a trait of arbitration that limited consumer activists' rights in Seidel.

Class arbitrations in Canada are rare and so it is unlikely that an arbitration clause banning class arbitrations would, itself, be determinative of whether an arbitration agreement is enforceable. However, when dealing with commercial arbitrations in Canada, careful attention should be paid to any provincial statutory provisions that limit the enforceability of an arbitration clause that prohibits class proceedings—such as consumer protection legislation enacted in Quebec, Ontario, and Alberta.

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1 131 S.Ct. 1740 (2010).
2 2011 SCC 15.
3 SBC 2004, c. 2.
4 2007 SCC 34.
6 RSBC 1996, c. 15.
ENGLAND

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Supreme Court Ruling Leaves Parties Free to Choose Arbitrator

The UK Supreme Court has overturned a Court of Appeal ruling (www.bailii.org/ew/cases/EWCA/Civ/2010/712.html) that threatened the freedom of parties to specify characteristics, such as religious persuasion or nationality, of the arbitrator or panel of arbitrators in arbitration proceedings. The Court of Appeal had ruled that arbitrators were employees, and therefore subject to anti-discrimination legislation. On a practical level, this ruling had an impact upon the validity of arbitration clauses that included stipulations in respect of the “protected characteristics” of an arbitrator and brought much uncertainty to agreements incorporating such characteristics. As a result of the Court of Appeal’s decision, those drafting arbitration clauses sought to disapply provisions relating to nationality within the rules of a number of arbitration institutions. The ruling of the Supreme Court has been welcomed by the arbitration community in the UK as an endorsement of the principle underlined in section 1 of the Arbitration Act 1996 (the “Act”) (www.legislation.gov.uk/ukpga/1996/23/contents) which provides that: “...the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.”

Facts
Mr Jivraj and Mr Hashwani entered into a joint venture agreement in 1981 which contained an arbitration clause that stated that in the event of any dispute, the dispute must be determined by three arbitrators, all of whom “shall be respected members of the Ismaili community and holders of high office within the community.” A dispute arose in 2008 and Mr Hashwani appointed Sir Anthony Colman as arbitrator. Mr Jivraj sought a declaration from the High Court in the UK that such appointment was in breach of the arbitration agreement and therefore invalid. Mr Hashwani argued that the arbitration clause was discriminatory and had been rendered unlawful as a result of the Employment Equality (Religious or Belief) Regulations 2003 (the “Regulations”) (http://www.legislation.gov.uk/uksi/2003/1660/contents/made).

Is an arbitrator an employee?
The definition of “employment” for the purpose of the Regulations includes “…employment under a contract of service or a contract personally to do any work...” (regulation 2(3) (http://www.legislation.gov.uk/uksi/2003/1660/regulation/2/made)).

In his judgment, Lord Clarke stated that “…the role of an arbitrator is not naturally described as employment under a contract personally to do work. That is because his role is not naturally described as one of employment at all.” Lord Clarke accepted that there is a clear distinction between those who are “…employed and those who are “independent providers of services who are not in a relationship of subordination with the person who receives the services.” He goes onto say that: “Although an arbitrator may be providing services for the purposes of VAT and he of course receives fees for his work, although he renders personal services which he cannot delegate, he does not perform those services or earn his fees for and under the direction of the parties...” In support of this analysis, Lord Clarke drew upon various provisions of the Act, particularly:
Sections 23 (http://www.legislation.gov.uk/ukpga/1996/23/section/23) and 24 (http://www.legislation.gov.uk/ukpga/1996/23/section/24) which provide that an arbitrator may only be removed in exceptional circumstances;
Section 33 (http://www.legislation.gov.uk/ukpga/1996/23/section/33) which states that the arbitrator has a duty to act fairly and impartially as between the parties and to adopt procedures suitable to the circumstances of the particular case so as to provide a fair means of determination of the issues between the parties;

Section 34 (http://www.legislation.gov.uk/ukpga/1996/23/section/34) which provides that subject to the right of the parties to agree any matter, it is for the arbitrator to decide all procedural matters; and

Section 40 (http://www.legislation.gov.uk/ukpga/1996/23/section/40) which states that the parties shall do all things necessary for the proper and expeditious conduct of the arbitration, which includes complying with any order of the arbitrator.

Is religious belief a genuine occupational requirement?
Regulation 7 (http://www.legislation.gov.uk/uksi/2003/1660/regulation/7/made) provides an exception where being of a particular religion or belief is a genuine occupational requirement or where an employer has an ethos based on religion and being of a particular religion or belief is a genuine occupational requirement having regard to that ethos. Having found that an arbitrator does not fall within the definition of employee for the purpose of the Regulations, the Court did not need to consider this exception but did so. The majority held that in this case, the requirement that the arbitrators should be respected members of the Ismaili community was not only genuine, but legitimate and justified. In coming to this decision Lord Clarke criticised the approach of the Court of Appeal as “…too legalistic and technical”. He stated that: “The parties could properly regard arbitration before three Ismailis as likely to involve a procedure in which the parties could have confidence and as likely to lead to conclusions of fact in which they could have particular confidence.” The majority rejected the argument that an English law dispute in London under English curial law does not require an Ismaili arbitrator, as this “…reduces arbitration to no more than the application of a given national law to a dispute.”

Conclusion
In his judgment, Lord Clarke stated that: “One of the distinguishing features of arbitration that sets it apart from proceedings in national courts is the breadth of discretion left to the parties and the arbitrator to structure the process for resolution of the dispute.” The Court of Appeal ruling threatened the underlying freedom of the parties and forced many arbitration institutions including the LCIA and ICC to consider the need to amend their rules relating to the ability to choose the nationality of arbitrators (on the basis that nationality was a “protected characteristic” under UK anti-discrimination legislation). The Supreme Court judgment has reversed the unsettling effect of the earlier judgment and brought certainty to the validity of arbitration agreements that incorporate such rules. Those drafting arbitration clauses no longer need to carve out such provisions and can include stipulations regarding particular characteristics of an arbitrator without fear of invalidating the clause.

2 Jivraj v Hashwani [2011] UKSC 40 per Lord Clarke para 23
2 Ibid, para 27
3 Ibid, para 40
The Supreme Court’s Decision in *Jivraj v Hashwani* [2011] UKSC 40

On 22 June 2010, the UK Court of Appeal held in *Jivraj v Hashwani* [2010] EWCA Civ 712, [2010] ICR 1435 that arbitrators are employees for the purposes of UK law. This decision caused considerable controversy in international arbitration circles because it appeared to render a common arbitral practice—prescribing the nationality of arbitrators—illegal under UK anti-discrimination laws. This, in turn, threatened numerous existing arbitration agreements with being void and, more significantly, threatened to erode the effectiveness of London as a seat for international arbitrations. On 27 July 2011 the UK Supreme Court overruled the Court of Appeal’s controversial decision. With the decision of the Supreme Court, London is certain to remain a popular place to conduct international arbitrations.

**Background**

The dispute at issue in *Jivraj v. Hashwani* stemmed from a Joint Venture Agreement (“JVA”) entered into in 1981 by two members of the Ismaili community. The JVA’s arbitration clause stated that the arbitrators “... shall be respected members of the Ismaili community and holders of high office within the community.” In 2008, at the same time that he commenced an arbitration under the JVA, Mr. Hashwani claimed that the Ismaili arbitrator provision was void under the 2003 Employment Equality (Religion or Belief) Regulations 2003 (the “Regulations”)—which prohibit employers from discriminating against employees on the basis of race, religion or other such factors—and sought instead to appoint a non-Ismaili person (former Commercial Court judge, Sir Anthony Coleman) as his arbitrator. Commercial Court proceedings commenced and the fundamental issue was whether the inclusion of a clause prescribing an arbitrator’s religious beliefs (and, by analogy, his or her nationality) would be void under the Regulations. At first instance, the Commercial Court found that an arbitrator was not an employee and as such was not covered by the Regulations. The Court of Appeal controversially found the reverse. An appeal was then heard by the Supreme Court.

**The Supreme Court Decision**

**Employment**

The Supreme Court upheld the appeal, finding that an arbitrator is not an employee under the Regulations and thus that the arbitration agreement was not made invalid by reason of them. Core amongst the Supreme Court’s reasoning was the Regulation’s definition of employment as being “employment under ... a contract to personally do any work” (emphasis added). Lord Clarke said that “it is in my opinion plain that the arbitrators’ role is not one of employment under a contract personally to do work... He is rather in the category of an independent provider of services who is not a relationship of subordination with the parties who receive his services.” In support of this, Lord Clarke cited the Arbitration Act 1996 and concluded that the arbitrator’s powers set out there mean that, once appointed, “the parties effectively have no control over him”. The Court also noted similarities in institutional rules, such as the UNCITRAL Model Law, the ICC Rules, and the LCIA Rules. Additionally, Lord Clarke noted that an arbitrator’s role is to impartially resolve a dispute, something anathema to subordination to a party’s interests. Lord Clarke thus decided that “there is no basis upon which it could be properly held that the arbitrators agreed to work under the direction of the parties” and that the Regulations did not apply.
Genuine occupational requirement

The Court also held that, even had the Regulations applied, the general occupational requirement exception in the Regulations (allowing for the appointment of a person of a particular religious or other belief in certain circumstances) would have been legitimate and justified here. In addition to holding that “one of the more significant and characteristic spirits of the Ismaili sect [is] an enthusiasm for dispute resolution within the Ismaili community”, the Court held more broadly that “[o]ne of the distinguishing features of arbitration ... is the breadth of discretion left to the parties and the arbitrator to structure the process for resolution of the dispute.”

Conclusion

The Supreme Court decision rejects the ‘legalistic and technical’ argument of the Court of Appeal and forms a prudent, pro-arbitration resolution of the issue. One of the key reasons for parties choosing arbitration is their ability to frame the method through which their dispute is resolved, including the ability to prescribe that arbitrators hearing the dispute be of a particular nationality. Ensuring that national and cultural nuances are understood, and that bias in international disputes is avoided, is central to this. The Supreme Court’s decision has confirmed that those arbitral principles of autonomy remain alive and well in England.

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Double Exequatur – Challenging Finality of Arbitral Award

The High Court in its recent decision in the case of (1) Dowans Holdings SA (2) Dowans Tanzania Ltd v Tanzania Electric Supply Co Ltd rendered on the 27 July 2011 has confirmed that pending petitions to set an arbitral award aside at the seat of the arbitration do not automatically render the award non-binding for the purposes of s.103(2)(f) of the Arbitration Act 1996.

The argument advanced in the Supreme Court case of Oil & Natural Gas Commission v Western Company of North America AIR 1987 SC 674 (“ONGC”) that there must be a “step required to make the Award ready for enforcement” which, if met with an “impediment”, will mean that the award is “not yet binding” was expressly rejected by the judge in this case. The ONGC case was distinguished on the basis that while the seat of the arbitration was London, the substantive law was Indian law and enforcement was in India; in other words enforcement was in the country under the law of which the award was made.

The judge has also emphasized that the power available to the English Court under s.103 (2) of the Arbitration Act 1996 was discretionary and did not necessarily give rise to any remedy just because one of the subsections of s.103(2) was satisfied. The judge went on further by adding that “even if an award has been set aside in the home jurisdiction upon one or other of the grounds set out in the subsections, the English courts still retain discretion to enforce the award...”

When considering the question of adjournment of the decision to recognise or enforce an award under the s.103(5) of the Arbitration Act 1996 which was sought as an alternative to refusing an enforcement under the s.103(2)(f), the judge upheld the “sliding scale” test developed in the Soleh Boneh International case. According to this test, if the award is manifestly invalid, there should be adjournment without an order for security for costs whereas, if the award is manifestly valid, there should be an order for immediate enforcement or an order for substantial security with anything in between to be assessed by the judge accordingly. This case was held to be on the “lower end of the
sliding scale” thereby justifying an adjournment coupled with an order for security. The question of security for costs was said to be assessed in the context of delay and whether it “is likely to cause the Claimants prejudice by way of loss of opportunity to recover assets and/or the deterioration in their prospects of recovery.”

While not ground-breaking, the *Dowans v Tanesco* case thus provides for a good summary of the relevant case law under section 103 (2)(f) and 103 (5) of the Arbitration Act 1996.

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1 - *Soleh Boneh International Ltd v Government of Republic of Uganda and National Housing Corp*n [1993] 2 Lloyd’s Rep 208

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**Shareholder disputes based on unfair prejudice petitions are arbitrable**

The Court of Appeal has held that there is no rule of public policy which has the effect of rendering an arbitration agreement void and/or unenforceable insofar as it purports to bind the parties to refer to arbitration the determination of the issues that would arise in an unfair prejudice petition under the *Companies Act* 2006 (the “*Companies Act*).

The Court of Appeal has upheld the decision of the High Court in *Fulham Football Club v (1) Sir David Richards (2) the FA Premier League* [2010] EWHC 3111 (Ch) by granting a stay of court proceedings under s.9 of the Arbitration Act 1996 on the application of the Defendants.

Fulham Football Club presented an unfair prejudice petition to the Companies Court alleging that Sir David, the long-standing chairman of the FA Premier League, had acted as an unauthorised agent for Portsmouth FC in advising Tottenham FC to pre-empt an increased bid from Fulham in the transfer from Portsmouth of English footballer Peter Crouch. Fulham alleged that Sir David had failed to act fairly as between the members of the FA Premier League by promoting the interests of one club over another. Fulham sought an injunction to restrain Sir David from acting as an unauthorised agent in the future and/or his removal as chairman of the FA Premier League.

Sir David and FA Premier League had applied for a stay of Fulham’s unfair prejudice petition on the basis that the rules of the FA Premier League (of which all clubs in the English Premier League are members), contain an arbitration clause submitting all disputes which might arise between the members to arbitration in accordance with the Arbitration Act 1996 (the “Arbitration Act”). The stay was granted by Vos J in a decision of the High Court in December 2010. Fulham appealed the decision on the basis that Vos J had followed the earlier, rather than later, of two inconsistent High Court judgments on the same issue.
Key points
The question that the Court of Appeal had to decide was one of arbitrability; in particular, whether statute or public policy prohibits the reference to arbitration of an unfair prejudice petition. The Court of Appeal held that:

- Neither the Arbitration Act nor the Companies Act contain an express restriction on submitting an unfair prejudice petition to arbitration. No such restriction could be implied into the Companies Act on public policy grounds.

- There is nothing in the scheme of the statutory unfair prejudice provisions which makes the resolution of an underlying dispute between shareholders inherently unsuitable for determination by arbitration on grounds of public policy.

- The only restriction placed upon the arbitrator is in respect of the kind of relief which can be granted, since he cannot make a winding-up order or some other order which affects third party rights. Disputes between shareholders which do not involve the making of a winding-up order are therefore capable of being arbitrated.

- It does not follow from the inability of an arbitrator to make a winding-up order affecting third parties (an order that could be made by the Court following an unfair prejudice petition) that it was not possible for the members of a company to agree to submit disputes between shareholders to arbitration.

- A dispute between members of a company about alleged breaches of the articles of association or a shareholders’ agreement is in essence a contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards imposed for the benefit of third parties.

How will this affect shareholders?
The courts are now likely to stay any unfair prejudice proceedings brought before them in breach of an arbitration clause in a shareholders agreement or articles of association.

In such circumstances, a petitioner may need to first resolve the underlying unfair prejudice complaint through arbitration. If the petitioner is successful and the relief sought is of the kind that an arbitrator does not have jurisdiction to make (for example an order that a company be wound-up or that fines be imposed) the arbitrator is likely to direct the petitioner to seek such relief from the court.

Such a two-stage process is clearly inefficient and undesirable. If your shareholders agreement or articles of association contain an arbitration clause, and your preference is to have any issues of unfair prejudice determined in court proceedings (because of the breadth of relief available, for example), it will be necessary to expressly exclude disputes relating to those issues from the scope of the arbitration agreement by reserving the right to present an unfair prejudice petition through the courts.

The Court of Appeal’s judgment is a welcome decision as far as the questions of arbitrability and party autonomy are concerned. However, there are potentially wider implications for companies and shareholders and careful consideration should be given to the implications of this judgment at the stage of drafting and agreeing shareholders agreements, articles of association, and other company constitutional documents.

Although permission to appeal was refused by the Court of Appeal, Fulham’s website indicates that it intends to seek permission to appeal from the Supreme Court. It will therefore be necessary to await the outcome of any appeal Fulham may decide to make to the Supreme Court for the final say on the arbitrability of unfair prejudice petitions.
FRANCE

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Of fraud and arbitration – Paris Court of First Instance, Ordonnance du juge de la mise en état, 29 June 2011

On 29 June 2011, the Paris Court of First Instance rejected an application by three arbitrators to summarily dismiss a claim for damages and injunctive relief brought by French oil company Total (acting as successor to the former Elf). Total is suing the members of the tribunal personally in an attempt to halt what it calls a fraudulent use of arbitration.

The dispute stems from a contract for oil exploration concluded between three Russian parties and a former subsidiary of Total that was wound up in 2005. In 2009, the Russian parties initiated arbitration proceedings against the now defunct Total subsidiary and petitioned a French commercial court to appoint a registrar to act in the interest of the liquidated company. The registrar in turn appointed a former presiding judge of the Paris Commercial Court as the second arbitrator. The first two arbitrators then selected a highly respected Austrian arbitrator as the chair.

Total then successfully challenged the ex-parte appointment of the registrar and proceeded to challenge the appointment of the tribunal on the basis that the second arbitrator had been appointed by a registrar whose own appointment was now null and void. In two separate proceedings brought by Total and its former subsidiary, the Paris Court of Appeal ultimately rejected the argument. The court stressed that the appointment of an arbitral tribunal could only be contested as part of a challenge against an award or enforcement decision.

Total then changed the basis for its claim and sued the arbitrators in tort before the Paris Court of First Instance. According to Total, the claims against its former subsidiary constitute a fraudulent attempt to procure an award against Total itself. Total is accordingly claiming damages and an order that the arbitrators resign or face a €100,000 daily fine until they do so. Faced with this claim, the arbitrators filed a request for summary dismissal, based on accepted principles of arbitration law, in particular the principle according to which the tribunal is empowered to rule on the validity of its own appointment. The Paris Court of First Instance rejected the argument. It stressed that the claim against the arbitrators was a claim for liability in tort, and thus wholly separate from the arbitration proceedings. Accordingly, Total’s claim against the arbitrators was ordered to proceed to the merits phase.

This case evidences the contradictory requirements of ensuring both efficient arbitral proceedings and protection from fraud. The fraudulent use of arbitration is not unknown and has been sufficiently prevalent in some countries to lead Ukraine to restrict, in 2009, the arbitrability of corporate disputes. However, legitimate concerns about fraud should not allow unwilling parties to effectively bypass arbitration law, given the existence of appropriate safeguards. First, as the arbitrators correctly pointed out before the Paris Court, the fact that a party is allegedly attempting to make fraudulent use of arbitration does not mean that the award itself will give effect to this fraud. A colourful case in point was Larsen v Kingdom of Hawaii, where Hawaiian separatists created a sham claim in an attempt to obtain international recognition of a long-extinct kingdom – to no avail, since the arbitral tribunal had no qualms in rejecting their claim. A second safeguard is criminal law, which deters arbitrators from being complicit to fraud. And in the unlikely circumstance that arbitrators would give effect to a fraudulent claim in their award, public policy would constitute a third safeguard and prevent enforcement, a point underscored by the Swiss Federal Tribunal in the recent Thalès case, where it annulled an award obtained through perjury, ten years after it had been rendered.
Given the existence of these safeguards, one would expect courts to exercise extreme caution in effectively halting the work of a tribunal on the basis of a fraud claim.

GHANA

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Enforcement of a foreign award under Ghana’s new Alternative Dispute Resolution Act 2010

Ghana passed into law a new Alternative Dispute Resolution Act (ADR Act 798) in May 2010. The new ADR Act 798 repealed the Arbitration Act of 1961 which was applicable in Ghana prior to the enactment of the ADR Act 798. The passing into law of the ADR Act is quite timely coming in the wake of Ghana’s new status as an oil producing and exporting country. As a result of Ghana’s oil find, the country has become the new toast for foreign direct investment on both small and large scale. Foreign investors will however always want to ensure that the country they invest in, is both politically and economically conducive such that their investment is protected. A legal system which recognizes and enforces international arbitration awards is considered to be a very conducive environment for foreign investors.

Ghana is a signatory to the New York Convention and the convention formed a schedule to the 1961 Act. However though under the 1961 Act, a foreign award was enforceable in Ghana, the definition of the term “foreign award” was quite restricted such that only awards made in a state declared by a legislative instrument to be a party to the New York Convention were enforceable in Ghana. The Arbitration (Foreign Awards) Instrument 1963, the Legislative Instrument issued pursuant to the 1961 Act, declared the following states to be reciprocating states for the purpose of enforcement and recognition of foreign awards in Ghana: Austria, Bulgaria, Byelorus, Cambodia, Central Africa Republic, Ceylon, Czech Republic, Slovakia, Ecuador, Germany, Finland, France, Greece, Hungary, India, Israel, Japan, Madagascar, Morocco, Norway, Poland, Romania, Syria, Thailand, Ukraine, Russia and the United Arab Republic. Thus an award made outside Ghana and in a country not listed above, could not be enforced in Ghana except by institution of a fresh action, where the existence of an award would have to be proved.

The ADR Act 798, has expanded the restrictive definition of “foreign award” as found under the 1961 Act. Under the ADR Act 798 a foreign award is enforceable in the High Court of Ghana where:

(a) A reciprocal arrangement exists between the Republic of Ghana and the country in which the award was made or
(b) The award was made under the New York Convention or under any other international convention on arbitration ratified by Parliament

The above provisions have significantly improved the law with respect to enforcement of foreign awards in Ghana and should give much comfort to the increasing number of foreign investors coming into Ghana.

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1 Ghana produced first oil on 15 December 2010
2 See Section 59 (1) (a) –(c) ADR Act 798.
Reforms to the Mexican Arbitration Law regarding Judicial Intervention

On 27 January 2011, the Mexican Commerce Code was amended in order to add Chapter X “Judicial Intervention in Commercial Transaction and Arbitration” comprising articles 1464 to 1480. The amendment deals with I) the referral of the dispute to arbitration; II) judicial assistance to the constitution of the arbitral tribunal, the presentation of evidence and the fees of the Arbitral Tribunal; III) a special trial and IV) interim measures.

I) Referral of the Dispute to Arbitration

Prior to the reform, the referral to arbitration could be executed at any time, even before rendering the judgment (Third Collegiate Civil Court of the First Circuit. REMISIÓN AL PROCEDIMIENTO ARBITRAL... Ninth Period, Registry No. 176471, December 2005). With the new amendment a judge shall refer the parties to arbitration, if a party so requests not later than when submitting his first statement on the substance of the dispute. Once the request for referral is submitted, the judge shall inform the parties and immediately resolve the matter. If the judge orders to refer to arbitration, he shall also hold the proceedings in abeyance. There is no remedy against the resolution for referral to arbitration. When the case is finally resolved through arbitration, the judge shall end the proceedings at the request of any party (article 1464).

If the dispute is not settled by means of arbitration, any of the parties may request the judge to continue with judicial proceedings. A judge may refuse a referral to arbitration on the basis of the following grounds: 1) that the arbitration agreement was annulled by a court decision or arbitration award; or 2) that the arbitration agreement is manifestly null, ineffective or unenforceable (article 1465).

II) Judicial Assistance

The voluntary jurisdiction is the adequate proceeding in order to: 1) request the appointment of arbitrators; 2) request judicial assistance for the presentation of evidence; 3) consult the fees of the arbitral tribunal (article 1466 fractions I, II and III).

III) Special Trial

A special trial was established in order to deal with the following matters: 1) Challenge of arbitrators; 2) the jurisdiction of the arbitral tribunal; 3) interim measures either before or during the arbitral proceedings; 4) recognition and enforcement of interim measures ordered by the arbitral tribunal; 5) setting aside an arbitral award; and 5) recognition and enforcement of an arbitral award (articles 1470 and 1471). The special trial comprises the following stages: Once the claim is accepted, the judge shall notify the respondent, who shall have 15 days to reply (article 1473). If parties do not submit evidence and if the judge deems the presentation of evidence as unnecessary, the judge shall summon the parties for the hearing on closing arguments within three days (article 1474). If evidence has been presented or the judge deems it necessary, an additional period of 10 days shall be granted (article 1475). Once the hearing takes place, the judge shall summon the parties to hear the decision. Intermediate resolutions and final resolutions ordered under this special trail shall not be subject to appeal.
IV) Interim Measures

The judge has full discretion in the adoption of interim measures. Either a party that requests interim measures or the arbitral tribunal which issues such measures are liable for damages and lost profits. It seems an unfortunate provision, since there is a manifest opportunity to claim against the arbitrators for the measures. However, parties may contractually waive the responsibility of arbitrators. The arbitration rules most commonly used in Mexico contain provisions for this exclusion of liability.

One of the most successful provisions of this reform is found in article 1479, under which interim measures issued by an arbitral tribunal shall be recognized as binding and enforced upon application to the competent judge, irrespective of the country in which it was issued. A judge may order the requesting party of recognition or enforcement of an interim measure, to provide appropriate security, if the arbitral tribunal has not made a determination regarding the security.

The judge may refuse the enforcement of an interim measure based on one of the following grounds: 1) that a security requested by the arbitral tribunal has not been provided; 2) that the interim measure has been terminated or suspended by the arbitral tribunal; 3) that the interim measure is incompatible with the powers of the judge; 4) that the dispute is not capable of settlement by arbitration under Mexican laws or the recognition or enforcement of the interim measure is contrary to public policy, among other grounds (article 1480).

V) Conclusion

The reform provides greater certainty as regard the framework of judicial action. In this way, the Mexican arbitration law consolidates significant progress on judicial intervention. There is remaining some practice in order to analyze the performance of these new provisions and determine their effectiveness and timely assistance in arbitration.

NIGERIA

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Duty of Nigerian Courts to enforce Arbitration Agreement

The Nigerian Court of Appeal (Lagos Division) in ONWARD ENTERPRISES LIMITED V MV ‘MATRIX’ & 2 ORS (2010) 2 NWLR (PT.1179) 530 recently reiterated the sacrosanct duty of Nigerian Courts to enforce arbitration agreement entered into by parties.

Onward Enterprises Limited (‘the Appellant’) and MV ‘Matrix’ & 2 Ors. (‘the Respondents’) entered into a contract of affreightment by executing several Bills of Lading at Bangkok, Thailand on March 25, 2002. Under the contract, the Respondents were required to carry about 280,000 bags of rice belonging to the Appellant to Nigeria. The Appellant alleged that the Respondents breached the terms of the contract and took out a writ against the Respondents at the Federal High Court. The Appellant also sought and obtained an order ex-parte for the arrest and detention of the Vessel (MV ‘MATRIX’). Pursuant to the order the vessel was arrested. Upon becoming aware of the arrest and detention of its vessel, the Respondents filed three (3) applications. The first application sought the release of the Respondent’s vessel, whilst the second application sought to confine the vessel to port pending the outcome of the
first application. The third application requested the court to order a stay of proceedings pending a reference to arbitration in London pursuant to the terms of the contract entered by the parties.

At the hearing, the Appellant consented to the release of the Vessel. Accordingly, the Respondents’ first and second application became otiose. The Appellant opposed the Respondents application for stay of proceedings. In a considered ruling, the Judge granted a stay of proceedings pending reference of the dispute between the parties to arbitration in London.

Dissatisfied, the Appellant appealed to the Court of Appeal, wherein it contended amongst other things that the Respondents had lost their right to apply for a stay of proceedings under section 5 of the Arbitration and Conciliation Act.¹ (‘the Act’) because they had taken steps in the proceedings by filing two (2) motions before the motion for stay of proceedings.

Section 5 (1) of the Act provides that “if any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject matter of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering any pleading or taking any other steps in the proceedings, apply to the court to stay proceedings”. The Nigerian Supreme Court interpreting this section held in the case of Obembe v. Wemabod Estates Ltd² that a party who makes any application whatsoever to the court, even though it be merely an application for extension of time, takes a step in the proceedings.³

The Appellant argued that in light of the Supreme’s Court decision in the aforementioned case, the filling by the Respondents of (2) applications before the application for stay of proceedings amounted to taking steps in the proceeding. On their part, the Respondents argued that section 5 of the Act contemplates filing of pleadings as against the filing of preliminary applications as was the scenario in their case.

The Court of Appeal (MSHELIA J.C.A. delivering the leading judgment) agreed with the Respondents’ contention to the effect that section 5 of the Act contemplates filing of pleadings as against the filing of preliminary applications. Although the Court of Appeal decision in this case appears⁴ to contradict the decision of the Supreme Court in the Wemabod Estate case to the extent that the Supreme Court’s decision does not draw a distinction between preliminary applications and filing of pleadings, it nevertheless reiterates the current trend of Nigerian Courts to enforce an agreement to arbitrate a dispute entered into by the parties. The leading judgment of Mshelia JCA captures in a nutshell what influenced the decision of the Court. Thus his Lordship had remarked:

“The Court of Appeal’s decision in this case shows the current trend of Nigerian Courts in enforcing arbitration agreement entered into by the parties. This trend is in line with the positions held by courts in the USA⁵, UK⁶ and South Africa.”⁷
The learned authors of Halsbury’s Laws of England, Volume 2 (1991) 4th Edition, at paragraph 627 gave examples of what constitutes “steps in the proceedings” as follows; “Steps in the proceedings have been held to include the filing of an affidavit in opposition to summons for summary judgment, service of a defence, and an application to the court for leave to serve interrogatories, or for a stay pending the giving of security or costs, or for an extension of time for serving a defence or for an order for discovery or for an order for further and better particulars.

It is to be noted that that section 4 of the Act provides that a court before whom an action, which is the subject of an arbitration agreement is brought shall, if any of the parties so requests not later than when submitting his first statement on the substance of the dispute order a stay of proceedings, and refer the matter to arbitration.

In Moses H Cone Memorial Hosp. v. Mercury Construction Corp., 460 US 1, 22 (1983), the US Supreme Court was emphatic in stating that the US congress’s intent in the Federal Arbitration Act was to move parties to an arbitration agreement out of court and into arbitration as quickly as possible.

In Ace Capital Ltd. v. CMS Energy Corporation (2008) EWHC 1843 (Comm.) it was held that a mandatory arbitration clause prevails over the US service of suit clause.

See Telcordia Technologies Inc. v. Telkom SA Ltd. (2007) 3 SA 266, where the South African Supreme Court of Appeal after observing that S. 34 of the South African Constitution, which provides that “everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent or impartial tribunal or forum” applied to arbitration, then held that an agreement to arbitrate was not a clog in the wheel of a person’s right of access to court.
Arbitration Developments in Pakistan

Law and Rules of Arbitration provided by United Nations Commission on International Trade Law (UNCITRAL) are widely followed by most of the States around the globe. However, the arbitration system in Pakistan is not new, as it has been informally followed from ages in the shape of Punchayat and Jirga etc. With the passage of time the arbitration system has now been acknowledged on international levels, Pakistan has also adopted certain legislative measures to introduce modern arbitration system. These developments are leading to introduce new legislations and their interpretations in accordance with International laws to compete the nations who have made their mark to best practice of arbitration. Pakistan has also signed several international treaties the most relevant to the arbitration are New York Convention on Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and International Convention for Settlement of Investment Disputes 1965 (ICSID) to which the current legislations are directly related.

The arbitration process is not as complex and time consuming as the judicial system in Pakistan. At a conference the Chief Justice of Pakistan, Justice Iftikhar Muhammad Chaudhry also favoured the modern law and procedure for arbitration and declared it in the national interest of Pakistan. Acknowledgment of international rules of arbitration is also appreciated by the Supreme Court of Pakistan even if they are not formally endorsed or agreed by the State. Arbitration in Pakistan is governed by Arbitration Act, 1940. However, the nature of disputes which can be referred to arbitration, presenting the dispute to arbitration without interference of the court and requirement of a signed agreement to arbitrate between the parties are the issues not addressed in the Act. Income Tax Ordinance, the Sales Tax Act and the Customs Act were also amended to promote the arbitration system in Pakistan. After a series of legislative developments starting from 2005, Pakistan has promulgated Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Award) Act 2010, and The Arbitration (International Investment Disputes) Act, 2010 to give legislative effect to the New York Convention 1958 and ICSID respectively.

The Pakistani government is very keen to promote a modern arbitration system in this country, and the courts have also supported and encouraged arbitration by declaring the procedure just, proper, equitable and in consonance with the spirit of the arbitration agreement. It is generally observed that the Pakistani courts are facing an exceptional backlog of cases making the courts’ performance poor, which usually does not meet the international standards. However, the international standards can be achieved by introducing a permanent and drafted set of rules of arbitration addressing domestic and international arbitrations, with a permanent seat of arbitration to decide the disputes referring to arbitration on their own forum rather than by the ordinary domestic courts.

A comprehensive draft with the proposed name of Arbitration Bill 2009 was presented before the National Assembly of Pakistan for approval in April 2009 and is still under discussion. The Bill consists of six parts and two schedules addressing arbitration, conciliation, enforcement of domestic and foreign arbitral awards and the establishment of an independent institution and its composition. However, the New York Convention is annexed as Schedule 1 and Convention on the Settlement of Investment Disputes as Schedule II of the Bill. The Bill apparently meets the international standards of arbitration based on UNCITRAL model law; it covers domestic as well as international arbitrations and seems uniform in nature. Therefore, it will be a wise step to approve the Bill in its true spirits with slight changes to the intervention of the courts and the enforceability of the award. The Bill also suggests the establishment of a Pakistan National Arbitration and Conciliation Centre to regularise arbitration services in accordance with the modern and international standards to make the proceedings simple, effective and speedy.

Therefore, it will be right to say that arbitration proceedings are the most appropriate way to deal with commercial disputes and it is a comparatively simple and expeditious process. Parties to an arbitration agreement have relative control over the proceedings, and can decide to arbitrate their dispute in accordance with the rules agreed between them, law and place of arbitration, which does not affect the commercial relationship between the parties. However, in Pakistan parties to commercial disputes have been facing problems with regard to an unclear and ambiguous arbitration system. Despite numerous developments in arbitration in Pakistan, where legislation either addressed the domestic aspect of arbitration or purely followed the international aspect of it making the system unclear, the
The proposed Bill of 2009 is an appreciated step towards the modern arbitration system to achieve international standards of arbitration.

POLAND

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Rules of law applicable to arbitration agreements under the New Polish Private International Law

I. General remarks.
The rules of law applicable to arbitration agreements determine the law which governs the formation, validity, enforcement and termination of the arbitration agreement. In a perfect world, parties would always put into their contracts choice-of-law clauses in relation to their arbitration agreements. Unfortunately, this is often not the case and at the end of the day it is up to arbitral tribunals and state courts to decide which law applies. The problem of the law applicable to arbitration agreements is complicated and controversial and this paper only aims to provide basic information on the topic and about the New Polish Law on Private International Law in relation to arbitration agreements. On 16th May 2011 the Private International Law of 4 February 2011 (hereinafter: NewPIL) entered into force in Poland. It replaced the previous Private International Law of 1965 after more than 45 years. NewPIL introduced into Polish PIL rules of law applicable to arbitration agreements.

II. NewPIL, the 1985 New York Convention, the 1961 European Convention and European Union Private International Law.

Before we move to discuss NewPIL, another important preliminary issue has to be dealt with. Poland is one of the contracting states of the NY Convention and the European Convention. The legal regime for arbitration agreements established by the above-mentioned conventions remains applicable in all cases covered. The relevant provisions are: Article V (1)(a) NY Convention, Article VI (2) first clause European Convention (substantive validity), Article II (2) NY Convention and Article I (2)(a) European Convention (formal validity). However, these provisions will not be discussed here.

The exhaustive regulation of the law applicable to arbitration agreements at the international level was the rationale behind the decision to exclude the regulation of this matter from European Private International Law. It is clearly expressed in Article 1 (2) (e) Rome I Regulation that the Regulation is not applicable to arbitration, even if the arbitral tribunal sits in a member state.

III. NewPIL

If the NY Convention and the European Convention do not apply, it is controversial which rules should be applicable: private international law rules or international civil procedure rules. Moreover, the situation is complicated by the fact that it is uncommon to regulate the law applicable to arbitration agreements in national laws. This was also the situation in Poland until NewPIL was adopted.

The law applicable to arbitration agreements is regulated in Chapter 8, entitled ‘Arbitration agreement’ and Articles 39 and 40 NewPIL. Article 39 regulates the law applicable to the arbitration agreement as such and the Article 40 NewPIL determines the law applicable to the form of the arbitration agreement Article 39(1) clearly expresses the primacy of party autonomy as to the choice of law that governs their arbitration agreement. This is probably the best...
way of determining the applicable law (and recognized in most legal systems), however in practice, it is rather rare that the parties put an additional choice-of-law clause in their contract, specifically for the arbitration agreement. Mostly, parties use a so-called general choice-of-law clause. The question whether the arbitration clause then falls within the scope of the general choice-of-law clause (especially when taking into account the separability doctrine), is not covered by this paper.

If parties fail to choose the law governing their arbitration agreement, Article 39(2) NewPIL provides certain rules. Firstly, the law applicable will be the law of the state in which the place of arbitration agreed by the parties is located. This must be the place of arbitration agreed upon by the parties and not the place of arbitration determined, for instance, by the arbitral tribunal. Secondly, if Parties failed to agree on the place of arbitration, the law applicable will be the law governing the legal relationship at issue in the dispute. Lastly, Article 39(2) provides a rule in favorem validitatis. Pursuant to this rule, it is sufficient for the validity of the arbitration agreement that the agreement is effective either under the law of the state in which the proceedings are pending or where the arbitration court issued a ruling.

Article 40 NewPIL\(^7\) concerns the form of the arbitration agreement. If the NY Convention and the European Convention do not apply, the form of the arbitration agreement is thus determined by the lex loci arbitri. According to P. Berger\(^8\) this rule follows from the fact that (1) the rules on form have to be qualified as substantive rules of PIL and (2) the territorial connection of the arbitration to the lex loci arbitri leads to the conclusion that an arbitral tribunal sitting in that country must apply the mandatory rules of form contained in that law. If the arbitration takes place in Poland, Articles 1162 § 2 of the Polish Code of Civil Procedure\(^5\) will apply.

Article 40 first clause NewPIL states that the form of the arbitration agreement is subject to the law of the state where the place of arbitration is located. The second clause of Article 40 subsidiarily provides that it is sufficient if the form of the arbitration agreement complies with the law of the state governing the arbitration agreement. This part of the provision appears to constitute an exception to the lex loci arbitri and aims to uphold the validity of the arbitration agreement (in favorem validitatis).

IV. Summary.

To conclude, after more than 45 years of application of the previous PIL, the new legislation introduced into Polish PIL rules that determine the law applicable to arbitration agreements. Whether the legal solution chosen by the Polish legislator will prove satisfactory remains to be seen upon further debate and review of case law rendered under the new rules.

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\(^6\) Article 39 NewPIL: “1. An arbitration agreement shall be subject to the law chosen in the agreement concluded by the parties. 2. If no choice of law is made, an arbitration agreement shall be subject to the law of the state in which the place of arbitration agreed by the parties is located. If such agreement is not made, the arbitration agreement shall be subject to the law applicable to the legal relationship at issue in the dispute; it shall be sufficient, however, that the agreement be effective under the law of the state in which the proceeding is pending or where the arbitration court issued the ruling.” This is not an official English translation. This English translation of articles 39 and 40 is available at [http://arbitration-poland.com/](http://arbitration-poland.com/).

\(^7\) Article 40 NewPIL: “The form of an arbitration agreement shall be subject to the law of the place of the arbitration. It shall be sufficient, however, to comply with the form provided by the law of the state governing the arbitration agreement.”


Russian Constitutional Court declares real estate disputes arbitrable

On 26 May 2011 Russian Constitutional Court (the “Court”) rendered Ruling No. 10-P interpreting provisions of the Federal Law “On Arbitration Tribunals in the Russian Federation”, Federal Law “On Registration of Immovable Property and Transactions Therewith” and other Russian laws touching upon competence of arbitration tribunals. The case was based on an inquiry by the Supreme Commercial (Arbitrazh) Court (the “SCC”) regarding enforcement of an arbitral award levying execution upon mortgaged property. Commercial courts of first and second instance enforced the arbitral award, and the mortgagor submitted an appeal to SCC arguing that state commercial courts had exclusive jurisdiction over real estate disputes.

For several years Russian commercial courts took a position that arbitral awards leading to a change in ownership of real estate were not enforceable. In its Information Letter No. 96 (dated December 22, 2005) SCC Presidium stated that arbitral tribunals could not order registration of a title to immovable property, “public law” matters such as real estate registration being non-arbitrable.

SCC’s inquiry raised a wider question: whether arbitration tribunals are to be considered “courts in terms of the constitutional right to justice” and whether arbitral awards have the effect equivalent to that of court judgments.

The Court concluded that arbitral tribunals have jurisdiction over disputes relating to real estate (including mortgage foreclosure) and registration authorities may register titles based on arbitration awards. The Ruling contains several important statements supportive of the status of arbitration in Russia:

1. While arbitration tribunals are distinct from state courts, arbitration is assigned an important public function, and the ability to refer disputes to arbitration is an important aspect of the constitutional guarantee of court protection of rights and the freedom of choice concerning protecting one’s rights.

2. Under Russian law there is no uncertainty as to which categories of disputes are arbitrable - the only limitation to arbitral tribunals’ jurisdiction (apart from explicit restrictions found in law) follows from the rule that only “civil-law” disputes may be referred to arbitration. This means that disputes arising from administrative and other public legal relations are outside arbitral jurisdiction.

3. The Court criticized SCC’s position where it directed commercial courts to refuse enforcement of awards ordering registration of title to real estate as this gave rise to a so-called “public element”. State registration of property does not affect the title to property or the legal relations among respective parties, the compulsory nature of state registration does not prevent arbitral tribunals from adjudicating real estate disputes.

4. Article 248 of the Commercial Procedure Code (Exclusive Competence of Commercial Courts in Matters Involving Foreign Persons) does not delineate the jurisdiction of arbitral tribunals, it only sets jurisdictional boundaries between Russian and foreign state courts. Hence, the Court adopted the view that has long been expressed by leading Russian arbitration scholars.
5. Russian lawmakers may further specify and modify the categories of arbitrable disputes depending on their nature, social importance and other factors. However, any such modification may not arbitrarily reduce the current level of guarantees concerning arbitration and must consider the aims of ensuring stability and dynamism of civil relations as well as predictability of available procedural remedies.

6. The Court’s conclusions were not modified by the argument that an award ordering mortgage foreclosure could violate the rights of persons who are not parties to arbitration. According to the Court, such a third party may challenge the award in a state court; at the enforcement stage a state court should refuse enforcement of an award infringing upon the rights of a third party (the right to participate in a case affecting one’s rights being a fundamental rule of Russian law).

The Court referred to the case law of the European Court of Human Rights (Deweer v Belgium, Lithgow and Others v. The United Kingdom, Regent Company v. Ukraine), confirming the right of private actors – enjoying autonomy of will and freedom of contract – to use arbitration for resolution of civil-law disputes.

On its face Ruling No. 10-P, ending the long debate regarding arbitrability of real estate disputes, is a significant step toward a wider use of arbitration in Russia. Although the issue in question dealt with domestic arbitration, the same reasoning should in principle apply to international commercial arbitration, especially as the Court explicitly referred to both domestic and international arbitration as “recognized .. means of resolving civil law disputes” in the context of the constitutional guarantee of protecting rights by any means permitted by law.

**SOUTH AFRICA**

**Michael Wietzorek - Landgericht Krefeld, Düsseldorf**

**South Africa: An arbitrator may make an award on agreed terms**

The South African law on arbitration is regulated by the Arbitration Act No. 42 of 1965, which came into force on 14 April 1965. The Act is silent on whether an arbitrator or an arbitral tribunal may make an award on agreed terms. According to Patrick M. M. Lane SC & R. Lee Harding (National Report for South Africa 2010, in: Jan Paulsson (ed.), International Handbook on Commercial Arbitration, Kluwer 2010, p. 21), there seems, however, no reason why an arbitrator should not have such power, and in practice in South Africa most arbitrators do not hesitate to make an award on agreed terms; an award incorporating a settlement will be enforceable as a final award. This view has now been affirmed by the Supreme Court of Appeal of South Africa (VM Ponnan JA) in Bidoli v Bidoli & another (436/10) [2011] ZASCA 82 (27 May 2011) (available at www.justice.gov.za/sca/judgments/sca_2011/sca2011-082.pdf)

When disputes arose amongst the Bidoli brothers, they concluded an arbitration agreement with a view to having an arbitrator determine all of their disputes, which inter alia provided that the arbitration would be governed by the Arbitration Act 42 of 1965 and would deal with all of the parties’ disputes. The parties filed their respective statements of claim during September 2007, and the hearing commenced before the arbitrator on 3 December 2007. On 7 December 2007, the parties met outside of the arbitration hearing to discuss a settlement of the matter. That led to the conclusion of a settlement agreement. On 10 December 2007, the arbitrator rendered an award.
During February 2008, the claimant applied to the Western Cape High Court in Cape Town (Fourie J) for the arbitral award to be made an order of court in terms of Section 31 of the Arbitration Act 42 of 1965. The respondent opposed this application and requested to set aside the arbitral award, arguing that the arbitrator’s mandate terminated automatically when the parties settled their dispute, and any award as issued thereafter was void for want of jurisdiction.

Fourie J dismissed the application and set aside the arbitral award, holding that:

“[…] upon the settlement of their disputes by the parties, the arbitrator’s appointment was at an end, for there was nothing left for him to decide in terms of the referral to arbitration. The publication of any award thereafter, which merely incorporates the settlement concluded by the parties, did not, in my opinion, bring about a valid award which may be made an order of court in terms of section 31 of the Arbitration Act. Nor can it, in terms of our common law, be regarded as a valid arbitral award.”

In reviewing this decision upon appeal by the claimant, Ponnan JA quoted Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd 2002 (4) SA 661 (SCA) para 25:

“The hallmark of arbitration, as reflected in s 3(1) of the Act, is that it is an adjudication flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement.”

He also found that here, it was intended by the parties that the arbitration would come to an end with the issue by the arbitrator of the arbitral award. The settlement agreement was dependent upon the issue of that award. Both parties approached the arbitrator before then with the request that the arbitrator issue an award recording the terms agreed.

Consequently, Ponnan JA held:

“It does not appear to me to follow that in the absence of a statutory provision the parties would not be free to elect to regulate their relationship with each other as occurred here. […] The arbitrator here – as all arbitrators do – plainly derived his powers from his acceptance of a reference from the parties to the arbitration agreement. He thereby undertook to hear their dispute and to make an award. Only when a final award was made did his authority as an arbitrator come to an end and with it his powers and duties in the reference.”

Spain reforms its Arbitration Act

On 20 May 2011, the Spanish parliament enacted the Reform Act of the Spanish 2003 Arbitration Act (the Ley 11/2011, de 20 de Mayo, de reforma de la Ley 60/2003) which has revised important provisions of the 2003 Arbitration Act. The new law constitutes the first reform of the legal framework under which domestic and international arbitrations have been regulated in Spain for the past 8 years. The changes introduced have refined some areas of the 2003 Arbitration Act and modernised certain aspects to bring them closer to international standards.

The reform of the Spanish Arbitration Act is inspired by the same pro arbitration spirit under which the Arbitration Act 2003 was enacted. It intends to enhance the use of arbitration as an alternative means of dispute resolution to improve the administration of justice, and to attract higher numbers of international arbitrations into Spain.

The main changes introduced by the Reform Act are the following:

1. The functions of the courts in relation to arbitration proceedings have been reorganised. The nomination and removal of arbitrators, annulment actions and exequatur of international arbitral awards, which had been assigned to the Courts of First Instance and the Provincial Courts under the 2003 Arbitration Act, are now competencies of the High Courts of Spain’s 17 autonomous regions. As a result, functions which were until now exercised by more than 50 Courts of First Instance and Provincial Courts will be exercised by 17 regional High Courts. It is expected that this measure will bring greater consistency and harmonisation of arbitral case law (see modifications to Article 8 of the 2003 Arbitration Act).

2. The Reform Act has eliminated the 2003 Arbitration Act's requirement of being a member of a bar association to act as sole arbitrator in domestic arbitration proceedings which are not ex aequo et bono. In the absence of an agreement by the parties, the arbitrator will only be required to be a “jurist”. Should there be a three member (or more) arbitral tribunal, a maximum of two arbitrators may be non-jurist professionals (see modifications to Article 15 of the 2003 Arbitration Act).

3. The reform establishes that corporate disputes may be subject to arbitration, in line with a series of previous court decisions. The Reform Act provides that the decision to include an arbitration agreement in the company's constitution will require a two thirds qualified majority agreement of the votes attached to shares in which the capital is divided (see new Article 11 bis).

4. Finally, it is worth mentioning that the Reform Act expressly states that, unless otherwise agreed, an arbitrator must not have previously acted as mediator in the same dispute between the parties (see new section 4 for Article 17 of the 2003 Arbitration Act).
Domestic Arbitration pursuant to the New Turkish Code of Civil Procedure

In Turkey, regulations on arbitration date back to 1927 with the Code of Civil Procedure (http://www.mevzuat.adalet.gov.tr/html/435.html), where the rules on commercial arbitration cases had been embedded without, however, differentiating between domestic and international arbitration. Although the provisions of the Code of Civil Procedure still apply to domestic arbitration, the need for a more comprehensive law concerning international arbitration was met in Turkey with the adoption of the Turkish International Arbitration Law in 2001 (http://www.mevzuat.adalet.gov.tr/html/1147.html). Regulating the procedures and principles of international arbitration, the Turkish International Arbitration Law applies to disputes bearing foreign elements and where the place of arbitration is located in Turkey or, where the provisions of the Turkish International Arbitration Law are chosen by the parties or the arbitral tribunal. When drafting the Turkish International Arbitration Law, the legislator was generally guided by the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”) (http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf) but made changes to a few provisions.

In addition to the rules on international arbitration, Turkey’s Code of Civil Procedure offered the above mentioned rules on domestic arbitration which were somewhat out of date, less arbitration friendly and less detailed compared to the rules applicable to international arbitration. Notwithstanding, recent legislative reforms in Turkey proof Turkey’s efforts to align its laws with the European Community acquis. Inter alia, new and efficient regulations regarding domestic arbitration have been adopted and will be effective as of 1 October 2011. Those new, detailed rules on domestic arbitration are likewise in line with the Model Law. The new rules on domestic arbitration will apply if the arbitration does not hold a foreign element as defined by the Turkish International Arbitration Law and where the place of arbitration is located in Turkey. Some of the essential features of the new rules are as follows:

- Disputes arising out of estates or matters that are not subject to the parties’ disposition are not arbitrable;
- The arbitral tribunal may issue preliminary injunctions during the course of the proceedings. More interestingly, in case a local court issues a preliminary injunction before the commencement of the arbitral proceedings, the injunction may be amended or annulled by the arbitral tribunal;
- In case the arbitral tribunal consists of more than one arbitrator, at least one of the arbitrators should be a lawyer with at least five years of legal experience;
- A party may file an annulment action against the award within one month following the notification of the final award to the parties. The grounds for filing this action are similar to those provided by Article 36 of the Model Law, i.e. the grounds for refusing recognition or enforcement of the award. Furthermore, the parties are entitled to appeal the result of the annulment action on the same grounds; however, the appellate proceedings will not hinder the enforcement of the arbitral award.
The new provisions regarding domestic arbitration are designed to provide effective solutions, to give dynamic to and increase the choice of Turkish arbitration on the basis of the common, familiar and secure nature of the Model Law. This will further Turkish case law on arbitration which will, in return, enhance the number of international arbitrations taking place under the regime of the Turkish International Arbitration Law, since both laws are rooted in the Model Law.

UKRAINE

Yaroslav Petrov – Asters, Kiev

VA Intertrading Aktiengesellschaft (Austria) vs. HEKRO PET Ltd., LLC (Ukraine): A summary

In June 2010 VA Intertrading Aktiengesellschaft (Austria) filed a petition to Amur-Nignedniprovskiy district court of Dnipropetrovsk to enforce an international arbitration award. The award in the case VA Intertrading Aktiengesellschaft (Austria) vs. HEKRO PET Ltd., LLC (Ukraine) was rendered on March 25, 2010 by a sole arbitrator, Ernie Sekolets, under the VIAC Rules. The arbitrator awarded HEKRO PET Ltd., LLC to pay the sum in the amount app. USD 2 mln.

The Ukrainian court of the first instance granted the petition. HEKRO PET Ltd., LLC was not satisfied with the court ruling and filed an appeal to Dnipropetrovsk Oblast Court of Appeal. The appeal stated that the court of the first instance while confirming the arbitration award breached material and procedural laws.

HEKRO PET Ltd., LLC has based its defence referring to Article 5(1)(b) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and on the Ukrainian Civil Procedure Code. HEKRO PET Ltd., LLC has provided a proof that it was not given a proper notice of the appointment of the arbitrator. As a proof of this it provided to the court letters submitted by VIAC saying that the notification on appointment of the arbitrator was submitted by DHL courier services, copies of electronic delivery report (Tracking & Tracing report) were attached. The Court of Appeal uphold the appeal of HEKRO PET Ltd., LLC and stated that Tracking & Tracing report, printed from the DHL web-site, cannot be considered as a sufficient proof for delivery of notices because they do not include any signatures and stamps required by Ukrainian legislation.
NEW PROCEDURAL RULES FOR ARBITRATION-RELATED MATTERS IN UKRAINE

1. Introduction

On 3 February 2011 the Ukrainian Parliament adopted several laws introducing important amendments to the procedural legislation in arbitration-related matters, including:


- **Law No.2980-VI** (see [http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2980-17](http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2980-17)), in force since 1 March 2011, amending the **Commercial Procedure Code of Ukraine** (see [http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1798-12](http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1798-12)).

These laws have filled many gaps in Ukrainian legislation and are of practical importance for all arbitration users in Ukraine. In particular, they set forth new procedural rules of enforcement and setting aside of the arbitral awards made in the territory of Ukraine according the **law of Ukraine On International Commercial Arbitration 1994** (see [http://www.ucci.org.ua/en/legalbase/zua944002.html](http://www.ucci.org.ua/en/legalbase/zua944002.html)), as well as cover arbitrability issues.

Prior to entering into force of the above amendments, neither the **Civil Procedure Codes of Ukraine** (2004), nor the **Commercial Procedure Code of Ukraine** (1991) contained specific provisions on the arbitration-related state court proceedings for arbitral awards made in Ukraine (both domestic and international) and regulated only recognition and enforcement of foreign arbitral awards in Ukraine (after the reform in 2010).

Thus, for many years arbitration practitioners in Ukraine have been applying to the state courts for setting aside or enforcement of arbitral awards with reference to the provisions of the respective arbitration laws only. Needless to say, that lack of procedural rules for such cases resulted in practical difficulties and uncertainty for the parties and even judges. And the court practice in arbitration-related matters was rather controversial.

The 2011 procedural reform purported to improve the foregoing situation and to finally establish the long-expected procedural rules for such matters.

2. Procedure of International Arbitral Awards Enforcement

The **Law No.2979-VI** establishes different rules for enforcement of “domestic” arbitral awards (i.e. awards rendered under the law of Ukraine through domestic Arbitration Courts) and “international” arbitral awards (i.e. awards rendered under the law of Ukraine in International Commercial Arbitration).. According to this law, international arbitral awards made in the territory of Ukraine (e.g. by the **International Commercial Arbitration Court** (see [http://www.ucci.org.ua/arb/icac/en/rules.html](http://www.ucci.org.ua/arb/icac/en/rules.html)) and the **Maritime Arbitration Commission** (see [http://www.ucci.org.ua/arb/mac/en/rules.html](http://www.ucci.org.ua/arb/mac/en/rules.html)) at the Ukrainian Chamber of Commerce and Industry) will be enforced in accordance with the general provisions for granting permission to enforce foreign court decisions (Chapter VIII of the **Civil Procedure Code of Ukraine**). This clarification supplements the last year’s amendments to the **Civil Procedure Code of Ukraine**, providing for application of its Chapter VIII to recognition and enforcement of “foreign and international arbitral awards”. New provisions aim to eliminate practical difficulties in the enforcement
of the awards of the International Commercial Arbitration Court and the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry caused by lack of uniform interpretation by the courts of the said notion.

3. Procedure of Setting Aside Arbitral Awards

*The Law No.2979-VI* sets forth the procedure for setting aside domestic arbitral awards and contains also several provisions on setting aside international arbitral awards made in the territory of Ukraine. The interpretation of those provisions is a difficult task, however, it seemingly allows presuming that, the new procedure of setting aside domestic arbitral awards will be applied to “international” arbitral awards made in Ukraine also. However, the conditions and grounds for the setting aside of the latter should be exclusively regulated, as was previously the case, by the Law of Ukraine *On International Commercial Arbitration* and/or by respective international treaties of Ukraine.

4. Arbitrability

*The Law No.2980-VI* introduced minor amendments to Article 12 of the *Commercial Procedure Code of Ukraine*. Prior to entering into force of the above amendments, this article contained restrictions and prohibited to submit to arbitration (both domestic and international) certain categories of disputes (first of all, corporate disputes and public procurement contracts disputes). The new wording of this article and its new context of domestic arbitration may provoke discussions of its applicability to international arbitration, since the newly adopted version of Article 12 of the *Commercial Procedure Code of Ukraine*, unlike its predecessor, provides an opportunity for ambiguous interpretation of its provisions as applicable to domestic arbitration only or to international arbitrations also. Only with time and upon the establishment of court practice in this regard, the actual meaning and significance of these provisions for arbitration in Ukraine will be fully discovered.
Compelled Arbitration, Depravity or Propriety: AT&T Mobility LLC v. Concepcion et ux. Revisited

In its recent decision of AT&T Mobility LLC v. Concepcion et ux., the United States Supreme Court was presented with the question of whether the Federal Arbitration Act threatens “to undercut valuable consumer and civil protections.” (Alliance for Justice, AT&T Mobility v. Concepcion: Will the Supreme Court Give AT&T a License to Steal? (2011), http://www.afj.org/connect-with-the-issues/the-corporate-court/arbitration-report-final.pdf. In AT&T Mobility, the Court addresses the question of whether a compelled arbitration clause which places a contractual ban on class actions and class arbitrations can be found unconscionable under California law.

The cellular telephone contract at issue between AT&T and Concepcions “provided for arbitration of all disputes, but did not permit class wide arbitration.” AT&T Mobility LLC v. Concepcion et ux., 131 S.Ct. 1740, 1742 (2011). The case arose from a claim by Concepcions against AT&T in a California Federal District Court when the Concepcions were “charged sales tax on the retail value of phones provided free under their service contract.” Id. The suit was “consolidated with a class action alleging, inter alia, that AT&T had engaged in false advertising and fraud by charging sales tax on ‘free’ phones.” Id. Relying on the California Supreme Court’s decision in Discover Bank v. Superior Court, the Federal District Court denied AT&T’s motion to compel arbitration under the contract. In its holding, the court found the arbitration provision unconscionable because it disallowed classwide proceedings. On appeal, the Ninth Circuit agreed with the District Court and held that the Federal Arbitration Act which holds arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,” did not preempt the District court’s ruling. Id. (citing 9 U.S.C. § 9).

The Supreme Court granted certiorari, and in its holding reversed and remanded the Ninth Circuit’s decision. The Court’s decision in favor of applying AT&T’s arbitration provision was based on the proposition that to hold otherwise would run contrary to a federal policy favoring arbitration and the “fundamental principle that arbitration is a matter of contract.” Id. at 1745 (citing Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. 2772, 2776 (2011)) Such thoughts echo precedent in favor of arbitration articulated in decisions, such as the Court’s decision in Mitsubishi v. Soler Chrysler-Plymouth where the Court reiterated “that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” (Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (citing Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983)). In AT&T Mobility, the Court emphasized that “courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms.” AT&T Mobility LLC, 131 S.Ct. at 1745. .

Furthermore, the Court addressed the inconsistencies with the Discover Bank approach which allows for class arbitration by holding the denial of classwide proceedings to be unconscionable by stating that “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—it’s informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.” Id. at 1751. The Court also raises the risk of errors going uncorrected in the absence of multilayered review. Id. 1751-52.

A wide array of concerns have arisen as a result of the Court’s recent decision; such concerns include whether the decision will allow corporations to contract out of class arbitrations and class actions for various civil rights lawsuits, or whether the deprivation of the right to organize collectively will prevent access to the courts for those less likely
to sue individually, particularly in cases involving low dollar amounts or cases where individuals did not realize they had a claim but for a class action or class arbitration. Another concern that arises is whether the powerful disincentive to violate the law that class actions and class arbitrations present, providing a form of consumer protection, will come to pass when corporations can contract out of class action and class arbitration lawsuits. Most notably, a concern presented, is whether arbitration, a means envisioned to facilitate the contractual intentions of parties to a contract, will be compelled in an attempt to curb consumer protections. This concern is yet to unfold in a judiciary post AT&T Mobility LLC v. Concepcion et ux.

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Class Arbitration, the FAA, and the Role of State Law After the Stolt-Nielsen and AT&T Mobility Decisions

The Federal Arbitration Act, with its policy of arbitration as a mechanism founded on the consent of the parties, forms the basis for two recent United States Supreme Court decisions that limit the discretion of both individual arbitral tribunals and the states to green light class arbitrations absent an express agreement by the parties. In the first of these cases, the 2010 Stolt-Nielsen S.A. v. Animalfeeds International Corp. decision, the Supreme Court overturned a decision by an arbitration panel which had allowed class arbitration to go forward despite a stipulation by the parties that there was no agreement between them expressly allowing class arbitration. Taking a similarly restrictive view toward class arbitration, in the 2011 AT&T Mobility LLC v. Concepcion case, the Supreme Court overturned the ruling of a California federal district court, affirmed by the Ninth Circuit, holding that, in accordance with California law, agreements expressly foreclosing class arbitration are unconscionable. In so holding, the AT&T Mobility Court reasoned that California law on the issue was pre-empted by the FAA, which has a strong policy favouring the right of parties to formulate contractual terms that streamline the dispute resolution process. While these cases are consistent in their reliance on the FAA’s policy toward permitting efficient, consent-based dispute resolution, they may be problematic to consumer rights advocates who will be forced to work with an arbitration agreement negotiated by a consumer with little bargaining power to demand a class arbitration consent. Because of the potential implications of these recent cases, the decisions bear a closer look.

The Stolt-Nielsen case arose from a dispute between Stolt-Nielsen, a commercial shipping company, and Animalfeeds, a Stolt-Nielsen customer. The contract between these parties required arbitration but was silent as to whether it permitted class arbitration. The parties submitted the issue of whether class arbitration was permissible to the arbitral panel, which had ruled that, despite the absence of an express agreement, class arbitration was permissible. The Supreme Court, taking the relatively extreme measure of overturning an arbitral award on the grounds that the panel had exceeded its powers, found in a 5-3 decision (with Justice Sotomayor abstaining) that whether class arbitration was permitted was not merely a procedural matter within the discretion of the tribunal. Instead, the Court found that “because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator,” the arbitral panel had exceeded its authority by drawing such an inference. The Court further explained that while arbitration decidedly confers procedural advantages in bilateral arbitration, the benefits to a class arbitration are less clear. As just one example of the potential disadvantages to class arbitration, the Court noted the problems with confidentiality inherent in arbitrating against a class. Thus, according to the majority, “the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers
under the FAA, that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.\(^6\)

In 2011, the Supreme Court would again rely on the limiting, pre-emptive powers of the FAA to strike another blow to class arbitrations in *AT&T Mobility LLC v. Concepcion*. In *AT&T Mobility*, the Concepcions had entered into a consumer phone contract with AT&T. The contract required arbitration of disputes, but expressly foreclosed the possibility of class arbitration. Following a contractual dispute with AT&T Mobility over fees, the Concepcions joined a putative class action lawsuit that alleged, *inter alia*, that AT&T had engaged in false advertising and fraud. AT&T moved to compel arbitration, citing the arbitration clause in its agreement with the Concepcions. While the California federal district court viewed the arbitration clause favourably, it struck down the arbitration clause, citing California law which provided that agreements prohibiting class determinations were unconscionable. The Ninth Circuit, affirming the lower court’s decision, held that the FAA did not pre-empt the California holding.

In another narrow majority opinion by the same five justices in the *Stolt-Nielsen* majority, the *AT&T Mobility* Court overturned the Ninth Circuit, finding that the Federal Arbitration Act pre-empted California law, because the California unconscionability rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” as stated in the FAA.\(^7\) The Court gave three reasons why California’s policies favouring class arbitration contravened the intentions of the FAA. First, the majority stated that class arbitration would eliminate the primary advantage of arbitration, its efficiency, finding that “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—it’s informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”\(^8\) Second, the Court held that because class arbitration requires procedural formality, it was highly unlikely that Congress intended to leave these procedures to the discretion of an arbitrator.\(^9\) Finally, the majority reasoned that state law policies favouring class arbitrations went against the spirit of the FAA, because class arbitration greatly increased the risks to defendants because of the lack of meaningful review mechanisms.\(^10\) In so holding, the majority stated what was likely the policy underlying both the *Stolt-Nielsen* and *AT&T Mobility* decisions:

> Arbitration is poorly suited to the higher stakes of class litigation. We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.\(^11\)

It goes without saying that the Federal Arbitration Act has played a large part in encouraging the use of arbitration, which has had the positive effect of streamlining dispute resolution. Although the *Stolt-Nielsen* and *AT&T Mobility* decisions are couched in terms resounding in the favourable policies of the FAA, some of the effects of these decisions may be less salutary to parties with less bargaining power, particularly consumers. What’s more, the Supreme Court in each of these cases seems to be creating a jurisprudential culture which favours federal review over the discretion of arbitral panels or state legislatures. These actions by the Supreme Court have arguably reshaped the availability of class arbitration, and by extension, the relationship between consumers and businesses. As the state and lower federal courts grapple with the implications of these decisions, the full effects on consumers’ ability to challenge businesses through the class action vehicle will be seen. In the shorter term, there is no doubt now that for (an apparently disfavoured) class arbitration to occur; the parties have to expressly agree to it. Silence alone will never amount to consent.

\(^1\) 130 S.Ct. 1758 (2010).
\(^2\) 131 S.Ct. 1740 (2010).
\(^3\) 130 S.Ct. at 1775.
\(^4\) Id. at 1775-76.
\(^5\) Id. at 1776.
\(^6\) Id.
\(^7\) 131 S.Ct. at 1753.
\(^8\) Id. at 1751.
\(^9\) Id. at 1752.
\(^10\) Id.
\(^11\) Id.
**YIAG’s FORTHCOMING EVENTS**

9 September 2011  
**LUTON HOO**

**Young International Arbitration Group Symposium**  
A half-day symposium preceding the European Users’ Council Symposium

30 November 2011  
**MEXICO CITY**

**Young International Arbitration Group training seminar**  
A one-day training seminar.

8 March 2012  
**STOCKHOLM**

**Young International Arbitration Group Symposium**  
A half-day symposium preceding the European Users’ Council Symposium.

11 May 2012  
**TYLNEY HALL**

**Young International Arbitration Group Symposium**  
A half-day symposium preceding the European Users’ Council Symposium.

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**Other Arbitration Events**

**ICDR Young & International - 13 September 2011**  
Two Roundtables in the Center of Moscow -- Current Themes in International Arbitration  
Moscow, Russia  
[http://www.adr.org/sp.asp?id=33639](http://www.adr.org/sp.asp?id=33639)

**ICDR Young & International - 14 September 2011**  
Effectiveness and Implications of Mediation and Settlement Negotiations after the Commencement of Arbitral Proceedings  
Miami, USA  
[http://www.adr.org/sp.asp?id=33639](http://www.adr.org/sp.asp?id=33639)

**Young ICCA - 15 September 2011**  
The Future of Arbitration: The Boundary between Contract and Treaty Claims  
Buenos Aires, Argetina  
[http://www.arbitration-icca.org/YoungICCA/Home.html](http://www.arbitration-icca.org/YoungICCA/Home.html)

**International Association of Young Lawyers (AIJA) - 23 September 2011**  
3rd Annual Arbitration Conference  
Warsaw, Poland  

**Young ICCA, with the Co-Chair’s Circle - 24 October 2011**  
The handling of documentary/written evidence  
Prague, Czech Republic  
[http://www.arbitration-icca.org/YoungICCA/Home.html](http://www.arbitration-icca.org/YoungICCA/Home.html)
ICC YAF European Chapter - 24 October 2011
International Arbitration in Czech Republic, Poland and Russian Federation
Prague, Czech Republic
http://www.iccwbo.org/yaf/index.html?id=44554

ASA Below 40 - 21 October 2011
ASA B40’s annual full-day seminar
Zurich, Switzerland
http://www.arbitration-ch.org/events/

YAAP - 17-18 February 2012
Vienna Arbitration Days
Vienna, Austria
http://www.viennaarbitrationdays.at/

Institute for Transnational Arbitration - 20 June 2012
7th Annual Dallas Roundtable
Dallas, USA
http://www.cailaw.org/ita/