Dear Members,

We hope you will enjoy this Winter edition of our YIAG e-newsletter, which captures our events and activities since July 2011. As always, we wish first to welcome the 553 new YIAG members who have joined our membership since our last e-newsletter.

YIAG activities in the next few months include our symposium in Stockholm co-hosted by the IBA Arbitration Committee Young Lawyers and The SCC association Young Arbitrators Stockholm (YAS) and two symposia at Tylney Hall (May & September); we look forward to seeing you there!

**Stockholm** – 8 March 2012  
**Tylney Hall** – 11 May 2012  
**Tylney Hall** – 14 September 2012

In the meantime, we wish you all a very pleasant year ahead.

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

YIAG Symposium
Luton Hoo, UK - 9 September 2011

The annual September symposium was held at Luton Hoo, a new venue for YIAG. Undistracted by the view of Luton Hoo’s beautiful English gardens, 70 attendees ensured that the discussions were as lively as ever.

Young practitioners were particularly interested in the decisions in Dallah, Jivraj and the Democratic Republic of Congo v FG Hemisphere, as well as in challenges to arbitrators (especially in the case of repeat appointments by the same law firm), class actions and best practice in conducting arbitral proceedings and drafting awards.

The symposium was followed by the now-traditional drinks reception where the under and above-40 come together.
YIAG training seminar  
Four Seasons Hotel, Mexico City - 30 November 2011

YIAG co-chairs Andy Moody, Kate Davies and Marie Stoyanov welcomed the support of two YIAG regional representatives, Baiju Vasani and Alfredo De Jesus, for a one-day training seminar at the Four Seasons Hotel in Mexico City on 30 November 2011. The 43 attendants were introduced to the framework of international arbitration, taken through all the steps of an arbitral proceeding, including post-award enforcement and challenges, received an insight into investment-treaty arbitration and a special presentation on local issues. After a lively discussion, the speakers were joined by Lluis Paradell for a mock arbitration hearing, before heading off for dinner at Fonda el Refugio. The seminar was kindly sponsored by González de Cossio Abogados, Ogarrío Daguerre, S.C., Wöss & Partners, S.C. and Abascal & Asociados.
YIAG Social Evening
The Garrick Club, London - 21 December 2011

The venue for our annual YIAG Winter Social evening in December was the private members’ club, The Garrick, situated in the heart of London’s West End. Around 70 YIAG members, coming from as far afield as Saudi Arabia and Japan, attended a thoroughly enjoyable evening which was a great way to mark the end of another successful year for our members.

YIAG and COMBAR: a joint perspective on current issues
Roundtable and discussion - 24 January 2012

On 24 January 2012, 75 YIAG and Junior COMBAR members met in London for an inaugural half-day colloquium to discuss current issues in international arbitration.

The opening session, moderated by George Spalton (4 New Square and Chairman of Young COMBAR), began with Siddharth Dhar (Essex Court Chambers) presenting a paper on the recent English decision in MTSF v Nomihold on whether an applicant for enforcement in England needs to show a "legitimate interest" in having an award converted into an English judgment in order to make use of the provisions of sections 66 and 103 of the English Arbitration Act 1996. Amir Ghaffari (YIAG co-Chair) then discussed a series of challenges brought in 2011 against arbitrators, including in Universal Compression v Venezuela, Opic Karimum v Venezuela and The Republic of Mauritius v United Kingdom before opening both topics to questions and comments from the floor.

The day’s second session followed the usual YIAG Tylney Hall style, with Andy Moody (YIAG co-Chair), Christopher Harris (3 Verulam Buildings), Iain Quirk (Essex Court Chambers) and Amir Ghaffari moderating a number of topics introduced by delegates. Topics discussed included the new ICC Rules on joinder and consolidation, the recent launch of PRIME Finance, ethical advocacy in international arbitration and - a recent favourite - "hot-tubbing".

After light refreshments, YIAG and COMBAR members were then treated to an open debate between two giants of the international arbitration arena, Audley Sheppard (Head of International Arbitration at Clifford Chance) and Joe Smouha QC (Essex Court Chambers), moderated smoothly by Paul Kearney (Chief Counsel, European Bank of Reconstruction and Development).

The evening was brought to a fitting end with drinks and dinner at The Bleeding Heart restaurant. Our thanks go to Audley, Joe and Paul in particular, to 4 New Square and COMBAR for sponsoring the dinner and to Berwin Leighton Paisner LLP for hosting the event at their offices.
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.]

BOLIVIA

Brian Haderspock – Moreno Baldivieso Estudio de Abogados, Santa Cruz de la Sierra

Judicial Assistance: misinterpreting article 97

It’s been more than a decade since Bolivia enacted its Arbitration and Conciliation Act Nº 1770. It is convenient to say that (unlike other South American systems which look to their Codes of Civil Procedure for guidance on arbitral law and practice) our arbitral legislation was inspired by the principles of the UNCITRAL Model Law on arbitration; therefore our arbitral procedure is fairly modern compared to other

That being said, regarding judicial assistance one would presume it to be limited, but reality strikes the opposite; unfortunately arbitration in Bolivia suffers an extreme and abusive interference by judicial authorities. Article 97 (Arbitration and Conciliation Act Nº 1770) is a main cause of this judicial interference; Judges justify their intrusion based on the stipulations of the said article which reads as follows:

“The arbitral tribunal may additionally apply the rules of Civil Procedure and Civil Code when the parties, the institutional regulations made or the arbitral tribunal itself has not provided a specific treatment of the subject”.

After reading the referred article one may note that it is directed to the arbitrators, however, it is used by State Judges to expand their intervention in accordance with the rules of the Civil Procedure Code, rather than remaining subject to the provisions of the legal framework on arbitration.

For instance, the constitution of the arbitral tribunal may receive judicial recourse when the parties are having difficulty establishing the sole arbitrator or arbitral tribunal (Art. 17. III – 1770), thus parties may seek judicial assistance on the matter. This means the judicial authority must acknowledge and fulfill the requirements in accordance with articles 9-II; 22-II; 23-III; 36-I and 68 of the Arbitration and Conciliation Act-1770. Article 23-III in particular determines that the decision made by the judicial authority over the matter cannot be opposed by any of the parties, in other words, legal challenge offered by the Civil Procedure Code is inapplicable towards judicial decisions over issues bounded to the arbitral procedure.

Nonetheless, the rule cited above is commonly disobeyed by the parties as well as by judges involved in the arbitration process. For example, in most cases judicial decisions throughout the arbitral procedure are frequently subject to civil procedural remedy by the parties, such as appeals and cassation, which, as said before, are not applicable in arbitral procedures.

Constitutional judgment repeatedly affirms that “it should be remembered that according to article 97 of the law of arbitration (1770) the rules of the Civil Procedure Code are subsidiary.” This clearly denotes a grave misconception of the provisions of the referred article; hence judges use the above precedent as a guideline

Bolivian jurisprudence clearly demonstrates how judicial interference is overwhelmingly crushing the arbitral process, thus the misinterpretation of article 97 of the arbitration and conciliation Act Nº 1770 is one of the motives used by judges, generating a constant violation of the law of arbitration (1770) and its fundamental principles.

As a final recommendation I firmly believe the necessity of revising and amending the arbitral legislation, more specifically the removal of article 97, due to various reasons such as the misinterpretation of the said article which is causing an abusive judicial interference, not to mention an overall erroneous attitude towards arbitration in Bolivia.

**BRAZIL**

*Felipe Vollbrecht Sperandio, Intern - Wilmer Cutler Pickering Hale and Dorr LLP, London*

**The Definition of Domestic and Foreign Arbitral Awards in Brazil.**

The Brazilian Arbitration Law was completed 14 years ago, its constitutionality and validity has already been tested and confirmed by the STF\(^1\) and Brazil is a signatory of the New York Convention.\(^2\) The grounds enabling the functionality of the dispute resolution mechanism as an alternative to national courts have been set for a while, which, combined with an economic boost and heavy investments in infrastructure, energy and corporate transactions, has resulted in the widespread use of international commercial arbitration.\(^3\)

As important as both of the abovementioned factors, the increasing reliance on international commercial arbitration in Brazil is a direct outcome of a consistent supportive and pro-arbitration interpretation assured by the STJ\(^4\) towards arbitration related cases. In 2011, the most relevant issue brought before that court related to the definition of domestic and foreign awards.

The Brazilian Arbitration Law does not distinguish national and international arbitration. The only difference deals with the nature of the award, which can be domestic or foreign. The criterion adopted by the law to draw the distinction is territorial, *i.e.*, an award is foreign if rendered outside the Brazilian territory.\(^5\) For enforcement purposes, the national award has the same status of a judgment rendered by a national court; therefore, it can be immediately enforced in a first instance court.\(^6\) As a contrast, a foreign award, in order to reach the same status, demands a previous homologation procedure before the STF, in which the court verifies the validity of the award.\(^7\)

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1. Supremo Tribunal Federal - AgRg in SEC n. 5206-7.
2. Signed only in 2002.
3. Brazil figures as the 5\(^{th}\) country with the highest number of parties involved in ICC arbitrations, according to the 2010 Statistical Report, published in the ICC International Court of Arbitration Bulletin Vol. 22 No. 1 – 2011.
4. Highest Court competent to determine matters originated from the interpretation and applicability of the Brazilian Arbitration Law and recognition and enforcement of foreign arbitral awards.
5. Art. 34, sole paragraph, Brazilian Arbitration Law (Lei n. 9307/96).
7. Art 475 – N, VI – Civil Procedure Code (Lei n. 5869/73), combined with art. 35, Brazilian Arbitration Law (Lei n. 9.307/96) (constitutional amendment n. 45, 8 Dec. 2004, transferred the competence to the Superior Tribunal de Justiça).
and, only after completing this procedure, may the proceedings for recognition and enforcement of the foreign award be initiated.

Despite the straightforward language adopted by the law, the application of the domestic/foreign award legal provision raised conflicting decisions between a first instance court and the CA Rio de Janeiro,\(^8\) which required a final interpretation by the STJ in the case Nuovo Pignone SPA v Petromec Inc & Petróleos e Eng Ltda (Resp n. 1.231.554/RJ [2011]). The arbitral proceedings between the parties were held under the ICC rules, with the tribunal sitting in Brazil, applying Brazilian law in Portuguese. Nuovo Pignone obtained a favourable award and commenced procedures to enforce it, facing resistance from the ex adverse party, based on the following rationale: (i) the arbitral proceedings were regulated by the rules and administered by an international institution – ICC, located in Paris; hence, (ii) it resulted in a foreign award; and, as a consequence, (iii) the award could not be enforced in a first instance court, instead, requiring the appropriate procedure applicable to foreign awards.

The first instance court ruled that the award was domestic and determined enforcement. The resisting party filed an interlocutory appeal, forwarding the issue to the competent court of appeal, which reversed the decision. The court of appeal found that the international element involved constituted a foreign award and, consequently, it required the specific applicable procedures before recognition and enforcement. There was a second appeal, this time by the party seeking enforcement (Nuovo Pignone), and the question called for the competence of STJ, as the highest and final court to decide the issue. The case caught the attention of many practitioners and scholars, due to the fact the STJ’s position would influence several enforcement proceedings (in progress and finalized) of domestic awards rendered under the rules of international institutions. Aware of the relevance at stake, the ICC’s Brazilian Committee filed an \textit{amicus curiae} brief supporting the proposition that the nature of an award should be defined based solely on the territorial criteria. In a unanimous judgment (Resp n. 1.231.554/RJ), the STJ confirmed the text of the Brazilian Arbitration law and determined that an award will be domestic whenever a tribunal seated in the country.\(^\text{9}\) It was the first time the status of domestic and foreign award was tested by the Brazilian courts, and this jurisprudence has now set the standard on the issue, bringing even more predictability and confidence towards arbitration in Brazil.

Although the homologation procedure\(^10\) may be regarded as only one additional procedural step, in order to make a foreign award official, in practice it can be heavily burdensome. The respective application to the STJ allows the party against whom the award was rendered to resist the homologation and, in the end, this procedure results in the court scrutinizing the validity of award’s formal requirements.\(^11\) Along with accompanying additional legal costs, the relevant impact is the prolongation of commencing recognition and enforcement proceedings, considering the homologation procedure has taken an average of nearly 20 months to be completed, according to the Brazilian Arbitration Committee.\(^12\) Considering the above, it can be affirmed that selecting Brazil as the seat can be advantageous in cases in which the award might be enforced in the country. Therefore, this point should be considered while drafting an arbitration agreement.

\(^8\) Court of Appeal of State of Rio de Janeiro.
\(^9\) Quoting the decision’s reasoning: “The determination whether an award is foreign or not, for the purpose of recognition, is a discretion of the national legislations, as stated in art. 1 of the New York Convention, signed by Brazil”. “The national legal order selected the geographic criteria (\textit{ius solis}), to determine the nationality of the arbitral awards, based exclusively in the location in which the decision is rendered”. “In this case, the fact that the request for arbitral proceedings was filed in the International Court of Arbitration of the International Chamber of Commerce – ICC does not alter the nationality of this award, which remains Brazilian”.
\(^10\) Art. 35, Brazilian Arbitration Act (Lei n. 9307/96).
\(^11\) Conditions which allow refusal of homologating are set in art. 38 and 39 of the Brazilian Arbitration Law (Lei n. 9.307/96) and mirror the conditions set in art. V of the New York Convention.
\(^12\) \url{http://www.cbar.org.br/PDF/Homologacao_de_Sentenca_Arbitral_Estrangeira.pdf}
Brazilian Superior Court of Justice confirms the application of the geographic criterion as the exclusive standard on the definition of the nationality of an arbitral award

The third Panel of the Brazilian Superior Court of Justice (STJ - 3ª Turma), on a decision published in the beginning of June (REsp 1.231.554/RJ – judged on 24/05/2011, DJ 01/06/2011) resolved, by unanimity, to employ the geographic criterion – that is to say the place where the arbitral award was rendered – as the unique standard on the definition of the nationality of an arbitral award.

That ruling modified a previous understanding of the State Court of Rio de Janeiro (TJ-RJ), which considered that an arbitral award established under the auspices of the International Chamber of Commerce, and with seat in Paris, should be considered a foreign decision, in spite of the fact that the award was formally delivered in Rio de Janeiro.

The Brazilian Code of Civil Procedure (hereinafter “CPC”), on its article 475-N, includes arbitral awards (art. 475-N, IV and art. 31 of the law 9307/96) among the instruments which are directly enforceable before the Brazilian Courts, regardless of any Court approval, with the same legal effects on the parties as a judgment rendered by a Brazilian magistrate. Nevertheless, those rules are not extended to all kinds of arbitral awards, but only to those who are legally characterized as national ones.

International arbitral awards, on the other hand, were equiparated by the jurisprudence of the Brazilian Supreme Court (STF) to foreign judicial sentences, which must be previously homologated by the Superior Court of Justice (STJ) in order to be recognized and enforceable before the Brazilian judicial system (art. 475-N, VI, CPC, in accordance with the Constitutional Amendment 45/2004).

Therefore, the significance of the referred judgment stems from the fact that it defines the criteria to be employed to analyze whether an arbitral award is national or not, consequently establishing which awards could be enforced in Brazil independently of previous judicial approval.

The New York Convention, in article one, does not impose any kind of element in order to characterize an arbitral award as a national one. In this sense, national legislations are free to choose their own criteria. As a result, it is essential to know which are the criteria espoused by the Brazilian legal system to define the nationality of an arbitration sentence.

In accordance with Law 9307/96 – the Brazilian Arbitration Act – in article 34, every arbitral award delivered outside the Brazilian territory must be qualified as a foreign one. Hence, employing a contrario sensu interpretation, it is inferred that national arbitral awards are those which are formally rendered in Brazil. This topic is so relevant that the Brazilian legislation prescribes that the place of the making of the award must be explicitly included on the submission agreement (“compromisso” - article 10, IV, law 9307/96) so as on the arbitral award (article 26, IV, law 9307/96).

This is the main importance of the referred judicial pronouncement: it undeniably establishes that Brazil adopts exclusively the geographic criterion in order to conclude whether an arbitral award should be considered national or not, independently of the nationality of the arbitrators, the origin of the tribunal, the seat of the arbitration, the procedural or material laws applied on an specific case, or any other standard. Moreover, the judges expressly stated that the fact that the award was decided in accordance with the ICC rules does not affect the nationality of the decision.

In sum, this recent judgment of the Brazilian Superior Court of Justice expressly settled that the Brazilian legal system adopts the ius soli (understood as the place of the making of an arbitral award) as the exclusive criterion...
to define the nationality of an arbitral decision. In conclusion, all arbitral awards delivered inside the Brazilian borders must be considered national ones and, consequently, may be enforced without any kind of judicial homologation, independently of the analysis of any other possible standard.

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Public Administration Entities (government owned or government related entities) to Arbitration in Brazil - The Minas Gerais State Arbitration Law (State Law 19477/2011, MG)³

The submission of Direct or Indirect Public Administration entities (government-owned or government-related entities)⁴ to arbitration has been discussed for decades by Brazilian courts and legal scholars. The issue has come into sharper focus during the last ten years as a result of the evolution of arbitration in the Brazilian scenario and of the ever-increasing development of Brazil as a true seat for domestic and international arbitrations.

Although viewed with a certain mistrust not so long ago, the current majority stand is that the Public Administration and its entities may, in fact, elect arbitration as a dispute resolution method for conflicts of an economic nature, i.e. those dealing with disposable property rights and obligations.⁵

In line with predominant legal writings, recent decisions rendered by the Brazilian Courts have expressly admitted the participation of public entities in arbitral proceedings.⁶ The Superior Court of Justice⁷ has established in recent years important precedents that extend to public entities as a whole (even in cases related only to entities of the Indirect Public Administration), allowing them to choose and participate in arbitration proceedings.⁸

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⁴ In Brazil, the Public Administration is divided among Direct and Indirect entities: the former consisting of the Federal Government, states, the Federal District and municipalities; and the latter represented by all special funds, independent government entities, public foundations, State-owned companies, mixed-capital companies and other entities directly or indirectly controlled by the Direct Public Administration.
⁶ Albeit older and with its own specific features, the Federal Supreme Court, in a landmark decision on the matter, had already found for the admissibility of submission of the Federal Government to arbitration to resolve a pending issue with the Laje Organization (an organization composed of private companies related to the area of navigation, shipyards and ports) (Federal Supreme Court. Extraordinary Appeal RE 71467, Reporting Justice BILAC PINO, Full Bench, judged on November 14, 1973, published in the Court Gazette on February 15, 1974).
⁷ In the Brazilian Judiciary System, the Superior Court of Justice is responsible for deciding the last appeals on court cases and for recognizing foreign arbitral awards for future enforcement in Brazil.
⁸ In this sense, see (Special Appeal REsp 606.345/RS, Reporting Justice JOÃO OTÁVIO DE NORTONHA, Second Panel, judged on May 17, 2007, published in the Court Gazette on June 8, 2007, p. 240); (Internal Interlocutory Appeal (AgRg) in Motion for Writ of Mandamus 11.308/DF, Reporting Justice LUIZ FUX, First Section, judged on June 28, 2006, published in the Court Gazette on August 14, 2006, p. 251); and (Motion for Writ of Mandamus 11.308/DF, Reporting Justice LUIZ FUX, First Section, judged on April 9, 2008, published in the Court Gazette on May 19, 2008).
A precedent of the Superior Court of Justice has decided that: “when the agreements entered into by the
government-owned company deal with an economic activity in a strict sense – that is, public services of an
industrial nature or economic activity involving production or sale of goods, which may yield income and profits
- the rights and obligations arising from them may be transacted and disposed of and, therefore, are subject to
arbitration. (...) On the other hand, when the activities developed by the government-owned company derive
from acts of State of the Public Administration and, consequently, their performance is directly related to the
primary public interest, such activities will involve nondisposable rights, which are not subject to arbitration.”
(emphasis added)

Such trend, it must be accentuated, is also corroborated by the Brazilian Legislative Branch, since, in the last ten
years, several laws have been enacted, revised and/or amended in order to promote the adoption of arbitration
by Public Administration Entities, with special emphasis to the Federal Law nº 11.079/2004, which regulates
Public-Private Partnerships for investments mainly in infrastructure sectors, such as electricity, energy,
sanitation and transportation and expressly provides for the insertion of extrajudicial dispute resolution clauses
– in especial arbitration – in the contracts to be entered into between private and public entities. Other good
elements are (i) the Federal Law nº 8.987/95, which regulates the Public Services Concessions and Permits; (ii)
the Federal Law nº 9.472/97, known as the General Telecommunication Act, which regulates the organization of
the telecommunication public services; (iii) the Federal Law 9.478/1997, which regulates the National Energy
Policy and the activities related to the petroleum monopoly; (iv) the Federal Law nº 10.233/2001, which
regulates the restructuring of the Maritime and Terrestrial Transportation Services; and (v) the Federal Law

On January, 2011, adhering to this stand, the Minas Gerais State enacted Law 19477/2011, which ended up
being known as the Minas Gerais State Arbitration Law. This law provides for the adoption of arbitration for
resolution of disputes in which the entities of the Minas Gerais State Public Administration figure as a party.
Aimed at regulating in greater detail the participation of the Minas Gerais State and its entities in arbitration
proceedings, the Minas Gerais State Arbitration Law lays down the procedures to be observed by the public
administrator of Minas Gerais State when including an arbitration clause in administrative contracts and when
participating in arbitration proceedings.

The Minas Gerais State Arbitration Law permits in general the adoption of arbitration by public entities,
provided that the so-called “objective arbitrability” (the possibility of the disputed right being resolved by
arbitration) is present and that the principles that guide the Brazilian Public Administration (set forth in article
37 of the Federal Constitution) are observed.
However, enactment of this important law has drawn considerable attention from the Brazilian arbitration
community in recent months, as some of its provisions have been subject to heated debates among
professionals and scholars in the area.

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9 Special Appeal REsp 612.439/RS, Reporting Justice JOÃO OTÁVIO DE NORONHA, Second Panel, judged on October 25, 2005, published in the Court
Gazette of September 14, 2006, p. 299.
10 According to 1988 Brazilian Federal Constitution, Brazil is a federative republic, which adopts a system of separation of powers similar to the one
found in the United States of America; more precisely, Brasil is a Federation composed of states, Municipalities and the Federal District. Despite the
Federal Government is conferred the great majority powers, especially regarding its jurisdiction to legislate, the states, Municipalities and the Federal
District were also assigned powers in this regard --- although less relevant and with several limits imposed to its activities.
“Article 1: The arbitration, created by Federal Law No. 9307 of September 23, 1996, for resolution of disputes to which the State is a party, shall be
carried out in accordance with the procedures established in this Law.”
12 Regulated in Brazil by article 1 of Federal Law 9307/96, in fine: “Article 1. The persons with capacity to contract may avail themselves of arbitration to
settle disputes involving disposable property rights.”
13 Minas Gerais State Arbitration Law: “Article 3: Inclusion of an arbitration clause in a contract executed by the State and the stipulation of an arbitral
commitment shall observe the provisions of Federal Law 9307/1996, of the rules that regulate administrative contracts and of this Law, with due
regard for the public administration guiding principles, as established in the Federal Constitution and in the State Constitution.”
Debates have ranged from broader and more general matters to more specific issues, all addressed throughout the text of the law. A good example of the first case would be the supposed formal unconstitutionality of article 5 of the law, which imposes more requirements to act as an arbitrator than those established in the Federal Arbitration Law (Law 9307/96). This provision has raised controversy as to whether such law violates the Federal Government’s authority to legislate over process-related matters (article 22, I, of the Federal Constitution) or, from another perspective, whether it oversteps the supplementary state authority to legislate over procedure-related matters (article 24, XI and paragraphs 1 and 2 of the Federal Constitution).

The following requirements of the Minas Gerais State Arbitration Law have also been considered sensitive issues (from both lawfulness and convenience perspectives): (i) the arbitration clause must always be “full” (cláusula compromissória cheia) (article 8) (ii) the appointed arbitrators must always be Brazilians (article 5, I), and (iii) the international treaties ratified by Brazil must mandatorily apply to the arbitration (article 7).

There have been discussions also about the consequences of failing to observe the provisions of the Minas Gerais State Arbitration Law, i.e. whether a disrespect to such law would invalidate arbitral awards or simply hold the Minas Gerais State public administrator liable (considering that, in view of its purpose, it seems to be more to guide public administrators than to restrict the rights of potential litigants).

More importantly, the Minas Gerais State Arbitration Law has been deeply scrutinized because it brings to the fore a very current and important issue in Brazil involving submission of government-owned or government-related entities to arbitration, i.e. the need (or not) of specific authorization for the Public Administration to submit to arbitration, in compliance with the strict lawfulness principle (princípio da legalidade estrita set forth in the main section of article 37 of the Federal Constitution). Enactment of a law that expressly “authorizes”

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14 Minas Gerais State Arbitration Law: “Article 5. The following are requirements for exercise of the function of arbitrator:
I – to be Brazilian, of age and capable;
II –to have technical knowledge compatible with the nature of the contract;
III – to have no relations with the parties or with the dispute submitted thereto that characterize events of disqualification or recusation of judges, as stipulated in the Civil Procedure Code;
IV – to be a member of an arbitration chamber enrolled in the General Service Suppliers List of the State.”

15 In Brazil, the Federal Government has the jurisdiction to legislate on civil, criminal, labor and procedural law, among others. Other matters, such as tax, financial, urban and economic law are also under the competence of the Federal Government, however on a concurrent basis, where the Federal Government is in charge of the main rules and the states may legislate in order to complement it. The states also draw up their own constitutions, which cannot conflict with the provisions of the Federal Constitution and is based and modeled on the terms of the latter – the structure of the laws is the same as the federal sphere, but in residual matters, which are those neither under the competence of the Federal Union nor the municipalities.

16 This question was included in the fictitious case that served as a basis for the II Brazilian Arbitration Moot Competition – Petrónio Muniz, initiated in May 2011 and organized by the Brazilian Corporate Arbitration Chamber (CAMARB). The case dealt with the application and the effects of the Minas Gerais State Arbitration Law, guiding the Competition participants to the debate over the constitutionality of article 5, IV of the Minas Gerais State Arbitration Law.

17 The Federal Arbitration Law, in its article 19, provides that the arbitration clause, to be promptly enforceable against the signatory parties to a contract, must establish the method for nomination of the arbitrator(s). Therefore, in case such condition is met, the arbitration clause is considered “full” (cláusula compromissória cheia) and, without any further agreement or judicial support, a claimant may commence arbitration proceedings. When the parties do not agree on such issue in the arbitration clause (the so-called empty arbitration clause - cláusula compromissória vazia), in case of failure of the parties to reach an agreement as to how to nominate the arbitrator(s), the claimant’s only option is to file an action for compulsory or specific performance of the arbitration clause set forth in Article 7 of the Federal Arbitration Law. For obvious reasons, this situation impairs immensely the efficiency of the arbitration, since a judicial action is needed (with all the possibilities of appeals provided for the Code of Civil Procedure) just to compel de reluctant party to be submitted to arbitration.

submission of the Minas Gerais State to arbitration raises the question of whether this provision is practically a
statement that all situations require specific authorization and whether all other states should do the same.19

In any case, despite the importance of these debates, it is worth noting that while there are some points of
concern to law scholar and practitioners (as happens in fact with a large part of the more innovative rules), one
cannot deny the advances that enactment of the Minas Gerais State Arbitration Law has brought about not only
to the arbitration mechanism but also to the development of business and contractual relations between the
Public Administration and private investors.

From this standpoint, the provisions of the Minas Gerais State Arbitration Law are fully in consonance with the
autonomy granted by Law 9307/96 to the parties when determining the content of the arbitration clause, since,
one might say, could be interpreted only as conditions imposed by the Minas Gerais State Public Administration
for election of arbitration, i.e. the practices that the lawmaker believes should be adopted for the arbitration
proceeding to meet the primary and secondary public interests20 in said state.

It would have been better and more appropriate, in our view, if the Minas Gerais State had expressed this
evident support to submission of its entities to arbitration through lower ranking rules (internal bylaws ---
without the effects of a law),21 thus avoiding great part of the criticism pointed out above while still achieving its
purpose of representing a rule that is “modern and focused on public interest.”22

In brief, despite the criticism (which is certainly welcome, since it allows and collaborate to Brazilian legislation
to achieve its expected quality and technical accuracy), the Minas Gerais State Arbitration Law is largely
beneficial, as it offers greater security to the private partner and contributes toward dissemination of a true
arbitration culture in the public sector. In this sense, it is undeniable that the Minas Gerais State Arbitration Law
strongly contributes to put an end to the doubts over the erstwhile alleged impossibility of the Brazilian Public
Administration resorting to arbitration (a stand that was and is somewhat inconsistent with Brazil’s current
status of arbitration-friendly jurisdiction).

19 In this sense, it was questioned, for instance, whether it would be possible for the Minas Gerais State to choose arbitration should the Minas Gerais
State Arbitration Law be repealed and, even, if the other Brazilian states that do not have a similar law could be subject to arbitration.

20 As taught by Professor Cândido Rangel Dinamarco: primary public interests are the ones “which relate to the society as such and its values” and the
secondary public interests “which fall within the sphere of the State, pro domo sua, that is, as a legal entity”. (DINAMARCO, Cândido Rangel.

21 Stand taken by certain professionals and legal scholars during the abovementioned debates, as well addressed by Gilberto Giusti in a presentation
made at the “State Professional Enhancement Course for Judges –Controversial Themes in Arbitration”, organized by the Arbitration Chamber of the
Paraná State Industry Federation - CAIEP jointly with the Paraná State Judicial School – EMAP, in Curitiba, on August 4 and 5, 2011.

22 As pointed out by the Minas Gerais State representative, Dr. Neider Moreira, in a Panel held during the V Week of Extension of the Novos Horizontes
Faculty (Belo Horizonte, June 2, 2011).
English Court of Appeal considers scope of freezing order granted in air of engorgement of arbitral award.

Should a freezing order granted in aid of enforcement of an arbitration award contain an exception to permit the defendant to make payments in the ordinary course of its business? The answer is yes, according to the English Court of Appeal in *Mobile Telesystems Finance SA v Nomihold Securities Inc [2011] EWCA Civ 1040.*

**Background**

It is well established that the English courts have the power to grant a freezing order in support of the enforcement arbitral awards. This power is derived from the court’s general power to grant injunctions in aid of the enforcement of judgments, as opposed to its power to grant injunctions in support of arbitral proceedings pursuant to the English Arbitration Act 1996 (the “Act”).

The Act states that an arbitral award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. On application of the enforcing party, judgment may be entered in terms of the award. Although permission to enforce is ordinarily granted without notice, the defendant may make an application to set aside the order giving permission by virtue of the English court’s Civil Procedure Rules. Whilst such application is being dealt with, the award may not be enforced nor may the order be enforced until the period within which such application may be made has expired.

In *Mobile Telesystems*, permission was given to enforce an arbitral award following an arbitration in London. In conjunction with the order giving permission to enforce, a worldwide freezing order was granted containing an exception stating that the freezing order did not prohibit Mobile Telesystems from dealing with or disposing of any of its assets in the ordinary and proper course of business. However, this exception was later removed at the request of Nomihold. Later, in July 2011, Mobile Telesystems discovered that it was required to pay interest due to holders of loan notes issued in 2005 and applied to reinstate the ordinary course of business exception to allow such payment.

**First Instance Decision**

Mobile Telesystems lost at first instance. The court held that:

i) where a defendant is a judgment debtor, an exception in a freezing order to permit payments in the ordinary course of business is not generally appropriate; and

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ii) although not strictly a judgment debtor, Nomihold had in its favour an unchallenged arbitration award and the resistance to enforcement had already been characterised as having “somewhat limited prospects of success”.

Mobile Telesystems appealed, arguing that a freezing order without the ordinary course of business exception was only appropriate where the benefitting party was a judgment creditor, not where it was the mere beneficiary of an arbitration award.

Appeal
Mobile Telesystems’ appeal was successful; the ordinary course of business exception was reinstated. Lord Justice Tomlinson conceded that as Nomihold was the beneficiary of an unchallenged London arbitration award it was tempting to consider that the balance of convenience lay in favour of preserving assets in the hands of Mobile Telesystems against which execution could in due course be levied. However, he stated that this would be “…a wrong and unprincipled approach”. Drawing on the judgment of Aldous LJ in Camdex International Ltd v Bank of Zambia (2) [1997] 1 All ER 728, he noted that: “The purpose of Mareva relief is, and always has been, to prevent a defendant from removing from the jurisdiction his assets or dissipating them. It is not, and never has been, an aid to obtaining preference for repayment from an insolvent party.”

In Masri v Consolidated Contractors [2008] EWHC 2492 (Comm), Lord Justice Tomlinson was himself persuaded to omit an ordinary course of business exception from a freezing order in respect of sums in various of the judgment debtor’s bank accounts. In that case he stated that “…in relation to assets such as bank accounts an “ordinary course of business” exception is inappropriate in the post-judgment environment.” On reflection, Lord Justice Tomlinson considered this to be too sweeping a statement. Lord Justice Tomlinson concluded that the fact that Nomihold had in its favour an unchallenged arbitration award did not mean that it should be treated as a judgment debtor. Notwithstanding the fact that there was a judgment of the court, it was not enforceable at that time and therefore the freezing order could not be described as a remedy designed to effect execution, since execution was unavailable. He agreed with Mobile Telesystems, that the key difference between a judgment debtor and the beneficiary of an arbitral award is the ability to enforce.

Conclusion
The decision confirms that applications for freezing injunctions should be treated differently when dealing with court judgments and arbitration awards. In respect of arbitration awards, the award will remain unenforceable until any application to set aside leave to enforce the award has been determined. In the absence of exceptional circumstances, parties should therefore include an ordinary business exception in a freezing order.

8 http://www.bailii.org/ew/cases/EWHC/Comm/2008/2492.html
**Simon Maynard - Allen & Overy LLP, London**

**English Court provides relief in support of arbitration agreement even though no proceedings contemplated**

In its decision of May 2011, the English Court of Appeal held that it had jurisdiction to grant a final injunction restraining foreign proceedings brought in breach of an arbitration agreement, even though there was no actual or proposed arbitration. In doing so the court confirmed its ability to grant injunctive relief in support of arbitral proceedings in cases which fall outside of the scope of sec. 44 of the English Arbitration Act 1996.

The judgment means that a party will not be forced to start an arbitration in relation to a dispute which it has no interest in pursuing, merely to prevent proceedings brought in breach of the arbitration agreement. It should, however, be remembered that an anti-suit injunction remains unavailable where foreign proceedings are brought in another EU member state.

**Facts**

Ust-Kamenogorsk Hydropower Plant JSC (UK JSC) started proceedings in the Kazakh court against AES Ust-Kamenogorsk Hydropower Plant LLP (AES UK) based on a request for information on concession assets. These proceedings were brought in breach of an arbitration agreement governed by English law. AES UK unsuccessfully applied to the Kazakh court to dismiss the claim on the basis of the arbitration agreement. AES UK subsequently obtained a without notice interim anti-suit injunction against UK JSC in the English High Court. The Kazakh court disregarded the injunction and continued to hear UK JSC’s claim.

It was later agreed that UK JSC would withdraw its request for information, thus removing the basis of the dispute. However, AES UK remained concerned about the risk of further breaches of the arbitration agreement and wished to maintain the anti-suit injunction. UK JSC challenged the jurisdiction of the English court on the basis, *inter alia*, that it did not have jurisdiction to grant an anti-suit injunction where no arbitration had been commenced nor was intended to be commenced.

The High Court found in favour of AES UK, prompting UK JSC to appeal the decision.

**Decision**

The question before the court was whether, as a matter of principle, it had jurisdiction to grant a declaration or an anti-suit injunction to protect a party’s rights under an arbitration agreement in circumstances where there were no arbitral proceedings on foot and none were intended.

Section 44 of the English Arbitration Act 1996 (AA 1996) had been used previously by the court to grant interim injunctions for the purposes of and in relation to arbitral proceedings. However, sec. 44 did not apply in this case because there were no arbitral proceedings in prospect. The court therefore had to consider whether it could instead use its general power to grant injunctions under sec. 37 of the Senior Courts Act 1981 (SCA 1981).

UK JSC argued that sec. 44 AA 1996 should be interpreted as restricting the broader powers under sec. 37 SCA 1981; the Court of Appeal found though that sec. 44 did not operate so as to remove the court’s jurisdiction under sec. 37. Whilst the court noted that sec. 37 could not be utilised to circumvent the limitations of s44 in

situations where sec. 44 applied, it held that the court could use its powers under sec. 37 to grant an anti-suit injunction where sec. 44 did not apply.

The Court of Appeal did not consider that granting such an injunction would interfere with the arbitrators’ ability to decide their own jurisdiction (kompetenz-kompetenz) because the declaratory relief was granted so as to avoid deciding the validity of the arbitration agreement itself.

Allen & Overy LLP (Richard Smith and Angeline Welsh) acted for AES UK in this case.

FRANCE

Romain Dupeyré, Avocat à la Cour - SCP Bouckaert Ormen Passemard Sportes - Cabinet BOPS, Paris

Arbitrators, watch your Facebook friends!

Over the last year, French courts have heard a dozen cases in relation to the issue of arbitrators’ independence and impartiality and, in particular, the scope of the arbitrator’s duty of disclosure. French courts have applied a stringent standard pursuant to which arbitrators must reveal “all circumstances that are of such nature as to affect his or her judgment and to cause a reasonable doubt in the minds of the parties as to his or her impartiality and independence.”

In Tecso¹, the Paris court of appeal held that the arbitrator’s obligation of disclosure was not limited to his or her relationship with the parties: The arbitrator must also disclose his or her relationship with the parties’ counsel.

In this case, one of the parties contended that it had doubts as to the chairman of the arbitral tribunal’s independence since the latter was a friend on Facebook with the adverse party’s counsel. The court considered the matter in detail. It underlined that the arbitrator and the counsel only became friends on Facebook after the award had been rendered. It also noted that the arbitrator’s Facebook profile had been created as part of the arbitrator’s campaign for professional elections. As a consequence, the court concluded that, in this specific case, the relationship was too remote to justify reasonable doubts as to the arbitrator’s independence and impartiality. The decision nevertheless casts doubts on the implication that a Facebook relationship could have in relation to the independence and impartiality of arbitrators. As drafted, the court’s judgement suggests that the “Facebook friendship” could have justified the existence of reasonable doubts as to the arbitrator’s independence and impartiality if the relationship existed before the award was rendered or if the relationship did not arise out of specific circumstances such as professional elections, which necessarily suppose to widen the scope of one’s friendship. The consequences that social media may have on arbitrators’ and judges’ impartiality has been closely analysed in the United States. A number of ethical opinions have been issued with respect to judges’ use of social media and particularly whether judges can be “friends” with lawyers who may appear before them (L. Tyrone Holt, P. L. Michaelson, E. L. Sussman, “Issues Raised for Arbitrators by Current and Anticipated Future Use of Social Media such as Facebook©, Twitter©, YouTube© and other Internet-based Programs,” Presented at CCA 11th Annual Meeting, 21-23 October 2011 available at http://www.mandw.com/PRESENTATIONS/CCA_Social_Media(10-22-11).pdf). Generally, the opinions permit judges to engage in social networking sites including being friends with lawyers who may appear before them but caution that great care must be taken in this milieu to assure appropriate conduct. In brief, judges must

consider whether a social network contact is actually a close personal relationship that requires recusal or disclosure (E. L. Sussman, “Ethical Opinions on Judges and Social Media”).

For instance, in a recent opinion rendered in California (California Opinion # 66 (11/13/2010), available at http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf), the ethical committee answered the question “[m]ay a judge include lawyers who may appear before the judge in the judge’s online social networking?” by a “[v]ery qualified yes.” It answered “[n]o” to the question: “[m]ay a judge include lawyers who have a case pending before the judge in the judge’s online social networking?” The committee indicated that “depending on the nature of the site, a reasonable person could conclude that an attorney who interacts with a judge on the judge’s social networking site is in a position of special influence and could reasonably question the judge’s ability to be impartial in cases involving that attorney” and that it would be “troubling, to say the least, to discover that the opposing counsel and the judge are ‘friends’ on a social networking site.” As a consequence, “it is the committee’s view that, at the very least, disclosure is required in every case.” The committee goes even further and indicates that “if an attorney appears before the judge, he or she must be ‘unfriended.’”

In Tecso, the court nevertheless annulled the award on another ground. The court ruled that independence and impartiality of the arbitrators were of the essence of arbitration. It, therefore, annulled the award because one of the co-arbitrators (an academic) had not disclosed that he worked some ten years in the past for the law firm which employed one of the parties’ counsel. The decision of the court is a severe one since, in that case, the parties’ counsel (an associate at a large English law firm) did not act as a representative of the law firm but worked on that case on a personal basis in her spare time. Even though the links between the arbitrator and the counsel, through their relationship with the same law firm, were tenuous, the court held that the arbitrator should have been more careful in disclosing all and every relationships with the parties, their counsel and law firms involved in the arbitration.

Thomas Kendra - Hogan Lovells, Paris

Putrabali’s grandchild: the French Cour de cassation finds that an arbitral tribunal is an autonomous international jurisdiction in a decision of 12 October 2011

The saga before the French courts between Total / Elf Aquitaine and their Russian partners Interneft, amongst others, has already appeared in this publication concerning fraud in arbitration.² The French Cour de cassation decision on the summary application has now been rendered, denying Elf Aquitaine and Total’s request for a summary order (“référé”) and it is once again worthy of discussion as regards, this time, the very philosophy underlying the French approach to international arbitration. Ruling on the appeal of the decision rendered by the Paris Court of Appeal on 5 November 2010, the French Cour de Cassation confirmed the decision of the Court of Appeal.

The interim judge had first been seized by the French oil companies when they requested a summary order akin to a stay of proceedings, which would prohibit the arbitrators from proceeding with the arbitration brought by the Russian parties. They claimed that if the proceedings were allowed to continue this would cause them imminent harm and constitute a manifestly illegal nuisance, and they therefore asked for the arbitrators to be fined (the French remedy of "astreinte") if the procedure was continued, pending a decision on the merits by

the French courts. Following a rejection by the Paris Court of First Instance, Elf Aquitaine and Total lodged an appeal, and the Paris Court of Appeal ruled on 5 November 2010 that a French judge "does not have the power to intervene in arbitral proceedings and prevent the arbitral tribunal from acting, where the tribunal [...] has its seat in Stockholm in accordance with the UNCITRAL Rules of Arbitration". On further appeal, the French Cour de Cassation confirmed the decision of the Paris Court of Appeal on 12 October 2011, making sure however to emphasise that "the arbitral tribunal [being] an autonomous international jurisdiction, [...] the French domestic judge does not have power to intervene in the unfolding of international arbitration proceedings".

In the aftermath of the Hilmarton-Putrabali case law, this decision of the Cour de Cassation echoes the approach and philosophy previously adopted by French courts when considering the nature of international arbitration and, more precisely, arbitral awards.

The French Courts have affirmed several times in the past their profoundly non-territorialist view of international arbitration, ruling that awards annulled at the seat of arbitration can nevertheless be enforced in France as they form part of an international legal order. Thus, the Cour de Cassation, confirming previous case-law and, in particular, the Hilmarton decision, declared in Putrabali that "an international arbitral award - which is not anchored to any national legal order, is an international judicial decision [...]". In this context, the ruling of the Cour de Cassation sees the highest French court seizing the opportunity to extend the application of the Putrabali philosophy. It renews the French conception of international arbitration, which now concerns not only the nature of international arbitral awards but also the status of arbitral tribunals themselves: an international arbitral award is an international judicial decision and an international arbitral tribunal is an autonomous international jurisdiction, both of which are free from any national legal order. France's conception of international arbitration is reconfirmed as grounded in an international, rather than territorial, approach. For better or worse, practitioners should be alive to the consequences of this approach, both in court decisions such as this one and also in the reasoning of arbitrators steeped in this internationalist culture.

3 TGI Paris, 6 January 2010, RG No. 09/60539.
4 CA Paris, 5 November 2010, No. 10/01117.
5 C. cass, 12 October 2011, No. 11/11058.

GERMANY

Katja Schmid - Noerr LLP, London

The impact of German Insolvency Proceedings on Arbitration Clauses – Recent Developments in German Case Law

The impact of insolvency proceedings on the validity of an arbitration clause concluded by the parties before the commencement of insolvency proceedings has become increasingly important for parties acting internationally. While it is acknowledged that a German insolvency administrator is in general bound by an arbitration agreement entered into by the insolvent debtor prior to the initiation of insolvency proceedings, the German Federal Court of Justice (the “GFCoJ”) made an important exemption to that rule in its recent decision of 30 June 2011 (III ZB 59/10; cf, http://lexetius.com/2011_3105 for the German version of the decision) to the extent that the insolvency administrator’s statutory rights are concerned.
The insolvency administrator over the estate of a stock corporation (i.e. the applicant in the later action before the GFCoJ) had declared the non-performance of a Cross Patent License Agreement according to which the parties had granted each other non-exclusive and non-transferable licenses to their worldwide patents. The insolvency administrator did so on the basis of section 103 of the German Insolvency Code which grants the insolvency administrator an option with regard to the performance of mutual contracts. Accordingly, if a mutual contract has not been (completely) performed at the date the insolvency proceedings are opened, the insolvency administrator has the option to either conclude the performance under the contract in substitution for the debtor or may refuse its further performance. In the latter case, the other party is entitled to damages for non-performance and holds a respective claim as an insolvency creditor. The decision whether or not to continue the performance of a contract is in the sole discretion of the insolvency administrator.

Subsequently to the insolvency administrator’s declaration of non-performance, the contractual partner commenced arbitral proceedings against the insolvency administrator, seeking a declaration by the court that its license had remained unaffected by the commencement of the insolvency proceeding, the insolvency administrator’s declaration of non-performance respectively.

Concerned with the question, the GFCoJ finally held that an arbitration clause agreed to by a party that subsequently becomes insolvent is not binding to the extent that rights of the insolvency administrator are concerned that do not directly arise out of the underlying contract concluded by the debtor but originate in the German Insolvency Code. Such rights are insolvency-specific, not under the control of the debtor who may thus not dispose of them and thus non-arbitrable. The ruling of the GFCoJ is consistent with existing German case law addressing conflicting issues arising between arbitration and insolvency law. The GFCoJ had already held in the past that the insolvency of one of the contracting parties does not affect the validity of an arbitration agreement unless statutory rights are at stake.

GREECE

Dimitra Karadima - Stylopoulos & Associates, Athens

Arbitration in Greece: Overview of recent decisions of the Greek Supreme Court (the Areios Pagos)

The purpose of this report is to highlight recent developments in Greece concerning arbitration. In this context, reference is made to two recent arbitration-related decisions of the Supreme Court of Greece (the Areios Pagos) reviewing the possible annulment of two arbitral awards.

Possible annulment of an arbitral award on formalities grounds and arbitrators’ acting ultra vires

The decision no. 662/2011 of the Greek Supreme Court (available by reference to the decision number and year in the original Greek version and in Google translation, as well, at http://www.areiospagos.gr/en/INDEX.htm under “court rulings”) is considering the possible annulment of an arbitral award on formal grounds and arbitrators’ acting ultra vires. According to the facts, the parties had entered into an agreement including an arbitration clause covering any dispute arising from a construction contract between the land owner and the contractor. A request for annulment was lodged on the basis that the date on which the award had been rendered was not clear, a copy of the arbitral award had not been filed with the competent Court of First Instance as required by the local law and the arbitration award had been not notified to the claimant. The Supreme Court, in accordance with the Articles 892, 893 and 897 of the Greek Code of Civil Procedure, held that the Court of Appeals correctly rejected the above grounds for invalidity of the arbitral award, because improper filing or even absence of filing of the arbitral award as well as non-notification of the award to the parties do not constitute grounds for annulment, since an arbitral award is deemed complete and produces its legal effects.
from the date it has been signed by the arbitrators. Moreover, the exact date at which an award has been rendered may be found anywhere in the body of the award; the aim is to allow the parties to determine whether the decision has been issued within the validity period of the arbitration agreement; in a different case, it may consist ground for annulment in accordance with the Article 897 of the Greek Code of Civil Procedure. In addition, regarding the allegations of the respondent in respect of the arbitrators’ acting ultra vires, i.e. beyond the scope of the arbitration agreement, the Supreme Court concluded that the erroneous interpretation of a provision of substantive law, the insufficient reasoning of an arbitral award or an error on the merits of a case are not valid grounds for annulment of an award and in these cases the arbitrators may not be found to have acted ultra vires.

**Limitation provisions as a public policy ground for annulment**

In the context of the Decision No. 1377/2011 (available by reference to the decision number and year in the original Greek version and in Google translation, as well, at http://www.areiospagos.gr/en/INDEX.htm under “court rulings”) the Greek Supreme Court reviewed an arbitral award from a public policy perspective. The underlying facts are as follows: The parties had entered into a contract including an arbitration clause covering any dispute that may arise out of the transport of the claimants’ goods by the appellant. The permanent arbitration body of the Hellenic Chamber of Shipping held that the agreement between the parties constituted an ad hoc agreement and not a charter contract; hence, the claim was subject to a twenty-year limitation as provided for under Article 249 of the Greek Civil Code. Therefore, neither the provisions of the Greek Code of Private Maritime Law, nor Article 250 of the Greek Civil Code did apply, which both provide for shorter limitation periods. The appellant company claimed that the arbitral award was invalid since, under what was indeed a charter contract, the claimant had waived any limitation defense; the tribunal, by finding that the agreement was an ad hoc agreement, breached public policy rules in respect of limitation. The Supreme Court concluded that the parties’ agreement did indeed constitute a charter contract and therefore the arbitral award was to be annulled on the basis that public policy provisions are those mandatory rules whose application can not be excluded by the arbitration agreement (article 890 Greek Civil Procedure Code) and shall be fully implemented by an arbitral award, including with respect to limitation provisions (jus cogens). Nonetheless, the Supreme Court reaffirmed its thesis that inadequate justification, incorrect assessment of the merits, erroneous interpretation and application of legal rules are not sufficient grounds for annulling an award, as long as these flaws do not also amount to a breach of public policy.

**GUATEMALA**

**Víctor López – Rafael Landívar University**

**Recent Arbitration Law developments in Guatemala**

The Arbitration Law of Guatemala\(^1\) was based on the UNCITRAL Model Law and became effective in 1995 later on with the approval of the Legal Reforms to implement the U.S.-Central America- Dominican Republic Free Trade Agreement (CAFTA-RD) in 2006, Guatemala acquired commitments to perform different reforms into this legal framework to provide certainty to the commercial relationships on the area.

Article 117 from Decree Number 11-2006\(^2\), added to article 2 of the Arbitration Law a third paragraph in order to detail features of an international arbitration agreement as follows:

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\(^1\) Arbitration Law, Decree Number 67-95

\(^2\) Legal reforms to implementation of U.S.-Central America- Dominican Republic Free Trade Agreement, Guatemalan Decree Number 11-2006
“Any controversy arising out of the interpretation, enforcement and validity of the international contracts between privates, shall be settled under the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce, unless the parties expressly agree submission to other arbitration forums”.

This mandatory rule forces the parties to an arbitration involving the rules of the International Court of Arbitration of the ICC, unless parties decide on other arbitration forums, without considering the possibility to appeal against national courts to resolve the dispute.

Arbitration practitioners from a local law firm presented a partial unconstitutionality against Article 2.3 of the Arbitration Law, arguing *inter alia* that the article under analysis, violates the individual entitlement to recourse to a national court of Guatemala and the right to a hearing, with due guarantees by a competent, independent, and impartial judge, previously established by law. Also, Article 2.3 of Arbitration Law, subtracted the will of the parties to decide whether it was appropriate or not to submit their disputes to international arbitration assigned to a specific institution without considering the financial capacity of the parties to cover the costs that would result in such arbitration. The norm as well binds to individuals not subject to its jurisdiction and rule of law, granting a privilege to the International Court of Arbitration of the ICC in relation to other arbitration institutions at national or international level.

Further arguments were heard coming from representatives of the Chamber of Commerce of Guatemala, who pointed out that arbitration ought to be an alternative method of dispute resolution and should not be imposed as the principal mechanism. Article 2.3 of the Arbitration Law would cause any person who may be classified as an international contractor, including a small farmer who obtains a minimum profit margin in the export of their products, should incur high expenses to obtain justice, that includes the obligation to attend to a private entity based in Paris, involving more costs.

On 7 July 2011, the constitutional court of Guatemala established that arbitration as an alternative dispute resolution method is based on party autonomy principle which involves the voluntary resignation of jurisdiction, the norm imposing mandatory arbitration to settle disputes involves an arbitrary rule, violating the right to access to a judge and on the other hand the imposition of a specific arbitration procedure affects the referred party autonomy principle. Finally the court established that the fact of not being able to avoid arbitration to settle the dispute in international contracts between privates parties violated fundamental rights, as the right to access to a judge in national jurisdiction according with Guatemala’s Constitution. In consequence the third paragraph of Article 2 of the Arbitration Law was declared unconstitutional.

This development in Guatemalan Arbitration Law provides a greater legal framework to national and international commercial contractors, which allows them to decide the method to resolve any dispute in exercise of the party autonomy principle.

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3 Constitutional Court of Guatemala, file 387-2010

**INDIA**

**Amruta Kelkar - Juris Corp Advocates & Solicitors, Mumbai**

Indian courts responsive to changing times – but is it enough?

The question which has been the subject-matter of much debate but still remains unanswered is in what circumstances the Indian courts would refer the proceedings before them to arbitration. The peculiarity in the
Indian context is that the courts are not obligated to refer the disputes before them to arbitration once the existence of the arbitration agreement is ascertained but can undertake a full and final review of the validity of the arbitration agreement before making a reference to arbitration. Another dimension to these complexities is added when the courts are dealing with proceedings (i) where certain reliefs sought fall outside the purview of arbitration or (ii) reliefs sought are against entities who are not bound by the arbitration agreement or (iii) the reference would result into joinder of two or more different forms of arbitrations.

Even though certain recent judicial precedents have attempted to clarify the position, no definite conclusion can be reached. It is a well settled position that when the subject-matter of the proceedings before the court falls only partly within the ambit of the arbitration agreement or involves parties, some of whom are not parties to the arbitration agreement, the dispute cannot be referred to arbitration. The reason being that the Arbitration and Conciliation Act, 1996 does not make any provision for 'bifurcation' of the cause of action or parties. Allowing a dispute relating to the same subject-matter to proceed partly in arbitration, partly in litigation would result in increased costs and harassment to the parties. It may also lead, in certain circumstances, to conflicting decisions by the arbitral tribunal and the court.

But that does not mean that mere joining of parties who are not parties to the arbitration agreement to a suit where no substantial reliefs are sought against them would result in the court rejecting a reference to arbitration.1

Interestingly, the Supreme Court in its recent decision in Deutsche Post Bank Home Finance Limited v Taduri Sridhar and Anr.,2 stepped aside from the earlier precedent. Here the court was dealing with an appeal in respect of an application for the appointment of an arbitrator. In a dispute related to a construction agreement between the purchaser and the developer, which contained an arbitration agreement, the purchaser impleaded a lender with whom he had a separate loan agreement, which also contained an arbitration agreement, as a party. The lender had disbursed the funds under the loan agreement directly to the developer even though the developer had failed to complete the construction within the stipulated time and hence the purchaser had certain claims against the lender. The Supreme Court held that since there was no claim or dispute regarding the loan agreement, an application for appointment of an arbitrator against the lender was misconceived but while doing so, the court allowed the bifurcation of parties as it did not result in a bifurcation of claims.

Very recently, in P.R. Shah, Shares and Stock Broker (P) Limited v M/s B.H.H. Securities (P) Limited and Ors.,3 the Supreme Court of India was faced with a question as to whether two connected claims subject to a separate process of arbitration under the bye-laws of a stock exchange can be referred to a single arbitration. Answering in affirmative, the court adopted a very simplistic view and concluded that even though the bye-laws provide for dissimilar arbitration procedure for one claim compared to other; there is no impediment for single arbitration as it is based on the same legal relationship.

The above decisions throw some light on the issues regarding joinder and bifurcation of arbitration, the end result still remains ambiguous. The fundamental position which emerges is that (i) the parties cannot be referred to arbitration or joined-in unless they have agreed to the same, (ii) while consolidating arbitration proceedings, the claims have to be based on the same legal relationship. The difficulty arises if two or more different forms of arbitrations prescribing drastically different arbitration procedures are sought to be consolidated to which the Supreme Court has given its green light. We have to wait for the Indian legislation to come up with concrete provisions, till then we are guided by the above judicial precedents.

2 (2011) 11 S.C.C 375
3 Civil Appeal No. 9238 of 2003, decided by the Supreme Court on 14.10.2011
As a result of the Iranian government’s recent privatization initiative, more and more Iranian companies and state entities are resorting to arbitration.\textsuperscript{1} Two recent decisions of the 19\textsuperscript{th} circuit of the Tehran first instance court\textsuperscript{2} shed light on its current approach to the annulment of arbitral awards. In the first decision, the court denied an application to annul an award rendered against an Iranian state entity, and in the second, it annulled an award rendered in favour of an Iranian state entity.

In \textit{RAJA Rail company v VANIARAIL Rail Company} [1387.b 19.n167] the court denied an application by RAJA Rail to annul an award rendered under the auspices of the Iranian Chamber of Commerce in favour of VANIARAIL, a private company. Raja Rail argued that the award should be annulled on the grounds that under Iranian law, as a state entity, it lacked the capacity to conclude an arbitration agreement. It relied on principle 139 of the constitution\textsuperscript{3} and article 457 of the civil procedure act which provides that any arbitration agreement entered into by a governmental organization must be previously approved by the Council of Ministers. The Court rejected this argument, reasoning that the new approach of privatization promoted through all parts of the economy in Iran must be accompanied by access to dispute resolutions mechanisms including arbitration. The Court held that 139 of Constitution and Art. 457 of the civil procedure law do not apply to contracts by state entities unless the dispute relates to the government’s sovereignty.

In \textit{Arian Sahand Company v Iranian Privatization Organization} [1388.b19.n346] Arian Sahand Company applied to annul an award rendered by a special tribunal established for the resolution of privatization agreements and procedure disputes. The court annulled the award on the grounds that the arbitration tribunal breached Iranian public policy as set out in article 489 of the civil procedure code\textsuperscript{4} by failing to apply the mandatory rules governing transactions conducted on the stock exchange.

The court reasoned that the tribunal’s failure to apply mandatory provisions of Iranian law violated public policy. The Court’s approach was similar to that taken in \textit{Eco Swiss China Time Ltd v Benetton International NV}\textsuperscript{5}

\begin{itemize}
\item \textsuperscript{1} Under Iranian law, if one of the parties to the arbitration is a non-Iranian person the arbitration is governed by the act of “The Law Concerning International Commercial Arbitration” enacted in 1997 which is more flexible and compatible with international standards than civil procedure code of 1999, which applies to domestic arbitration.
\item \textsuperscript{2} Presided by judge Dr Yazarloo
\item \textsuperscript{3} It reads: “The settlement of claims relating to public and state property or the referral thereof to arbitration is in every case dependent on the approval of the Council of Ministers, and the Assembly must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important cases that are purely domestic, the approval of the Assembly must also be obtained...”
\item \textsuperscript{4} Article 489 provides in the relevant part as follows: “Arbitration award shall be ordered annulled and unenforceable on any of the following grounds:

\begin{enumerate}
\item the award is contrary to core substantive laws (public policy rules);
\end{enumerate}
\item \textsuperscript{5} ECJ Case C-126/97. Reference for a preliminary ruling: Hoge Raad - Netherlands
\end{itemize}
and SNF V. Cytec Industrie⁶ since it was emphasized in both cases that arbitrators have the right and, to be more exact, the obligation to consider mandatory laws applicable to the case, without reviewing the substance of the decision.

IRELAND


Irish Courts’ Enforcement of International Arbitration Awards

Recent legal developments in dispute resolution in Ireland have improved the commercial trading environment for domestic and international parties. Emerging trends appear to have the potential to promote Ireland to its global trading partners. Arbitration in Ireland has undergone renewed interest from parties and practitioners due largely in part to the introduction of the Arbitration Act, 2010. In incorporating the UNCITRAL Model Law since 8 June 2010, it aligns Irish arbitration rules and procedures with international commercial standards, making Ireland a progressively more attractive venue for national and international arbitrations. Recent legislative developments are welcomed as a progressive step in Ireland’s commercial dispute resolution environment.

In the recent High Court case of Danish Polish Telecommunication Group I/S v Telekomunikacja Polska SA,¹ Danish Polish Telecommunication Group I/S (“DPTG”) sought recognition and enforcement of an international arbitral award pursuant to Art. 35(1) of the Model Law given force of law in Ireland by Sec. 8 of the Arbitration Act 2010. The partial award, made by an arbitral tribunal in Vienna in 2010, ordered Telekomunikacja Polska SA (“TPSA”) to pay DPTG some €268 million, interests and costs in respect of the first phase of the arbitration which dealt with the first period of relevant time (February 1994 to June 2004). The dispute related to a contract between DPTG and TPSA in respect of the construction of an optical fibre system. The parties disagreed on the amount of money owed by TPSA and the dispute was referred to arbitration in accordance with the contract. TPSA issued proceedings in the Commercial Court of Vienna seeking to have the partial award set aside. An application for recognition and enforcement was subsequently made to the Irish High Court. TPSA contended that the Irish court ought to refuse recognition or enforcement of the partial award upon the basis that, inter alia, the composition of the arbitral tribunal and/or the arbitral procedure were not in accordance with the agreement of the parties or, failing such agreement, with the law of Austria² and that it would be contrary to the public policy of Ireland to recognise or enforce the partial award³ because TPSA did not have the opportunity to present their case.⁴

¹ [2011] IEHC 369 (6 October 2011)
² Article 36(1)(a)(iv) of the Model Law
³ Article 36(1)(b)(ii) of the Model Law
⁴ Article 36(1)(a)(ii) of the Model Law. It was submitted that an opportunity to present one’s case to an independent Arbitral Tribunal forms part of the public policy in Ireland.
Under the Model law, such awards may be the subject of recognition and enforcement proceedings in another state pursuant to Art. 35 unless refused on the basis of Art. 36. Art. 35(1) provides that an arbitral award, irrespective of the state of origin, shall be recognised as binding and, upon application to court, enforced. This is subject to Art. 36 which, as TPSA argued, states that the court should refuse the application on Art. 36 grounds. Accordingly, TPSA sought an adjournment under Article 36(2), of the court’s decision on recognition or enforcement of the partial award pending the determination of TPSA’s Austrian proceedings.7 Whilst TPSA’s primary submission was that the court should first determine (in its favour) the issues raised by the substantive defences of TPSA to the application for recognition or enforcement, it also submitted that on a proper construction of Art. 36, it is open to the court to determine that it should adjourn its decision on the application for recognition and enforcement and the defences raised thereto pending the determination of the Austrian proceedings.6 DPTG submitted that TPSA’s arguments were unfounded and failed to establish a reasonable chance that the award would be set aside by the Austrian court.7

DPTG argued that there should be at least a partial enforcement of the partial award since TPSA agreed that there were certain sums due to DPTG and that any adjournment should only apply to the enforcement of the balance of the partial award. Judge Finlay Geoghegan acknowledged that adjournment of enforcement proceedings did not automatically follow when proceedings for the setting aside of the arbitral award were already in existence.8 She emphasised that it was not a matter for the court, as the enforcement court, to decide on matters of Austrian law.9 Instead, the court had to give ‘brief consideration’ to the submissions to decide if there are reasonable grounds or a seriously arguable case for the setting aside of the award by the Austrian court.10 Judge Finlay Geoghegan stated that there was no undisputed amount recorded in the arbitral decision. The judge held that the court had no jurisdiction to grant leave to enforce the portion of the award that was not contested by DPTG.11

On the question of security, the judge referred to the period to which the award related, the length of time taken for the arbitration, TPSA’s acknowledgement that some monies were owed and TPSA’s assets within the jurisdiction. She concluded that security should be ordered in the sum of €1.5m pending the outcome of the Austrian proceedings and adjourned the court’s decision on the enforcement of the partial award. The judge felt that although TPSA has adduced evidence of reasonable grounds or a seriously arguable case in favour of the setting aside of the partial award the evidence considered did not permit the court to conclude that the partial award was manifestly invalid.12

The Irish courts have therefore shown a supportive approach to the enforcement of arbitral awards. Unless there is reason to avoid enforcement (which grounds are set out at Art. 36 of the Model Law and mirror the grounds for recourse against an award set out in Art. 34), enforcement is generally unproblematic. Indeed the judge indicated that a pro-enforcement construction of Art. 36(2) suggests that the mere existence of proceedings seeking to set aside an arbitral award would not normally of itself constitute grounds for an adjournment.13 Sec. 23(1) of the Irish Arbitration Act provides that an arbitral award shall be enforceable in the state either by action or, by leave of the High Court, in the same manner as a judgment or order of that court with the same effect. Sec. 23(2) of the Irish Arbitration Act precludes the possibility of an appeal to the Supreme Court in relation to the recognition and enforcement of an arbitral award which makes award enforcement a compact two-instance proceeding.

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7 The purpose of Article 36(2) appears to be to avoid the enforcement of an award and then a subsequent decision of the home court that the award be set aside.


8 Ibid at para 16

9 Ibid at para 41

10 Ibid at para 44

11 Ibid at para 43

12 Ibid at paras 50-57

13 Judge Finlay Geoghegan referred to the dicta of Tuckey L.J. in the Court of Appeal in Ipco (Nigeria) Ltd v. Nigerian National Petroleum Corporation [2009] 1 All ER (Comm) 611. (“The mere fact that a challenge has been made to the validity of an award in the home court does not prevent the enforcing court from enforcing the award if it considers the award to be manifestly valid.”)
Amendments to the Malaysian Arbitration Act 2005

The Arbitration Act 2005 ("the Act") which is based on the UNCITRAL Model Law was recently amended by the Malaysian Parliament by virtue of the Arbitration (Amendment) Act 2011 ("Amendment Act"). The Amendment Act received Royal Assent on 23 May 2011 and came into force on 1 July 2011. This piece of legislation was drafted by the Attorney General’s Chambers in consultation with the Malaysian Bar, the Kuala Lumpur Regional Centre of Arbitration, the Malaysian Institute of Arbitrators and other stakeholders, and is intended to clarify certain inconsistencies in the interpretation of the Act. The Amendment Act serves to provide greater clarity and certainty in arbitration law and is consistent with the efforts of various stakeholders in promoting Malaysia as a preferred arbitration destination in the Asia Pacific region.

The extent of court intervention

Section 8 of the Act has been amended to expressly limit court intervention to situations specifically covered under the Act and to exclude any general or residual powers given to the courts which are not provided for in the Act. The new section 8 now reads “No court shall intervene in matters governed by this Act, except where so provided in this Act”. This is to ensure that certainty is given to the parties and arbitrators alike on instances in which court supervision or assistance can be sought.

Prior to the amendment, section 8 reads “Unless otherwise provided, no court shall intervene in any of the matters governed by this Act”. The meaning of the word “unless otherwise provided” in the old section 8 of the Act was discussed by the Malaysian High Court in the cases of Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd & Ors [2008] 5 C.L.J 564 ("Aras Jalinan") and Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd [2010] 5 C.L.J. 83 where it was held that “this provision clearly stipulates that any assistance or supervision of the courts must be expressly provided, either under the Act or other relevant statute” and consequentially “power of intervention by courts may not be inferred, either from the invocation of inherent or residual common law powers, or by an inference that what is not expressly forbidden is permissible”. However, notwithstanding the clear wording of the old section 8, there were cases in which the Malaysian courts seemed to suggest that there was still a possibility of the invocation of the courts’ inherent jurisdiction [Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 7 C.L.J. 785]. In the case of Majlis Amanah Rakyat v Kausar Corporation Sdn Bhd [2009] 1 L.N.S. 1766, the High Court adopted the “what is not excluded is permissible” approach.

With the new section 8, the statutory intention of the Parliament has been clarified and it is thus clear that permissible intervention must be expressly provided for by the Act and cannot be drawn from other sources.

Interim measures

The new subsection 11(3) of the Act empowers the Malaysian courts to make orders for any interim measure even if the seat of arbitration is outside Malaysia. This amendment was drafted in response to the position taken by the High Court (and affirmed on appeal by the Court of Appeal) in Aras Jalinan where it was held that
the Malaysian courts have no jurisdiction, statutory or inherent or by the exercise of residual powers, to grant injunctive relief in matters where the seat of arbitration is outside Malaysia. The grounds provided by the courts were that the old section 8 of the Act stipulates that any intervention by the courts must be pursuant to express statutory provision and such power of intervention may not be inferred, either from the invocation of inherent or residual common law powers or by an inference that what is not expressly forbidden is permissible. Although the Act is based on the UNCITRAL Model Law (“Model Law”), the Malaysian Parliament had omitted Article 1(2) of the Model Law which extends the Courts’ jurisdiction in certain matters, including the power to grant injunctive relief, to foreign arbitrations. The Malaysian court in Aras Jalinan had adopted the approach taken by the Singapore Court of Appeal in *Swift Fortune Ltd v Magnifica Marine SA* [2007] 1 S.L.R. 629. However, Singapore has also made similar legislative amendments; section 12A(1) of the International Arbitration Act 1994 as amended by the International Arbitration (Amendment) Act 2009 which confers on the Singapore High Court the power to order interim measures irrespective of whether the place of arbitration is in the territory of Singapore.

**Reference on questions of law**

Section 42 of the Act allows the parties to refer to the Malaysian High Court any question of law arising out of an award. Unlike in other commonwealth jurisdictions such as the United Kingdom, Singapore, Hong Kong and New Zealand, there is no requirement in Malaysia to seek leave for such reference. Section 9 of the Amendment Act inserted a new subsection (1A) into section 42 of the Act which reads “The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties”. The phrase “substantially affects the rights of one or more of the parties” is vague and will be subject to judicial decisions. The amendment seeks to limit the type of questions of law arising out of an award that may be determined by the court.

Other changes made to the Act include:

**Stay of arbitration proceedings**

Section 10 of the Act has been amended to remove the ground for stay of arbitration proceedings where there is no dispute between the parties with regard to the matters which are to be referred. The Explanatory Notes to the Amendment Bill state that this provision is unnecessary. The courts’ jurisdiction to stay arbitration proceedings is now limited only to situations where the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. New subsections (2A) and (2B) have also been introduced to empower the court to order the retention of the property (vessel) or provision of security pending the determination of arbitration proceedings related to admiralty disputes. The definition of ‘admiralty proceeding’ is now provided in subsection (2C). A new subsection 10(4) was also inserted into the Act which provides that section 10 of the Act applies to an international arbitration involving a foreign seat.

**Interim measures**

Section 11(1)(e) of the Act has been amended to provide clarification that to secure the amount in dispute, the court may order the arrest of property, bail or other security pursuant to the admiralty jurisdiction of the High Court before or during arbitral proceeding.

**Recognition and enforcement of awards**

The amended section 38 now provides for enforcement of any awards made in Malaysia whether in respect of domestic or international arbitration. Prior to the amendment, an award in respect of an international arbitration made in Malaysia cannot be enforced under the provisions of sections 38 and 39 of the Act. The successful party must enforce the award by way of writ action in the Malaysian courts. The amended section 39 provides that the determination of validity of arbitration agreement should be decided in accordance with the laws of the State where the award was made and need not necessarily be under the laws of Malaysia.
1. Introduction

The Supreme Court of Poland’s resolution from 13 July 2011¹ deals with a very important issue, namely ratione personae scope of arbitration clause. The scope of the arbitration clause very often determines the jurisdiction of the arbitral tribunal. As arbitration is voluntary and relies upon an arbitration agreement, all effects connected to it should be attached only to those who signed the arbitration clause (see e.g. art. II (1) of the 1958 New York Convention²).

2. Key facts of the case

The parties, ING Bank Śląski S.A. (claimant) and a registered company which deals with construction (respondent) concluded a contract in 2008. The contract contained an arbitration clause according to which all disputes arising out of the contract should be submitted to the court of conciliation of the Polish banking association in Warsaw. On 25 January 2010, claimant commenced the proceedings. It claimed for more than PLN 42 mln and indicated as respondents: (1) the registered company, (2) one of the partners of the registered company (Mr. Stanisław B.) and (3) the acquirer of the registered company, the limited liability company A. sp. z o.o. (“A”).

3. Arguments presented by the parties

Claimant alleged that respondents (1) and (2) are jointly and severally liable according to arts. 22 and 31 of the Polish Code of Commercial Companies³. The arbitration clause had only been signed by the registered company. Moreover, claimant stated that the arbitration clause covered a particular legal relationship and that thus, the original indication of the parties would be irrelevant. As to the acquirer of the registered company, respondent

³ Art. 22 “§ 1. A registered partnership shall be a partnership which conducts an enterprise under its own business name and is not any other commercial partnership or company. § 2. Every partner shall be liable for obligations of the partnership, without limits, with all his assets jointly and severally with the remaining partners and with the partnership, subject to Article 31.” Art. 31 “§ 1. A creditor of a partnership may carry out an execution from partner’s assets where execution from the partnership’s assets proves ineffective (subsidiary liability of the partner). § 2. The provision of paragraph 1 shall not encumber bringing a suit against a partner before the execution from partnership’s assets proves ineffective. § 3. Subsidiary liability of the partner shall not apply to obligations that arose before the entry into the register.” Available (in polish) at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU20000941037.
(3), claimant alleged that it was jointly and severally liable according to art. 554 of the Polish Civil Code\(^4\). Respondents stated that the arbitral tribunal had no jurisdiction.

4. Proceedings
On 20 May 2010, the arbitral tribunal rejected respondents’ arguments and found that it had jurisdiction over the dispute. Respondents appealed to the regional court. The latter court upheld the arbitral tribunal’s decision on jurisdiction in its decision of 30 September 2010. In its reasoning, the regional court shared claimant’s point of view and stated that the arbitration clause covered a particular legal relationship and that the original indication of the parties was irrelevant. Respondent appealed from this decision to the court of appeal in Katowice. This court had serious legal doubts regarding the case and submitted a legal question for the Polish Supreme Court’s opinion, according to art. 390 § 1 Polish Code of Civil Procedure\(^5\):

The question was whether an arbitration clause is enforceable against persons who are not themselves subject to the legal relationship which has been submitted to arbitration and what if those persons could be jointly and severally liable for obligations of the legal relationship submitted to arbitration.

5. The Supreme Court of Republic of Poland’S resolution from 13 July 2011

The Supreme Court of Poland held that:

I. Every joint and several debtor of a particular obligation is independent and cannot be bound by an arbitration clause concluded by another joint and several debtor but for such a joint and several debtor’s agreement to the arbitration clause. Consequently, an arbitration clause concluded by one joint and several debtor does not bind another joint and several debtor.

II. As to the registered company, the Supreme Court underlined that all registered companies are independent subjects to rights and duties and have legal capacity and capacity to be a party in a given civil case (art. 8 § 1 of the Polish commercial code). Therefore, in the case on hand, there was no identity between the registered company and its partners. Arts. 22 § 2, 31 and 35 of the Polish Code of Commercial Companies are irrelevant for that conclusion. Consequently, the arbitration clause concluded by the registered company does not bind the individual partners of that company.

III. An acquirer of a company in accordance with art. 554 of the Polish Civil Code is bound by an arbitration clause concluded by the seller of the company before the purchase of that company. This is the case if the arbitration clause covers disputes as to the obligations connected with the conduct of the company.

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\(^4\) Art. 554 “The acquirer of an enterprise or an agricultural farm shall be liable jointly and severally with the transferor for the obligations of the latter connected with the running of the enterprise or the agricultural farm except for the case where, at the time of the acquisition, the acquirer did not know about those obligations in spite of due diligence on his or its part. The liability of the acquirer shall be limited to the value of the acquired enterprise or farm according to their state at the time of the acquisition, and according to the prices at the time of satisfying the creditor. Such liability cannot be precluded or limited without the consent of the creditor.”. Available (in polish) at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU19640160093.

\(^5\) Art. 554 “The acquirer of an enterprise or an agricultural farm shall be liable jointly and severally with the transferor for the obligations of the latter connected with the running of the enterprise or the agricultural farm except for the case where, at the time of the acquisition, the acquirer did not know about those obligations in spite of due diligence on his or its part. The liability of the acquirer shall be limited to the value of the acquired enterprise or farm according to their state at the time of the acquisition, and according to the prices at the time of satisfying the creditor. Such liability cannot be precluded or limited without the consent of the creditor.”. Available (in polish) at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU19640160093.
New Case Law regarding the “Constitutionalisation” of Arbitration in Peru

Until September 2011, case law issued by the Peruvian Constitutional Court (Tribunal Constitucional) established that the judicial review of awards shall follow a judicial annulment procedure as the previous step to a constitutional “Amparo” claim against arbitral awards. Nonetheless, on September 21, 2011 the Peruvian Constitutional Court reformulated and consolidated its previous criterions when ruling in the claim filed by Sociedad Minera de Responsabilidad Ltda. María Julia against the Third Civil Court of Appeals of Lima (File No. 00142-2011-PA/TC). In the ruling, the Peruvian Constitutional Court set the following rules as new case law regarding the constitutionalisation of arbitration in Peru:

1) The application for annulment provided in Legislative Decree No. 1071, which norms the arbitration, is a satisfactory procedural channel for the protection of constitutional rights. Hence, it is not deemed as a necessary previous step to a constitutional Amparo claim before the judiciary.

2) The Amparo is an exceptional mechanism since it should not serve to protect constitutional rights, even when they are part of due process or effective judicial tutelage. Likewise, it does not apply to cases related to the existence of the arbitration agreement or the scope of the arbitration.

3) The Amparo could be filed when; a) it is related to the direct violation of the case law set by the Constitutional Court; b) when the award exercises the control difuso over a norm declared constitutional by the Constitutional Court or the judiciary; or, c) when the Amparo has been filed by a third party who is not part of the arbitration agreement and whose constitutional rights have been directly affected in the award. In case of b) and c) it is necessary that the party who considers affected has previously filed a complaint before the arbitral tribunal and such complaint has been dismissed. If the Amparo is successful, a new award will be rendered.

4) If there is a conflict in an arbitration between a constitutional norm and a legal norm, the arbitrators must give priority to the former. However, the Constitutional Court has limited the exercised of control difuso by the arbitrators, stating that it can only be exercised when the norm in question affects the validity of the award and as long as it is impossible to obtain an interpretation in accordance to the Constitution and the existence of a direct damage to one of the parties rights has been verified.

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1 If there is an incompatibility between a constitutional norm and a law, the judges must give priority to the former.
In our opinion, this new case law is positive because it sets new rules in order to reduce effectively the “Constitutionalisation” of Arbitration in Peru and gives an up to date vision of the arbitration procedure and the constitutional controls applicable to it.

**ROMANIA**

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**New Amendments to the Arbitration Rules in Romania**

The first quarter of 2011 brought some novelties in relation to the arbitration rules (the “rules”) of the Court of International Commercial Arbitration of Romania (the “court”). The new amendments have become effective as of 4 March 2011 and the most significant of them are briefly described below.

The evidence supporting the arbitration claim shall now also include the following: References to documentary evidence and their relevance for the case to be settled by the arbitral tribunal, the name and home address of the witnesses, the facts that shall be proven, the objectives of the expertise and the expert requested as well as an announcement of the questions that will be asked during the oral hearing. An announcement of those questions only needs to be made in the event the questions raised are to be answered by a legal entity through its legal representative. Questions that will directly be addressed towards natural persons at the oral hearing do not need to be announced.

Another amendment regards the possibility for the president or first vice-president of the court to reasonably prolong the deadline within which the claimant is obliged to pay the arbitral fees. In case the claimant does not comply with this payment obligation, the arbitral claim shall be returned, without prejudice to the claimant’s right to file the claim anew.

With respect to the arbitral procedure, new amendments have been introduced as far as the change of the hearing date is concerned. As a general rule, in case the arbitral tribunal cannot convene at the envisaged first hearing date due to procedural incidents, the president or first vice-president may change this hearing date and must immediately summon the parties for the new hearing date. On an exceptional basis, hearing dates acknowledged by the parties or communicated to the parties through a subpoena may not all be changed by the court without summoning the parties but for well-grounded reasons.

Also, new provisions have been added in relation to the annulment action against interim arbitral decisions (in Romanian încheierea de ședință). Interim decisions of the arbitral tribunal may be annulled in case the arbitral tribunal has decided one of the following: (i) the suspension of the arbitral proceedings before the court; (ii) the instatement of constraint or temporary measures or (iii) an objection of unconstitutionality that had been overruled by the arbitral tribunal in its interim decision and was later accepted by the Constitutional Court.

1 Decision of the Chamber of Commerce and Industry of Romania no. 4 dated 17 February 2011 on the amendment and completion of the rules of arbitration procedure of the Court of International Commercial Arbitration of Romania and the approval of the regulation regarding the organization and functioning of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, published in the Official Gazette of Romania no. 160 dated 4 March 2011, Part I.
Nonetheless, in cases (ii) and (iii), the arbitration procedure shall not be suspended while the application for review of the arbitral tribunal’s interim decision is pending before the courts. The annulment action may also be initiated in case the measures taken by the arbitral tribunal have been taken without observing the established legal requirements. As a general rule, annulment action against interim decisions of the arbitral tribunal may be filed within five days as of the date of service of the affected interim decision. However, in case the arbitration procedure has been suspended, the annulment action may be filed at any time during the suspension period.

Annulment actions may also be filed against the arbitral award (in Romanian sentința arbitrală) rendered at the end of the arbitral procedure. The latest amendments of the rules provide for a new ground based on which the arbitral award may be annulled, i.e. if subsequent to the rendering of the arbitral award, the Constitutional Court accepted an objection of unconstitutionality and declared the legislation affected unconstitutional. The fact that the arbitral tribunal thus based its decision on legislation that has later been declared unconstitutional is reason to request the annulment of the arbitral award. In this case, the annulment action may be filed within three months of the date when the decision of the Constitutional Court has been published in the Official Gazette of Romania, Part I.

**RUSSIA**

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**Landmark decisions of the Supreme Arbitrazh Court turn the Russian court system towards arbitration**

The Russian courts are traditionally criticized for their conservative and formal approach to arbitration. The ice that is the courts’ infamous contempt towards arbitration, however, has been broken by the recent practice of the Supreme Arbitrazh Court of the Russian Federation (SAC).

The recent rulings demonstrate a stable tendency in favour of arbitration, which has been supported by the higher courts of Russia. In May 2011 the Constitutional Court of the Russian Federation (CC) issued a remarkable Ruling No 10-P, in which it broadly interpreted a number of legislative provisions regulating the competence of domestic arbitral tribunals. (The question was brought before the CC by the SAC within the cases on enforcement of an arbitral award over a real estate dispute). The SAC perceived the CC’s position in the cases under consideration. It upheld the lower courts’ decisions granting enforcement of the arbitral award and referred to the CC’s position that the public nature of the dispute, which causes its non-arbitrability, is to be determined solely by the parties involved and the nature of the legal relationship, and may not be determined by the category of property per se (case No A65-9867/2009, Ruling No 634/10 dated 24 September 2011; case No A65-9868/2009, Ruling No 503/10 dated 27 September 2011).

The SAC followed this pro-arbitration tendency in further cases concerning both domestic and international arbitration. Recently, notable decisions were delivered by the SAC, in which it resolved a set of important issues frequently arising in such cases.

1. **Prohibition to reconsider the case on its merits**

The Russian commercial (arbitrazh) courts of the two lower instances reassessed the factual evidence of the case and impeded the enforcement of the arbitral award rendered by the International Commercial Arbitration Court under the Chamber of Commerce and Industry of the Russian Federation (ICAC) (aka MKAS). Based on the

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1 The Ruling was discussed in the YIAG 2011 summer e-letter.
allegation that the evidence produced in the arbitration proceedings was fraudulent, the courts found the decision of the arbitral tribunal unlawful and refused to enforce it.

However, the SAC stated that reassessment of the facts already examined by the tribunal could not prevent the enforcement of an arbitral award, since it is not a ground for refusal of enforcement under Article 239 of the Arbitrazh Procedure Code of the Russian Federation (case No A14-2053/2010-65/29; Ruling No 2608/11 dated 26 July 2011). Thus, the SAC reconfirmed that the arbitrazh courts are not allowed to reconsider the merits of the cases while dealing with enforcement of the award – the basic provision, which was sometimes ignored by the courts.

2. Protection of foreign counterparties

The Russian courts were also criticized for favoring Russian parties in cases on recognition and enforcement of arbitral awards and their challenges, especially when one of the parties appeared to be a company of significant importance to Russian business. In the recent decisions, however, the SAC emphatically demonstrated the reverse of this trend ruling in favor of foreign counterparties in their disputes with the major Russian plants.

On 13 September 2011 the Presidium of the SAC affirmed the SCC arbitral award ordering the Russian big shipbuilding yard, Baltiysky Zavod, to pay a Swedish company, Stena RoRo AB, a penalty in the amount of 20 million euro for failure to comply with shipbuilding contracts concluded in 2005 (case No A56-60007/2008; Ruling No 9899/09). The Presidium also dismissed the claim of Baltiysky Zavod Russian shareholders for invalidation of the contracts at stake (case No A56-6656/2010; Ruling No 1795/11). The SAC intervened in this long-lasting dispute after the lower courts rejected Stena’s application for the recognition and enforcement of the arbitral award due to a public policy violation and after they recognized the contracts as invalid.

In another recent remarkable case the SAC ruled over a dispute between the largest shipbuilding complex in Russia, JSCo “PO “Sevmash”, and a Norwegian company, “Odfjell SE”. The SAC upheld the lower courts’ decisions satisfying the Odfjell’s application for recognition and enforcement of the SCC arbitral award, under which Sevmash was ordered to reimburse Odfjell’s damages (over 43 million US dollars) caused by Sevmash’s failure to perform shipbuilding contracts concluded in 2004 (case No A05-10560/2010; Ruling No BAC-4369/11 dated 26 May 2011).

3. Right to legal representation in arbitration proceedings

The SAC has also sealed a loophole, which allowed to resist the enforcement of an arbitral award in cases where representatives of the parties in arbitration proceedings were not specifically authorized to appear before the arbitral tribunal (case No A72-14613/2009; Ruling 12311/10 dated 12 April 2011).

The court of first instance found that the representative of one of the parties to arbitration proceedings was not authorized to represent its interest therein, since the power of attorney issued in his name allowed him to appear only in the courts of general jurisdiction and arbitrazh courts. However, the SAC reasoned that the authority to appear before courts (even without a specific indication to arbitration proceedings) was sufficient to consider the representative to be duly authorized. Thus, the SAC assumed a progressive position on the issue of legal representation in arbitration proceedings, which remains unregulated under Russian law.

Albeit the Russian court practice, especially of the lower arbitrazh courts, could still be hardly regarded as uniform, the above mentioned cases by all means enhance the arbitrazh courts to develop a balanced and predictable approach making arbitration in Russia more attractive for both Russian and foreign players.

One should also expect positive developments in the Russian arbitration legislation. The State Duma, the lower chamber of the Russian Parliament, is considering amendments to the Federal Law “On International Commercial Arbitration” No 5338-I of 1993, which are based on the amendments to the Model Law on International Commercial Arbitration of 1985 adopted by UNCITRAL in 2006. The proposed amendments would liberalize the requirements as to the form of arbitration agreements (including its execution in electronic form)
and would broaden the arbitral tribunals’ authority regarding the interim measures (including the preliminary ones). The bill also deals with a number of other important amendments intended to bring Russian law in compliance with international standards.

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Russian commercial courts oppose party-controlled arbitration tribunals

Russian commercial courts, in particular, the Supreme Commercial Court of Russian Federation (“SCC”), strengthen their opposition to the so-called “pocket” (party-controlled) arbitration tribunals. In Russia not infrequently a stronger party, usually a large holding company or a bank, imposes a dispute resolution regime providing for arbitration by a permanent arbitral institution that such party sponsors. Then the arbitrator appointment procedure of such institution ensures that the selected arbitrators are dependent upon or affiliated with such party. In such situations courts refused to enforce or set aside arbitral awards, invoking a violation of the principle of arbitrators’ impartiality, equality of the parties’ rights and autonomy of their will. Thus, SCC Presidium by its Decree of No. 17020/10 of 24.05.2011 refused to enforce the award rendered by the Court of Arbitration at the Investment and Construction company “Sberbankinveststroy” in favor of Sberbank against a number of its debtors. Lower courts granted the enforcement, but the SCC set their judgments aside. The SCC mentioned that according to the statute of the Court of Arbitration its chairperson, vice-chairpersons and the list of arbitrators shall be approved by the company “Sberbankinveststroy”, which is part of Sberbank group. Sberbank, as the company’s sole shareholder, took part in the approval of the list of arbitrators. The arbitral tribunal consisted of arbitrators from such list, and the other parties to arbitration had no procedural opportunity to appoint any other candidate. Thus the principle of equality of the parties’ rights and autonomy of their will was violated, held the SCC. In this context, it reasoned, the establishment and financing of an arbitration institution by a party to a civil contract, while another party was deprived of the opportunity to form the arbitral tribunal, evidences violation of impartiality and goes against the fairness of the dispute resolution procedure.

In another recent case, No. A13-8719/2011, the Commercial court of Vologda region (a court of 1st instance) refused to enforce an award of a permanent court of arbitration by a Law firm “Alpha Consult” LLC on a debt recovery. The court noted that the founder and CEO of the claimant was the founder and vice-president of the permanent court of arbitration. Therefore, concluded the court, the arbitrator was connected by “appropriate relations” [sic!] with the claimant. The arbitrator must be able to resolve the dispute impartially and independently of the parties.

Such an approach of the commercial courts should not, of course, be automatically labelled as anti-arbitral. The Supreme Commercial Court explains its position: it is necessary to distinguish between highly-reputed courts which strive for independence of arbitrators and puppet tribunals serving the interests of a party. The latter may be considered to discredit arbitration. This does not mean, however, that all arbitral institutions established by commercial entities should be abolished, or that their awards should be unenforceable. Several such institutions, in particular, the Arbitration Court at Gazprom OJSC, gained experience, credibility and respect in Russian business community and proved that they correspond to standards of fairness of arbitral procedure and independence of arbitrators.
Legislative Developments in Singapore

The International Arbitration Act ("IAA"), which is based on the Model Law, provides the legislative basis for Singapore’s international arbitration regime. The international arbitration caseload has been increasing in Singapore, with more cases, in particular, from China and India having been commenced at the Singapore International Arbitration Centre ("SIAC") in recent years. The cases at the SIAC increased to 198 last year compared to 160 in 2009, while the number of cases heard in Maxwell Chambers more than doubled - from 46 in 2009 to 120 last year. Singapore is also the fifth top seat of arbitration for International Chamber of Commerce-International Court of Arbitration cases. To further strengthen Singapore's position as an international arbitration venue and to keep its legislative framework progressive, the Ministry of Law is considering the introduction of several amendments to the IAA including:

- Amending the requirement that arbitration agreements be in writing;
- Allowing judicial review of Negative jurisdictional rulings;
- Clarifying the tribunal’s powers to award interest and costs; and
- Seeking to ensure that awards issued by an “emergency arbitrator” are enforceable.

The most controversial among these are the amendments with respect to the review of negative jurisdictional rulings and the emergency arbitrator procedure.

The amendment to allow review of negative jurisdictional rulings is the product of a report by the Law Reform Committee, which expressed the view that negative jurisdictional rulings should, like positive jurisdictional rulings, be subject to judicial review principally because:

- To disallow judicial review in negative jurisdictional ruling cases shuts out parties’ agreed form of dispute resolution (i.e. arbitration) and undermines the essence of what they agreed to avoid (i.e. litigation in national courts).
- It is inconsistent to deny judicial review of negative jurisdictional rulings, when judicial review of positive jurisdictional rulings is permitted. Injustice can just as easily arise in cases where a tribunal makes an erroneous negative jurisdictional ruling.
- Potential claimants may favour a seat where judicial review of negative jurisdictional rulings is possible.

The strongest case against the reform stems from party autonomy and the principle of kompetenz-kompetenz. Where parties have purported to agree to arbitration, the prevailing view is that it is fitting and important that the tribunal decides challenges to jurisdiction. Just as parties, by choosing arbitration, do not want national courts to pronounce on the merits of their dispute, it must be presumed that parties do not want national courts to pronounce on the validity or limits of the arbitration agreement itself. If the tribunal appointed according to their joint agreement does not consider that it has jurisdiction, then that decision must be
accepted. The lack of international consensus on the review of negative jurisdictional rulings is another reason why, it is argued, Singapore should be slow to accept this proposal, particularly if it wishes to strengthen its position as an international arbitration venue.

Another proposal of interest is the amendment with respect to emergency arbitrators. In July 2010, the SIAC amended its rules to include a procedure for the appointment of an emergency arbitrator, aimed at providing an avenue for parties to obtain urgent interim relief prior to the constitution of the full tribunal, and without having to seek relief before the national courts. However, both the legal status of emergency arbitrators and the enforceability of the interim orders issued by such arbitrators are unclear. In this connection, the Ministry of Law has proposed to amend the IAA to provide express legislative support for the emergency arbitrator procedure (for any arbitral institution which has similar provisions, and not limited to the SIAC) to make it clear that any orders issued by such emergency arbitrators would be enforceable.

While there is a need to clarify that awards issues by emergency arbitrators are enforceable, the amendment put forward in the draft Bill could potentially bring awards rendered by emergency arbitrators into conflict with Section 19(B)(2) of the IAA which provides that ‘upon an award being made…the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award’. Under the SIAC Rules, the orders or awards of an emergency arbitrator may be reconsidered, modified or vacated by the arbitral tribunal subsequently appointed according to the Rules. In addition, the emergency arbitrator’s interim award ceases to be binding if the arbitral tribunal is not constituted within 90 days of the award or when the arbitral tribunal makes a final award. One way to resolve this would be to exclude ‘interim’ and ‘interlocutory’ awards from section 19(B)(2).

The window for public consultation on these amendments closed on 21 November 2011. While it remains to be seen whether these proposals will be enacted by Parliament, it is clear that the law making bodies in Singapore are taking a keen interest in promoting Singapore as a centre for international arbitration.

SWEDEN

Ola Ilebrand and Caroline Snellman - Hannes Snellman Attorneys Ltd, Stockholm

Emergency arbitrator - the Swedish experience

The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the “SCC”) on the Emergency Arbitrator have attracted attention since they were introduced on 1 January 2010. As per 1 January 2012, the International Chamber of Commerce (the “ICC”) has also revised its rules for International Arbitration including a key amendment, i.e. the possibility to appoint an Emergency Arbitrator. The SCC has recently decided to release abstracts of the four Emergency Arbitrator cases that took place during the rules’ first years (embedded in an article by the SCC’s Legal Counsel). In view of the recent development within international arbitration regarding Emergency Arbitrators, the SCC’s experience so far may be of a certain interest.

In short, up to now, the SCC appointed an Emergency Arbitrator in four cases. Two out of four decisions were rendered within the SCC rules’ five days’ time limit. Extensions were granted in the other two cases upon request by the Emergency Arbitrator based on a petition by the respondent. One request for interim measures was successful, whereas the other three have been denied. Reasons for denial include findings that (i) the

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request was not of an urgent nature and that no irreparable harm would be inflicted upon the claimant if the request was denied, and (ii) the request did not aim at interim measures but rather was a substitute for a judgment or concerned material questions that could not be ruled upon by the Emergency Arbitrator. In the decision where the claimant was successful in its request for an interim measure, the respondent was ordered not to sell, assign, transfer, pledge or otherwise dispose of any of its shares in a company. The Emergency Arbitrator had found that the respondent’s offer to sell shares to other shareholders was sufficient proof of a need for interim measures to protect the claimant’s position.

In a different matter, one concern that has been voiced in relation to the Emergency Arbitrator proceeding under the SCC rules during its first years is the problem for a respondent to be compensated for its legal costs. Since the SCC rules provide that the cost of the emergency proceedings may be allocated between the parties by “an Arbitral Tribunal in a final award” at the request of a party (cf. Appendix II, Article 10 (5) SCC rules), the respondent may encounter difficulties in being compensated for its legal costs when a request for interim measure has been denied and the case has not, for one reason or another, evolved into ordinary arbitration proceedings. The new ICC rules provide that the costs of the Emergency Arbitrator proceedings (including the parties’ legal costs) and their allocation shall be decided by the Emergency Arbitrator’s Order (cf. Appendix V, Article 7 2012 ICC Arbitration Rules). Thereby, the ICC avoids the above-mentioned concern arising as to the costs of emergency arbitrator proceedings under the SCC rules.

**UKRAINE**

Michael Wietzorek - Landgericht Krefeld, Düsseldorf

The Enforcement of an LMAA Arbitral Award in Ukraine

The recently established Supreme Specialized Court of Ukraine for the Examination of Civil and Criminal Cases finally granted enforcement of an LMAA arbitral award rendered on 29 November 2006 in the case Sea Emerald S.A. (Panama) v State-owned Enterprise "Shipyard named after 61 Communars" (Ukraine) on 17 August 2011 (Case No. 6-15286sv11). A sole arbitrator had ordered 61 Communars to pay Sea Emerald an amount of US$ 17,258,750.63. The dispute that led to the arbitration arose out of a shipbuilding contract dated 9 December 1993.

This decision is the last one in a series of six decisions of Ukrainian courts dealing with Sea Emerald’s request for enforcement of the arbitral award. There had also been related proceedings in four Ukrainian commercial courts and in the High Court of England and Wales regarding a guarantee provided to Sea Emerald and in respect of obligations of 61 Communars.\(^1\) In addition, it is also very likely that the same dispute led to an investment arbitration initiated against Ukraine in 2007 under the Greece-Ukraine BIT by the Greek Laskaridis Group - to which Sea Emerald belongs.\(^2\)

Besides the fact that the arbitral award was granted enforcement after almost five years, the decision of the Supreme Specialized Court provides important guidance for parties willing to enforce arbitral awards in Ukraine:

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1. In the decision prior to the one reported, the Court of Appeals of the Mykolaїв Oblast refused Sea Emerald's request based on Article V(1)(b) of the New York Convention, which means that the court held that 61 Communars had not been given proper notice of the arbitration proceedings (Decision dated 10 March 2011, Case No. 22c-406/11). In particular, the court established that copies of messages printed from a computer and originally sent by the arbitrator using a telefax are not admissible evidence without the original documents, or stamps, or proof that such copies had been duly made. In addition, the arbitrator had sent the messages to a Ukrainian telefax number, yet not the one specified in the contract. In reversing that decision and granting enforcement, the Supreme Specialized Court took into account a whole host of documents already submitted in the previous instances by Sea Emerald, among them an affidavit given by the arbitrator under oath, certified by a notary public and accompanied with an apostil. This decision taken together with the Supreme Specialized Court’s decision in VA Intertrading AG (Austria) v TOV Hekro PET Ltd. (Ukraine) on 30 November 2011 (Case No. 6-18499sv11) should make it more difficult to rely on Article V(1)(b) of the New York Convention in Ukraine: there, the court explicitly confirmed that the burden of proof regarding the ground for refusal in Article V(1)(b) of the New York Convention lies on the party opposing such request.

2. The arbitrator had been appointed based on a provision in the arbitration agreement similar to the provision now contained in Sect. 17 of the English Arbitration Act 1996: As 61 Communars did not appoint a party-appointed arbitrator within thirty days after receipt of the notice about the appointment of an arbitrator by Sea Emerald, that arbitrator conducted the arbitral proceedings as a sole arbitrator. Such a provision may help prevent delays in the constitution of the arbitral tribunal. At the same time, there might be concerns whether the mere provision is in accordance with the principle that the arbitrator has to act impartially towards all parties. For instance, the German Federal Supreme Court made such considerations in 1986, but concluded that the corresponding Sec. 7 English Arbitration Act 1950 did not raise concerns (BGH 15 May 1986, NJW 1986, 3027). The issue is not discussed in the Supreme Specialized Court’s Sea Emerald decision.

Olena Perepelynska, MCIArb - Sayenko Kharenko, Kiev

New procedural rules of applying interim measures in foreign arbitral award enforcement proceedings in Ukraine


Law No. 3776 expressly confers upon a competent court the powers to grant interim measures during recognition and enforcement proceedings and sets out the applicable procedural rules.

Competent courts

Under Law No. 3776, the request for interim measures shall be submitted to the same court before which the recognition and enforcement of the foreign arbitral award is sought.

Terms and Conditions

The request for interim measures may be submitted by a party applying for recognition and enforcement of the foreign arbitral award and, if failure to order such interim measures may complicate or render the enforcement of the arbitral award impossible, such measures may be granted by a court at any stage of the respective enforcement proceedings.

Types of Interim Measures
The court may order any of the interim measures envisaged by civil procedure legislation (art.152 of the Civil Procedure Code of Ukraine), including: attachment of a debtor’s assets or money, injunction against certain debtor’s actions, order to the debtor to carry out certain actions, injunction against transfer of money or assets to the debtor by third parties, and order to transfer the object in dispute into the custody of third parties.

Procedure

The request for interim measures shall be considered by the court in *ex parte* proceedings on the day of its submission. In order to prevent possible abuses, the court may, when granting interim measures, request from the applicant suitable security to be transferred to the deposit account of the court.

The court’s ruling on granting interim measures can be enforced immediately according to the procedures established for the court judgments. Interim measures can be changed or cancelled by the court at the request of any party to the proceedings.

Conclusion

Thus, the Law No.3776 has filled a significant gap in the procedural legislation of Ukraine. It will undoubtedly facilitate enforcement of foreign arbitral awards in Ukraine and deter bad faith practices employed by some Ukrainian debtors to avoid paying their foreign creditors.

USA

*Colm P. McInerney – Skadden Arps, New York*

The Second Circuit Rules in *In re American Express* that a Federal Court May Issue an Anti-Arbitration Injunction in Certain Circumstances

The Federal Arbitration Act (the "FAA"), while granting – pursuant to Section 4 of the FAA – a federal court the power to compel an arbitration under certain circumstances, is silent as to whether a court may enjoin an arbitration (a so-called "anti-arbitration injunction"). Until recently, it was an open issue within the United States Court of Appeals for the Second Circuit as to whether a federal court could enjoin an arbitration pursuant to the FAA. The majority of relevant district court decisions had held that a federal court did have the power to stay an arbitration, with some courts stating that the power to enjoin arbitration was "the concomitant power" of the power to compel arbitration under Section 4 of the FAA. However, some other courts had questioned whether the FAA provided federal courts with such a power. Recently, the Second Circuit Court of Appeals, in *In re American Express Financial Advisors Securities Litigation*, answered the "open question" in the affirmative, stating that "federal courts are vested with power under the FAA to enjoin a pending arbitration where appropriate."
The facts of *In re American Express* relate to an arbitration conducted by the Financial Industry Regulatory Authority ("FINRA"). The plaintiffs, John and Elain Beland, had brought various claims against Ameriprise Financial Services, Inc. ("Ameriprise") before a FINRA arbitral panel. Ameriprise had been the Belands' financial advisor and, after they had lost a significant amount of money through their investments, they commenced an action against it. Ameriprise answered in the arbitration that the Belands had released their claims by operation of a settlement agreement in a class-action suit that had proceeded between 2004 and 2007 in the Southern District of New York, and it moved to stay the arbitration. The Belands were class members but had taken no action at the time of the settlement, neither opting in nor out of the settlement.

The FINRA arbitrators denied Ameriprise's motion to stay the arbitration. Ameriprise then commenced a federal court action, seeking an order to enforce the settlement agreement and enjoin the Belands from continuing with the FINRA arbitration. The Southern District issued an injunction enjoining the Belands from proceeding with their arbitration, finding that the settlement agreement barred all of their claims. The Second Circuit affirmed in part, holding that the settlement agreement barred some — but not all — of the Belands' claims.

As to the issue of whether it had the authority to enjoin an arbitration, the Second Circuit noted that neither party had raised the issue but, as the question was "an open one in this Circuit," it determined to answer it nonetheless. The court examined previous Second Circuit jurisprudence, finding that such injunctions were generally granted where a court determined either, one, "that the parties have not entered into a valid and binding arbitration agreement," or, two, "that the initiation of judicial proceedings in a foreign country constituted a waiver of a plaintiff's right to arbitration." The court then looked to the decision of the United States Court of Appeals for the First Circuit in *Societe Generale de Surveillance, S.A. v Raytheon European Management & Systems Co.*, which it found to be "instructive." The First Circuit in *Societe Generale* found that "to enjoin a party from arbitrating where an agreement to arbitrate is absent is the concomitant of the power to compel arbitration where it is present." It also stated that "[t]o allow a federal court to enjoin an arbitration proceeding which is not called for by the contract interferes with neither the letter nor the spirit of' the FAA."

The court emphasized, in a footnote, that "we are relying on a reading of the FAA, FINRA Rule 12200, and the Settlement Agreement. The particular circumstances presented in this appeal – with emphasis on the exclusive nature of the *In re AEFA* district court's retention of jurisdiction over the Settlement Agreement – persuades us that the district court here could properly enjoin the private arbitration of claims already settled and released by class members such as the Belands." It observed that other courts had explicitly relied on the All Writs Act, which authorizes federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions," in enjoining arbitrations in similar circumstances to the present case. However, the Second Circuit declined to "decide whether the dictates of the All Writs Act might, in another case without the type of jurisdictional retention present here, give a district court 'the authority to enjoin arbitration to prevent re-litigation.'"
While *In re American Express* answered in the affirmative the "open" question in the Second Circuit as to whether a federal court may stay an arbitration, subject to the court's additional comments discussed immediately above, two related issues remain to be affirmatively decided by the Second Circuit.

First, the court was not called on to address the issue of whether the venue provision of Section 4 of the FAA (which requires that a court that compels an arbitration must be located within the district where the arbitration is seated) also applies where a court stays an arbitration. There is conflicting district court authority on this point within the Second Circuit. 16

Second, *In re American Express* involved a domestic arbitration, and therefore the questions of whether a court may stay an international arbitration that is subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention"), 17 or indeed the 1975 Inter-American Convention on International Commercial Arbitration (the "Panama Convention"), 18 did not arise. The Second Circuit previously indicated in *Republic of Ecuador v Chevron Corp.* that in certain circumstances a court would have the power to enjoin an arbitration that was subject to the New York Convention, 19 and several Southern District of New York cases have enjoined an arbitration pursuant to Chapter 2 of the FAA 20 (the Convention’s implementing legislation in the United States). 21 However, the Second Circuit has yet to directly decide this issue.

Finally, it should be noted that federal courts within most of the other circuits have also held that they may stay or enjoin an arbitration, although the types of circumstances allowing for a stay and the reasoning that the courts provide for granting a stay have varied. 22

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16 Compare Kipyony Prods., Ltd. v RMH Teleservices, Inc., No. 97 Civ. 7599(LMN), 1997 WL 706445, at *1 (S.D.N.Y. Nov. 13, 1997) (holding that where "an application to stay an arbitration is brought in a district other than that in which the arbitration (if there is to be one) is to be held, the district in which the application for a stay is made does not have concomitant power to compel arbitration, because it does not have power under 9 U.S.C. § 4 to compel arbitration in another district.") with Maronian, 2008 WL 141753, at *8 (noting the lack of "clear guidance" on the issue, but holding it had the authority to stay an arbitration that was venued in Michigan).

17 21 U.S.T. 2517, 330 U.N.T.S. 3 (enabling legislation codified at 9 U.S.C. § 201 et seq.). The 1975 Inter-American Convention on International Commercial Arbitration, 1975 O.A.S.T.S. No. 42, 14 I.L.M. 336 (Jan. 30, 1975) (the "Panama Convention") should also be considered. This convention has been ratified by various states including the United States, Argentina and Brazil. See http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp (last viewed December 13, 2011). Chapter 3 of the FAA implements the Panama Convention into U.S. federal law. See 9 U.S.C. § 301 et seq. The Panama Convention will generally apply where the parties to the arbitration agreement are citizens of State(s) that have ratified or acceded to the Convention, and Chapter 3 of the FAA provides that the Panama Convention shall prevail over the New York Convention where "a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the [Panama] Convention and are member States of the Organization of American States [a regional body comprising members from North, Central and South America]." 9 U.S.C. § 305.


19 638 F.3d 384 (2d Cir. 2011).

20 9 U.S.C. § 201 ("The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.").


22 Some courts have held that they have this power under Section 4 of the FAA, some have held that the All Writs Act provides them with the authority, and some courts have simply applied the traditional test for a preliminary injunction to a party's motion to enjoin an arbitration. See Colm P. McInerney, "The Practice of United States Federal Courts Regarding Anti-Arbitration Injunctions" (December 2011) *Mealey's International Arbitration Report,* at Part VI.
**YIAG’s FORTHCOMING EVENTS**

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.

14 September 2012  
TYLNEY HALL

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

**OTHER ARBITRATION EVENTS**

Associação Portuguesa de Arbitragem – 21 March 2012  
Inaugural conference for APA Sub 40  
Lisbon, Portugal  
[http://arbitragem.pt/noticias/2012-03-21--programa.pdf](http://arbitragem.pt/noticias/2012-03-21--programa.pdf)

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