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1. NEWS:

ABA: The Arbitration Committee of the American Bar Association (Section on Dispute Resolution) released for public comment a revised draft for comments of the document "Disclosures for Arbitrators in Commercial Disputes". Dated January 3, 2009, comments are due by March 13, 2009.

AFOA: The American Fats and Oils Association have made arrangements to transfer the administration of its arbitrations to the American Arbitration Association (AAA) as of March 8, 2009.

CIETAC: The China International Economic and Trade Arbitration Commission reports on March 4th, 2009, that "In 2008, CIETAC established a new record by accepting 1230 new cases, including 548 foreign-related ones and 682 domestic ones, and resolved a total of 1097 cases, with a total claim amount of RMB 20.9 billion."

ICSAS: The International Commodity & Shipping Arbitration Service has been launched in London for the commercial resolution of international commercial and shipping disputes under English law.

Investment Arbitration Update: As of Dec. 31st, 2008, Global Financial Analytics LLC has published in the **TDM** website their annual report. Amongst other findings, the following headlines are noteworthy: "A steep decline in new filings in 2008, dropping from 37 new filings in 2007 to only 21 last year; ICSID registered new matters against only twelve respondent

countries; From an industry perspective, the energy and extractive industries continue to be the single largest source of investment claims."

LMAA: The London Maritime Arbitrators Association introduced The Intermediate Claims Procedure (2009) designed to deal with claims of between USD 100,000 and 400,000. LMAA has worked with BIMCO to produce some recommended additional wording for its Dispute Resolution Clause/Law and Arbitration Clause 1998.

SIAC: The Singapore International Arbitration Centre appoints nine leading arbitrators and arbitration counsel to its new Board of Directors for a term of 2 years, with effect from 1 March 2009. The new Board members include Professor Michael Pryles (Chairman), Mr Sundaresh Menon (Deputy Chairman), Mr Cavinder Bull, Mr Pierre Yves-Gunter, Mr David W. Rivkin, Mr John Savage, Ms Judith Gill, Ms Pallavi S. Shroff and Mr Byung-Chol Yoon.

SMY: The awards of the Society of Maritime Arbitrators Inc. are now available on Westlaw as well as Lexis/Nexis. This is the so called "SMA Award Service". So far over 4000 Awards have been published

UNCITRAL: Working Group II (Arbitration and Conciliation), in its 50th session held in New York, 9-13 February 2009, presents the "Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules".

2. LAWS & TREATIES:

ASEAN Comprehensive Investment Agreement. Signed on Feb. 26th, 2009, by the Governments of the Member States of the Association of Southeast Asian Nations (Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore Thailand and Viet Nam), it will replace both the 1998 Framework Agreement on the ASEAN Investment Area and the 1987 ASEAN Agreement for the Promotion and Protection of Investments (the "ASEAN IGA"). Article 33 allows the investors of the Member States to submit their claims to: (a) the

courts or administrative tribunals of the disputing Member State, (b) under the ICSID, (c) under the ICSID Additional Facility Rules, (d) under the UNCITRAL Arbitration Rules; or (e) to the Regional Centre for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN; or (f) if the disputing parties agree, to any other arbitration institution. Resort to any arbitration rules or *fora* under sub-paragraphs (a) to (f) shall exclude resort to the other.

Bolivia: A new Constitution came into force on 07.02.2009. Article 366 binds foreign investors in the hydrocarbons sector to Bolivian sovereignty and jurisdiction. No international arbitration agreements shall be upheld. Likewise, diplomatic or foreign tribunals protection will not be acknowledged in disputes relating to investments in hydrocarbons.

Brazil: A new Brazilian Gas Act (Bill no. 11.909, Federal Law) came into force on March 4th, 2009. The new Act provides that Concession Contracts and Commercialization Contracts must now contain rules on dispute settlement, including conciliation and arbitration to be drafted within the terms set in the Act no. 9.307 of Sept. 23rd, 1996.

Canada-Colombia: On March 26, 2009, the Government of Canada introduced legislation to implement bilateral Free Trade, Labour Cooperation and Environment Agreements in the House of Commons. Dispute settlement provisions envisage ICSID/UNCITRAL arbitration, separate arbitration process for stability contracts, and local administrative remedies.

Cook Islands have acceded, as the 144th party, to the New York Convention. It will be entered into force for the Cook Islands on April 12th, 2009.

Netherlands: The Arbitration Statute in The Netherlands is undergoing a complete facelift. Although unknown when it will become in force, the new Arbitration Act should bring the regulatory framework into line with modern trends and developments in comparative arbitration regulation and contemporary arbitration practice. It is believed the new act, embracing the 1985 UNCITRAL Model Law, will make the Netherlands a more attractive venue for international arbitration.

Israel: The Arbitration Act (Amendment No. 2), 2008 was published in the Official Gazette No. 2186, p. 22, on November 12th, 2008. It introduces the possibility of adopting appeal procedures on an arbitral awards. The idea is promoting the use of arbitration by overcoming any reluctance to arbitration where the forthcoming award is final and non-appealable. According to the new amendment, parties can adopt in

their agreement to arbitrate one of two types of appeal procedures: one private and the other one judicial.

Switzerland/Japan: An Agreement on Free Trade and Economic Partnership between Japan and the Swiss Confederation was signed on Feb. 19th, 2009. Article 94 provides for a settlement of investment disputes regime between the Investors and the Parties. On that scheme, investors may commence arbitration under (a) ICSID, (b) the Additional Facility Rules of ICSID or (c) an *ad hoc* arbitral tribunal.

United Nations: Through Resolution of Feb. 2nd, 2009, the General Assembly on the report of the Sixth Committee (A/63/438) approved the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. Also known as “Rotterdam Rules”, it contains rules concerning arbitration agreements and the designation of the place of arbitration in volume contracts of liner transportation.

3. LANDMARK RULINGS:

European Union

Anti-suit injunction. The main issue was whether the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves came within the scope of Regulation (EC) No. 44/2001 and then to ascertain the effects, on those proceedings, of an anti-suit injunction issued by the High Court of Justice of England and Wales in protection of an arbitration agreement. The anti-suit injunction was found not compatible with the Regulation No 44/2001 on various grounds. Among others, the ECJ held that “the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation”. Accordingly, “the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.” *Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc. (Case C 185/07, Feb. 10th, 2009).*

Canada

Stay of proceedings. A dispute arose out of an agreement incorporating an arbitration provision “in accordance with the JAMS International Arbitration Rules”. A month before Dancap sued in Ontario, Key Branch had commenced an action in the US District Court of California for an order compelling Dancap to submit their dispute to JAMS arbitration in California. Key Branch applied for a stay of the Ontario action based upon art. 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, adopted in Ontario by the International Commercial Arbitration Act, R.S.O. 1990. The Court of Appeal for Ontario granted a stay pending the arbitration underway in California. The “competence-competence” principle is thus re-affirmed and deference is called to arbitrators to resolve challenges to their jurisdiction. [*Dancap Productions Inc. v. Key Brand Entertainment, Inc.* \(Feb. 13, 2009 ONCA 135\).](#)

France

Public order. «In respect of the international public order exception, the judge, ruling on a recourse for the cancellation of an arbitration award, must confine himself to appreciating whether the arbitrator has committed an actual, blatant and concrete breach of the public order; the proper application by the arbitrator of the rules of law to the merits of the case falls outside the judge power of cancellation...» This decision is of importance as it confirms a prior ruling of the Supreme Court rendered on June 4th 2008, which could be misinterpreted by some in such a manner as suggesting that the judge is empowered to control the proper application by the arbitrator of mandatory EU regulations. [*M. de Prémont v. Trioplast A.B. Cour de Cassation, Chambre Civile 1^{ère} \(March 11th, 2009\).*](#)

Germany

Interim measures. The Brussels Convention on Jurisdiction and the Enforcement of Judgements in Commercial Matters (resp. EU Regulation 44/2001) apply to the recognition and enforcement of interim measures granted by EU state courts for safeguarding claims. Even if the decision whether the claims are valid or not will be made in an arbitration procedure. With this decision the Bundesgerichtshof clarifies its interpretation of the scope of Art. 1 section 2 No. 4 Brussels Convention respectively Art. 1 section 2 (d) of the EU Regulation 44/2001. [*Order of Bundesgerichtshof \(Federal Supreme Court\) published Feb. 5th, 2009 \(Case Ref. IX ZB 89/06\).*](#)

Netherlands

Dissenting opinion: In December 2008, the Supreme Court of the Netherlands rendered a decision in relation to an arbitration matter subject to the ICC Rules with The Hague as arbitration venue. It concerned a dispute under a contract for the construction of a railway in Turkey. The third arbitrator refused to sign the award. Reason behind his dissenting opinion was that the draft of the award had been discussed by the other two arbitrators only. Dutch procedural law on arbitration, applicable where the ICC Rules are silent, requires a notice in the award about the dissenting opinion, signed by the deciding majority. This requirement is not prone to reparation. Subject award did not contain this notice. The Dutch courts annulled the award, upheld by the Supreme Court, ruling that the signature requirement is essential and aims at securing an award is rendered in a collegial manner. This Dutch procedural rule also applies in international arbitration. [*Bursa Büyükşehir Belediyesi v. Güris Insaat Ve Mühendislik AS Siemens AG, Siemens Sanayi Ve Ticaret AS and Tivasas Türkiye Vagon Sanayi AS \(Supreme Court, Dec. 5th, 2008 \(Netherlands Jurisp. 2009/6\).*](#)

Spain

Costs. The parties agreed to be bound to the tribunals of Barcelona and to rule their disputes under Spanish Law. In manifest disregard of the agreement, Ángel Jesús entered a writ before the US Courts of Florida. He was claiming punitive damages of 455 Mio USD dollars (plus interests and costs) from USA Sogo Inc. The concept of punitive damages is inexistent in Spanish Law. Although USA Sogo Inc. defeated the US action, lawyers’ fees did not fall within the scope of recoverable costs. USA Sogo Inc. then sought reimbursement of US lawyers’ fees by filing a suit in Barcelona, Spain. The highest court in Spain held that Ángel Jesús was indeed liable for a blatant and reckless breach of the choice of forum and law. Damages were thus awarded to USA Sogo Inc. in as much as to cover US lawyers’ fees. Reportedly, there was no reason why the Spanish court should follow here the US principle on non-recoverability of legal costs. [*USA Sogo Inc. v. Ángel Jesús \(Recurso 3327/01; Tribunal Supremo, Jan. 12, 2009\).*](#)

United Kingdom

Defendants’ standing and investment arbitration. The Corporation of London commenced court proceedings in England against Mr. Sancheti, a solicitor of Indian nationality, for moneys due. Mr. Sancheti contested jurisdiction and issued an

application for a stay of proceedings under section 9 of the Arbitration Act 1996. He invoked the dispute settlement rules of a Bilateral Investment Treaty (BIT) concluded on 6 January 1995 between the U.K. and India, which called for ICSID arbitration or ad hoc arbitration under the UNCITRAL Arbitration Rules. Mr. Sancheti's appeal was refused. L.J. Lawrence Collins held: "The Corporation of London is not a party to the arbitration agreement. The relevant party is the United Kingdom government. The fact that in certain circumstances a state may be responsible under international law for the acts of one of its local authorities, or may have to take steps to redress wrongs committed by one of its local authorities, does not make that local authority a party to the arbitration agreement." Thus any award made in Mr Sancheti's favour in the BIT arbitration would not bind the Corporation. [City of London v. Sancheti \[2009\] 1 Lloyd's Rep. 117 \(C.A.\)](#).

Partial enforcement of award. NNPC had applied to the Federal High Court of Nigeria to set aside an arbitration award rendered locally in favour of IPCO. The latter, in turn, sought the enforcement in the U.K. The U.K. enforcement was adjourned pending the outcome of the Nigerian application. Three years later the Nigerian court proceedings showed no progress. IPCO then renewed its application and sought enforcement in the U.K. for at least the two unchallengeable parts of the award. NNPC's appeal was dismissed. The New York Convention 1958 and the Arbitration Act 1996 did not prevent part enforcement of the award in the instant case. An "all or nothing" approach to the enforcement of an award is inconsistent with that purpose and unnecessarily technical. The award was partly enforced. [Nigerian National Petroleum Corp. v. IPCO \(Nigeria\) Ltd. \(No. 2\) \[2009\] 1 Lloyd's Rep. 89 \(C.A.\)](#).

Stay of proceedings. The High Court of Justice declined an application by DHL GBS (UK) Limited to stay the registration in England of an Italian judgment entered against it. Finmatica, in the person of its Bankruptcy Receiver, brought a claim against DHL before the Court of Brescia, Italy, in respect of unpaid invoices for services. DHL did not participate in the litigation in Italy and judgment was rendered for the Receiver. The Italian Court decided that the Bankruptcy Receiver was not bound by a London arbitration clause incorporated to an agreement between the Italian Finmatica (now in Receivership) and DHL. The Italian Receiver filed an application to register the judgment in the U.K. under the Regulation (EC) 44/2001. DHL filed an appeal to set aside the registration of the Italian judgment in the U.K. It was held that a decision of a court of a Member State as to the applicability of an exclusive jurisdiction agreement must not be reviewed. [DHL GBS \(UK\) Limited v Fallimento Finmatica SPA \[2009\] EWHC 291, Feb. 20th, 2009 \(Comm.\)](#).

Jurisdiction. French underwriters sought contribution from English underwriters under insurance arrangements. A claim was made in Paris arbitration pursuant to an arbitration clause in the insurance arrangements. English underwriters denied the existence of the insurance arrangements and commenced High Court proceedings in London seeking a declaration of non-liability. The fact that the proceedings arose out of a contract (albeit one which the English underwriters denied) where England was the "place of performance of the obligation in question" was sufficient to found jurisdiction under Article 5(1) of the Council Regulation (EC) No. 44/2001. However, the French underwriters challenged the Court's jurisdiction pursuant to Article 1(2) on the basis that the whole foundation of their claim in Paris was that there was a contract with English underwriters and that the contract contained a Paris arbitration clause. The Court held that the mere fact that a claim is the subject of an arbitration agreement does not deprive a court, which could otherwise determine the substance of the claim, of its jurisdiction over that claim under the Brussels Convention. It is the nature and substance of the claim that is critical in determining whether it falls within the arbitration exclusion in Article 1(2). Here, the nature of the claim concerned the English underwriters' assertion that they were not liable under the alleged insurance arrangements. The fact that the French underwriters sought to enforce that liability in arbitration was not, in itself, sufficient to bring the claim within the arbitration exception. The French underwriters' remedy was to seek a stay under section 9 of the Arbitration Act 1996 instead. [Youell and Others v. La Reunion Aeriennne and Others \[2009\] EWCA Civ 175 \(March 11th, 2009\)](#).

Sovereign immunity. NML filed an application in the U.K. for the enforcement of a judgment issued in New York against Argentina. Permission was obtained to serve proceedings out of the jurisdiction on the basis that Argentina had waived its sovereign immunity by the terms of the agreement incorporated to the contract (i.e. bonds), the breach of which had given rise to the New York judgment. Alternatively, the agreement and the bonds were commercial transactions for the purposes of sec. 3 of the State Immunity Act 1978. A foreign judgment against a state would be capable of enforcement in England if the foreign court would have had jurisdiction if it had applied the United Kingdom rules on sovereign immunity set out in the State Immunity Act 1978, sec.2 to 11. [NML Capital Ltd. v. Argentina \[2009\] EWHC 110 Feb. 11th, 2009 \(Comm.\)](#).

Substantial injustice. The Court can use its power to set aside an award where the arbitrators behaved unfairly in a way that caused substantial injustice. In assessing whether there had been a substantial injustice, the Court is not required to decide for itself what would have happened in the arbitration had there

been no irregularity. The arbitrators' failure to deal with all essential issues is likely to be a serious irregularity under sec. 68 of the Arbitration Act. In this case, the arbitrators had not complied with their general duty of fairness as they had not explained why they had chosen a 10% interest on the awarded sum, as opposed to any other rate. [*Van der Giessen-de Noord Shipbuilding Division BV v Imtech Marine & Offshore BV \[2008\] EWHC 2904 \(Comm\).*](#)

Breach of arbitration agreement. On discharge at Dakar, cargo underwriters claimed damage and shortage over the goods and sought a bank guarantee providing for Senegalese jurisdiction. The bills of lading incorporated the London arbitration clause and thus the P&I Club preferred to use its standard letter of undertaking (LOU) incorporating English law or at least a "court or tribunal of competent jurisdiction" wording. Underwriters refused to accept such wording and decided to arrest the vessel. The vessel was released 12 days later after an English court had granted an anti-suit injunction. It was held that there was an express agreement for London arbitration and that, where a party seeks to use a foreign arrest for purposes beyond obtaining reasonable security for an arbitration claim, he would be in breach of the express agreement. The cargo underwriters were using the arrest to try to secure Senegalese jurisdiction. Their conduct, knowledge and intent was such as to make it liable for the accessory tort of procuring the insured's breach of the contract to arbitrate all disputes in London. [*Sotrade Denizcilik Sanayi Ve Ticaret AS v Amadou LO \(The Duden\) \[2009\] 1 Lloyd's Rep. 145.*](#)

United States

Conservatory measures. A judge of the Court for the Southern District of New York held that a contract for the sale of a vessel is within the maritime jurisdiction. The maintenance of a Rule B attachment action is thereby extended to ship-sale disputes. [*Kalafrana Shipping Ltd. v. Sea Gull Shipping Co. Ltd., a/k/a Sea Gull Shipping Co. SARL, 08 Civ. 5299 \(SAS\) \(S.D.N.Y. Oct. 2, 2008\).*](#)

Manifest disregard of the law. On appeal, the Court considered that manifest disregard of the law was no longer a valid ground for vacatur of a domestic arbitration award. Specially, in the light of the Supreme Court's recent decision in *Hall Street*

Associates, LLC v. Mattel, Inc. As an independent, non-statutory ground for setting aside an award, manifest disregard "must be abandoned and rejected". There still remains the question whether it is still applicable to international awards. [*Citigroup Global Markets, Inc. v. Bacon, Debra M. \(Case No. 07-20670 5th Cir. March 5, 2009\).*](#)

Arrest of ship. Reversing the District Court's ruling, the Third Circuit decided that the arrest of a vessel is not admissible to collect an award where the action *in rem* is time-barred by a statute (i.e. COGSA). That is so irrespective of an *in personam* arbitration claim that had been timely commenced. Neither the existence of a Letter of Undertaking (LOU) reserving the right to a later arrest for the unsecured sums was an reason to uphold the action. The right of later arrest, though expressly reserved in the LOU, is still "subject to the well-known one-year COGSA statute of limitations". Thus, on appeal, it was held that the COGSA statute of limitations is "one which extinguishes the cause of action itself, and not merely the remedy". [*Petroleos Mexicanos Refinacion v. M.T. "KING A", 554 F.3d 99 \(3d Cir. 2009\).*](#)

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This is a non-exhaustive review. Do not rely on its contents without legal advice from experts in the relevant jurisdiction. New contributors are welcome in the next issues. We thank those who contributed in present issue. Editor: Albert Badia.

The Commercial, Shipping & Investment ARBITRATION WATCH