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CEPANI, the Belgian Centre for the Study and Practice of National and International Arbitration, announced the creation of a study group charged with the revision of Belgium's arbitration act. Created in 1969, CEPANI was founded by the Federation of Belgian Business (VBO/FEB) and the Belgian National Committee of the International Chamber of Commerce (ICC) when Belgium was in the process of codifying the 1969 (Strasbourg) Uniform Arbitration Act. CEPANI hopes revisions to the arbitration act, which will result in the act more closely following the UNCITRAL Model Law, will increase the international influence of Belgium's arbitration act. The proposed revisions will be submitted to the Minister of Justice following a large consultation process during the first semester of 2010.

1. NEWS

Germany Hosts 17th Annual International Congress of Maritime Arbitrators

ICMA XVII, the Seventeenth International Congress of Maritime Arbitrators took place in Hamburg, Germany, in October 2009 hosted by the German Maritime Arbitration Association. In 20 different sessions almost 80 speakers from all over the world addressed the delegates on various issues concerning shipping and arbitration. Highly qualified papers on legal, technical and commercial issues will find their way into qualified arbitration awards. The next ICMA will take place in Vancouver between 13 and 18 May 2012. The Steering Committee of the ICMA appointed Manfred W. Arnold, member of the Society of Maritime Arbitrators Inc., New York, and the German Maritime Arbitration Association as its new Chairman. Following a suggestion of one of the delegates, ICMA has now its own website: www.icmaweb.com.

CEPANI to Propose Revisions to Belgium's Arbitration Act

Ecuadorian Investment Protection Agreements in Jeopardy

Ecuador's President Rafael Correa announced his intention to "denounce" or terminate bilateral investment protection agreements with thirteen countries. President Correa has requested that lawmakers end agreements with Finland, Sweden, Canada, the U.S., China, the Netherlands, Germany, France, the U.K., Ireland, Argentina, Chile, Venezuela, and Switzerland. Ecuador's bilateral investment treaties with these countries provide foreign investors from signatory countries with substantive protections in Ecuador. Additionally, in many cases the investment treaties allow foreign investors to pursue claims against Ecuador in international arbitration. This action follows President Correa's written notice to the International Centre for Settlement of Investment Disputes (ICSID), an entity of the World Bank that provides arbitration for international investment disputes, denouncing the ICSID Convention. This denunciation took effect on January 7, 2010. The government of Ecuador has criticized the international arbitration regime in the past. It has argued that companies have unjustly resorted to the international arbitrator and has questioned the impartiality of the ICSID arbitration.

rather than adding annotation and comments to the previous documents.

Arbitral Awards in China

On 12 November 2009, the Supreme People's Court of the People's Republic of China issued a judicial interpretation entitled "Several Provisions Regarding Assessment, Auction and Sale Entrusted by the People's Courts", which took effect on 20 November 2009. The Provisions aim to detail and amend the previous set of rules regarding assessment, auction and the sale of assets / properties of debtors in enforcement cases. Under the Provisions, the judicial technical department of Chinese Courts will be responsible for the assessment, auction and sale of assets / properties in enforcement actions. The assessors / auctioneers will be selected by the Courts from an established list of names in a transparent and random manner. The parties to an enforcement action will no longer be allowed to select the assessors / auctioneers by mutual agreement. The reserve price of any assets / properties to be enforced shall be equivalent to their assessed price (previously the reserve price could be as low as 80% of the assessed price). These measures under the Provisions should hopefully add transparency and fairness in the future enforcement of Court Judgments.

Scottish Arbitration Bill Enters Force

The Arbitration Bill 2009 was passed by the Scottish Parliament on 18th November 2009 and received Royal Assent and entered force on 5 January 2010. However, the main provisions of the Act are expected to be brought into force in March 2010. The Act is very much derived from the UNCITRAL Model Law and includes a very useful feature in that it can be amended by secondary legislation if any of NYC58, the Model Law or the UNCITRAL Rules change which, of course, the latter will do very shortly.

Draft of Revision to UNCITRAL Arbitrations Rules Issued

A draft of the revised articles 17 to 32 of the UNCITRAL Arbitration Rules has been prepared by the Working Group as a result of the Group's forty-ninth to fifty-first sessions. The revised articles were distributed on 10 December 2009 and will be considered by the Working Group for the third reading of the revised version of the Rules. The Working Group thought it advantageous in terms of clarity to propose a complete draft of revised Rules

2. LAWS & TREATIES

Haiti Ratifies the ICSID Convention

Haiti deposited an Instrument of Ratification of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) on 27 October 2009, making it the 145th state to ratify the ICSID Convention. The Convention entered into force for Haiti on 26 November 2009.

India and Colombia Sign Mutual Investment Agreement

The Bilateral Investment Promotion and Protection Agreement (BIPPA) between India and Colombia was signed 10 November 2009 by Anand Sharma, Minister of Commerce and Industry of India and Mr. Luis Guillermo Plata, Minister of Commerce, Industry and Tourism of Colombia. The aim of the agreement is to create favourable investment conditions which will enhance bilateral investment and technology flows between the two countries. An elaborate dispute resolution regime for issues arising between investors and the host government or between the each of the two governments is a feature of the Agreement. The agreement may be amended by mutual consent and shall remain in force for ten years and will be automatically extended barring either country's notice of its intention to terminate the agreement.

ASEAN – Australia - New Zealand Free Trade Agreement Signed

The Agreement Establishing the Association of Southeast Asian Nations (ASEAN)-Australia-New Zealand Free Trade Area (AANZFTA) was signed 27 February 2009 in Hua Hin, Thailand and entered into force on 1 January 2010 for eight of the twelve countries that signed the agreement including Australia, New Zealand, Brunei, Burma, Malaysia, the Philippines, Singapore and Vietnam. The AANZFTA will enter force in Thailand on 12 March 2010. The remaining three countries Cambodia, Indonesia and Laos are working to complete their internal requirements. The agreement will enter force for these countries sixty days following each country's formal notification of completion of the internal requirements. AANZFTA covers all sectors of trade including goods, services, investment,

intellectual property, electronic commerce, competition policy and movement of natural persons.

ALBA-TCP VII Summit Agreement

The Heads of State of Governments comprising the “*Alianza Bolivariana para los Pueblos de Nuestra América – Tratado de Comercio de los Pueblos*” (ALBA – TCP) participated in a summit in Cochabamba, Bolivia on 17 October 2009. The purpose was to establish the defence of International Law principles regarding sovereignty, right of self-determination, development rights, territorial integrity, promotion of social justice and international peace, educational rights, environmental protection. The participants pledged to work together to combat aggression and violence and foreign intervention in regional matters. ALBA-TCP promotes the principles of solidarity, cooperation, recognition of sovereignty between its member states, justice, equity, respect for cultural diversity, harmony with nature and the environment. ALBA-TCP strives to play a fundamental role in progressive processes around the world and to become an organization which promotes solidarity among the countries of South America. The member states understand the importance of environmentally sustainable development and reiterate the threats caused by global warming, the financial and economic crisis and, more specifically, and the food and energy crisis. ALBA-TCP attributes these problems to unsustainable production and consumer patterns, wealth concentration, the exploitation of natural resources and to speculation resulting from unchecked capitalism in its most concentrated form: Imperialism.

3. LANDMARK RULINGS:

Spain

Enforceability of Foreign Judgments. A court order handed down by the Court of Appeal of Barcelona during the execution of a foreign arbitration award was appealed to the Spanish Supreme Court. The Supreme Court held that the appellants cannot appeal to the Supreme Court regarding a foreign Court’s violation of its procedural rules. Under Spanish procedural law, enforcement of a foreign judgment is considered a special proceeding carried out for reasons of its substance. Therefore, under Spanish Supreme Court doctrine, appeals of special proceedings in general

can only be granted to further the interest of uniform legal doctrine. Thus, it is required that the appealed resolution run contrary to the Supreme Court precedent or creates an appellate court split regarding a rule of law, or contradicts a legal rule that has been in effect for no more than five years without existing precedents of the Supreme Court concerning previous rules of the same or similar content. It is important to realize that even though one of the main Spanish procedural laws limits extraordinary appeals of definite outcomes issued by the appellate courts due to fact that the interest of uniform legal doctrine is seen as a possible ground for appeal regarding super national rules and those rules have precedence over national rules, the Supreme Court understands that resolutions in the framework of executory proceedings regardless of the resolution, must be considered equivalent outcomes. Limiting extraordinary appeals avoids revisions of new facts or evidence which would produce delays in the enforcement of foreign judgements and arbitration resolutions, making the unimpeded application of resolutions possible. *Supreme Court Judgment, Civil Law Section, September 2009.*

Territorial Jurisdiction and Motion for Attachment. The claimant requested a motion of attachment relating to goods located in Alicante (Spain) owned by the defendant as a precautionary measure to secure a forthcoming award resulting from arbitration in London. The Commercial Courts no. 2 of Alicante denied the requested motion of attachment ruling that there was no risk to the plaintiff justifying attachment, in addition to the fact that any executory action ought to be postponed pending the outcome of the arbitration. The Commercial Court also held that the Civitavecchia Courts in Italy had already granted sufficient precautionary measures which would turn redundant yet another one in Spain. The claimant appealed to the Court of Appeal of Alicante, which, in turn, referred the claim to the Chief Prosecutor’s office, so that it could issue an opinion regarding the issue of territorial jurisdiction. In spite of the Chief Prosecutor’s office statement confirming the courtroom’s jurisdiction, the declared “the lack of jurisdiction of the Spanish tribunals” due to the absence of International Treaties signed by Spain that authorize precautionary measures in cases where the arbitration is held in a foreign country. The aforementioned decision, far from being positive, undermines the process of arbitration and denotes a worrying level of ignorance about procedural international private law by the Court of Appeal of Alicante, Section 8. *Judgment of the Court of Appeal of Alicante, 12 November 2009.*

Challenging Expert Opinions; Arbitration Law.

During the resolution of an appeal lodged with the Supreme Court by a insurance policy-holder relating to an expert's opinion involving objection and nullity of judicial proceedings sought by "Agroseguro" (Spanish Association of Combined Agrarian Company Insurance Entities), the Spanish Supreme Court held that the expert's opinion, as defined in article 38 of the Spanish Insurance Contract Law, is not an arbitral award and therefore cannot be contested in accordance with Arbitration Law. Therefore, even if experts and arbitrators in this case carried out similar activities (i.e. issuing technical statements and calculating the cost of damages caused by an accident), both come from different legal institutions falling under different legal regimes. The aforementioned expert's opinion lacks the executability characteristic of an arbitral award. The former makes exclusive reference to the valuation of damages and fails to address other aspects discussed between the parties. Furthermore, the challenge does not fall under the arbitration rules established for challenging awards. The proceedings involving the expert-surveyor fall under the insurance rule, the subject of which cannot be used to base an application for arbitration. *Supreme Court Judgment of November 11, 2009 - Civil Division.*

Peru

Two Rulings, Two Directions. In the first case, a constitutional action ("*acción de amparo*") filed directly against the award issued by the respective arbitration tribunal was vacated by the Constitutional Court after two decisions adverse to the plaintiff were issued by the judiciary. The court of first instance held that none of the plaintiff's constitutional rights were breached by the award being challenged. Subsequently, the Superior Court found that a constitutional action could not be brought against an arbitration award if the plaintiff has, at the same time, filed an Annulment Claim (a challenge against an arbitration award for limited causes specifically set forth in the Arbitration Law), which was pending before the Judiciary. [*Court Docket No. 05311-2007-PA/TC, Compañía Distribuidora S.A. v. the arbitration panel*].

In the second case, probably the first Annulment Claim under the Arbitration Law, the Superior Court of Lima understood that the grounds for vacating an arbitration award, as indicated in the Arbitration Act, could not be in any way construed as to allow a disguised re-examination of the merits of the case decided by arbitration, but should instead be

construed in a restrictive and narrow manner. Furthermore, the Superior Court found that even if one of the arguments used in the award could be challenged, if said argument is not the determinant reason of the award, then the latter could not be vacated. With this latter consideration, the Superior Court enforced a general principle in civil law, pursuant to which the eventual nullity of some points of an act do not imply the nullity of the act as a whole. *Court Docket No. 68-2009-02-SCO, parties undisclosed.*

Despite the procedural issues involved in the two rulings (which entail a larger explanation on remedies under Peruvian Constitution and their relationship with the Annulment Claim), it is clear that they come from entirely different approaches and cover distinct concerns. In the first case, the Constitutional Court, when it vacated the award found that: (i) pre-arbitration mechanisms (the direct negotiations or 'cooling off' period) were not dully observed by the Plaintiff; and (ii) the penalty clause agreed in the contract subject to arbitration was non-proportional, excessive and entailed an abuse of freedom of contract, an issue that should be dealt with by the new arbitration panel to be formed as a consequence of the of ruling in favour of the plaintiff in the constitutional action.

The different views are patent. While the Commercial Chamber of the Superior Court – appointed by the Arbitration Law with jurisdiction to resolve the Annulment Claims- takes a very narrow approach in vacating an arbitration award stating that even if the award may have invalid arguments (of those that constitute grounds for annulment) it may not be vacated unless those arguments do effectively determine the decision of the arbitration panel, the Constitutional Court takes a broader approach to the same issue, not only as to the procedural aspects (the plaintiff in the action brought before said court had already sought relief in another action), but on the merits of the claim: it allows judicial review even to rule on the reasonableness of a contractual clause.

Ukraine

Arbitrability. By two judgments delivered on 2 July 2009 and 30 November 2009 the High Commercial Court of Ukraine reversed two orders of the Commercial Court of Kherson Region on 6 April 2009 to enforce the awards of the *ad hoc* international commercial arbitration in Kherson city between the Ukrainian entity Ferum Invest Plus and the American corporation Capital Investment Group in matters regarding real estate located in the cities

of Dnepropetrovsk and Kherson. In the first case this Court referred to provisions of the Law of Ukraine on International Commercial Arbitration and resolved the matter under rules of the Code of Commercial Procedure about exclusive jurisdiction of commercial courts to decide the cases related to real estate. But in the second judgment the Court resolved the matter under new rules of the Law of Ukraine On the Domestic Arbitration Courts which exclude real estate cases from the jurisdiction of the domestic arbitration courts. *Ferum Invest Plus PE v Capital Investment Group Inc. Judgments of the High Commercial Court, 2 July 2009 No. 1/56-PD-2009 and 30 November 2009 No.1/56-PD-2009C*

Public Procurement and Arbitration. On 7 December 2009 the High Commercial Court of Ukraine upheld the judgment of the Kiev Appellate Commercial Court in the preliminary matter between the State Property Fund of Ukraine and AutoVAZ-Invest, Velbay Holdings Limited and Others. The Appellate court reversed the order of the Commercial Court of Kiev city on 2 September 2009 on rejection to take the General Attorney's claim in the interests of the State Property Fund of Ukraine because there were arbitration clauses in disputed agreements and, so, the commercial court lacks jurisdiction to try this case. In consideration of Velbay's cassation the High Commercial Court concluded that the Appellate court was correct having ruled that public procurement cases could not be submitted to arbitration and so the privatization cases have to be decided by commercial courts. *Attorney General (State Property Fund of Ukraine) v. AutoVAZ-Invest, Velbay Holdings Limited and Others. Judgment of the High Commercial Court, 7 December 2009 No. 05-6-48/85 (05-5-45/1432)*

Enforcement of Foreign Awards: Procedure. On 21 October 2009 the Supreme Court of Ukraine reversed the orders of the Feodosia City Court and the Appellate Court of Crimea refusing to enforce arbitration awards of the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce in the case between Stoninton Ltd. and Primoretst JSC. The Supreme Court has ruled that when considering the application on enforcement of the judgments delivered by foreign courts, the court tries the case within the application filed and the correctness of the judgments delivered by foreign courts cannot be doubted. The case was remanded to the first instance. *Stoninton Ltd v. Primoretst JSC. Judgment of the Supreme Court of Ukraine, October 21, 2009.*

Enforcement of Foreign Awards: Jurisdiction. The jurisdiction point on enforcement of international arbitration awards between civil and commercial courts has not been solved in legislature and practice. The Commercial Court of Donetsk Region handled new orders in *Berezastroymaterial* and *IST* cases on enforcement of foreign arbitral awards, but that practice has not been adopted in other regions. Therefore, we should pay attention to judgment of the Appellate Court of Kiev Region that upheld the order of the Kiev-Svyatoshinskiy District Court of Kiev Region dated 14 August 2009 which returned the application of Proxima Lebensmitteltechnik on enforcement of the award delivered by the International Commercial Arbitration Court at the Ukraine Chamber of Commerce. Having refused an appeal of Proxima Lebensmitteltechnik, the Appellate Court indicated that when delivering the ruling on application return, the judge decided that an award is to be recognized and enforced when an application is filed to the competent court. The competent court is to be determined according to the procedural rules of jurisdiction and venue. That is why the trial judge was correct that the Kiev-Svyatoshinskiy District Court of Kiev Region as a court of civil jurisdiction is not competent to hear the said application and held the legal ruling on return of the application to the applicant. *Proxima Lebensmitteltechnik v. Kievsky Myasoperera-bativayuschy Zavod. Judgment of the Appellate Court of Kiev Region, 2 December 2009 No. 22-C-5119/09*

United States

Court Overrules Rule B Attachments of ETFs. The case concerned a dispute between the Shipping Corporation of India (SCI) and the Jaldhi Overseas Pte Ltn (Jaldhi), a Singaporean company. SCI chartered the MV Rishikesh to Jaldhi to carry a cargo of iron ore from India to China. Under the terms of the charter party, SCI delivered the vessel to Jaldhi on 29 March 2008. The charter party between SCI and Jaldhi also provided for English law and London Arbitration. While the vessel was at the Kolkata port, a crane on board the vessel collapsed, temporarily interrupting cargo operations. Jaldhi subsequently failed to pay an invoice issued to it by SCI. Thereafter, SCI sought and obtained an order of maritime attachment pursuant to Supplemental Rule B of the Federal Rules of Civil Procedure in the US District Court (SDNY) as a means of securing Jaldhi's assets in anticipation of an arbitration award in SCI's favour. Subsequently, funds sent by Jaldhi via ETF to several third parties were attached. Jaldhi moved to vacate the order of attachment and its

motion was granted. SCI subsequently appealed. The appellate court held that funds sent via an electronic foreign transaction (EFT) and processed by intermediary banks were not property subject to attachment under Rule B. The appellate court held that the provisions of New York law establish that EFTs are neither the property of the originator nor that of the beneficiary while briefly in the possession of an intermediary bank. Rule B attachments require that the claim be maritime in nature, that the defendant's property, either tangible or intangible, lies in the district where the plaintiff brings a claim, and that the defendant is not found in the district where the plaintiff brings suit, and that there are no other bars to attachment. Because ETFs were not the property of the defendant Jaldhi, one requirement for supplemental Rule B attachment was not met and thus the ETFs could not be subject to attachment under Rule B. Prior to the Jaldhi decision, New York was the jurisdiction of choice to attach funds as most shipping and international trade transactions conducted in U.S. currency invariably pass through one of the clearing banks in New York. Between October 2008 and January 2009, 962 lawsuits seeking to attach US \$1.35 billion were filed by maritime claimants. As a result of the Jaldhi decision, there will probably be about thirty percent fewer civil cases filed in the Southern District of New York. *Shipping Corp. of India Ltd v. Jaldhi Overseas Pte Ltd., 08-3477-cv(L), 08-3758-cv(XAP), (2d Cir 2009) 16 October 2009*

Death on the High Seas Act and Forum Non Conveniens. In this case before the United States Court of Appeals for the Ninth Circuit, the plaintiff's husband, a Washington State resident, died in a scuba diving accident off the Mexican coast where he was vacationing at a Starwood resort in Los Cabos. The plaintiff filed a complaint in Washington State against Starwood alleging state law causes of action under the Washington State Consumer Protection Act (WCPA) and the Washington Timeshare Act (WTA) for falsely advertising that the resort offered safe scuba activities. Starwood removed the case to federal court on the basis of diversity and admiralty jurisdiction and subsequently sought dismissal on the grounds of foreign non conveniens which was granted. The court held that Death on the High Seas Act, 46 U.S.C. § 30301, et seq. (DOHSA) actions are within the admiralty jurisdiction of the federal courts, and are subject to discretionary dismissal. The plaintiff appealed arguing that actions implicating DOHSA are precluded from being dismissed on grounds of forum non conveniens because DOHSA provides the exclusive remedy for American beneficiaries and mandates venue in a United States district court.

DOHSA created a remedy in admiralty for wrongful deaths more than "a marine league" from shore and was a response to the Supreme Court's decision in *The Harrisburg*, 119 U.S. 199 (1886), which held that admiralty afforded no remedy for wrongful death in the absence of an applicable state or federal statute. One of the issues before the appellate court was whether DOHSA precludes application of the doctrine of foreign non conveniens. The court held that DOHSA claims may be dismissed by invoking the doctrine of foreign non conveniens. DOHSA actions lie in admiralty and the doctrine of foreign non conveniens is well accepted in admiralty law. In addition, the court rejected the argument that DOHSA "speak(s) directly" to the issue of mandatory jurisdiction. Furthermore, application of the doctrine of foreign non conveniens neither expands nor contracts the substantive law on wrongful death, but merely shifts the forum where the claim will be decided. *Loya v. Starwood Hotels & Resorts, 9th Cir. No. 07-35571 D.C. No. CV-06-00815-MJP, 02 October 2009.*

United Kingdom

Conflict of Laws; Recognition of foreign judgments in arbitration related matters. Readers may recall from Issue No.2 of this publication, which considered the first instance decision in this matter. Endesa Generación SA ("Endesa") commenced proceedings in the Spanish courts for damages resulting from late delivery of a cargo of coal under the Bill of Lading. On the basis of the arbitration clause incorporated into the Bill of Lading, National Navigation Co ("National") applied to the English Commercial Court for a declaration of non-liability as well as an anti-suit injunction for stay of the Spanish court proceedings. Prior to the Spanish judgment being handed down, National commenced arbitration and claimed that English law was the proper law for any disputes arising under the Bill of Lading, and that the arbitration clause was validly incorporated into the Bill of Lading. In the English court proceedings, Endesa relied on Art. 33 of the Regulation 44/2001 (the "Regulation") claiming that the judgment of the Spanish courts should be recognized by the English courts, and that the English courts were precluded from holding otherwise. The Spanish courts, however, held that Spanish law applied as there was no validly incorporated English law/ arbitration clause, and declined to refuse jurisdiction pending the decision of the English courts on that same issue. In the first instance decision, Gloster J recognised that a judgment of the Spanish courts would be covered by the terms of Regulation 44/2001, but on these particular facts, the Regulation did not bite

because the proceedings in question related to the validity of an arbitration clause, which proceedings were excluded from the Regulation. The judge also held that the arbitration clause had indeed been properly incorporated into the Bill of Lading and, therefore, English law was applicable. Endesa appealed to the Court of Appeal, which considered whether an issue of estoppel existed preventing the English courts from reaching a conclusion contrary to that of the Spanish courts, who themselves had already held that the arbitration clause was not incorporated into the Bill of Lading. The issue in question was whether this particular judgment of the Spanish Courts fell within the scope of the Regulation, and whether it therefore applied to the arbitration proceedings in question. The Court of Appeal considered the recent decision by the European Court of Justice (“ECJ”) in the *Front Comor*¹ and held that Gloster J’s judgment was contrary to the decision of the ECJ in that case. The ECJ held that a preliminary ruling by a court on the applicability of an arbitration clause, where the main subject matter of such proceedings was within the Regulation itself, fell within the scope of the Regulation. The Court of Appeal therefore allowed Endesa’s appeal, and held that the decision of the Spanish courts in relation to the absence of validly incorporated arbitration clause was binding on the English courts. Consequently, it was not open to the English courts to re-examine that very same issue. [National Navigation Co v. Endesa Generación SA – CA \[2009\] EWCA Civ 1397.](#)

Incorporation of Arbitration clauses; Civil Procedure; Estoppel. Capes Ltd (“Capes”) entered into two sale contracts with Western Arable Services Ltd (“Western”). The contracts had been concluded orally, and two contract notes (the “Contract Notes”) had been subsequently provided by Western, which purported to incorporate the standard form contract No.1/04 of the agricultural Industries Federation Limited (the “AIC Terms”). The AIC Terms themselves contained an arbitration clause. There was evidence that Western had previously sought to incorporate the AIC Terms in previous trades with Capes, although Capes countered this course of dealing argument by stating that their attention had never been drawn to it. Western rejected the goods; Capes entered into a substitute contract at a lower price and claimed against Western for breach of contract. Whilst Capes initially appointed an AIC arbitrator (apparently on advice received from the NFU Call Centre), and Western duly appointed their own. Thereafter, Capes sought to bring the dispute before the courts in lieu of arbitration. However,

Western challenged the jurisdiction of the court and applied for a stay of proceedings in favour of the arbitral process on two grounds. The first of these was that the AIC Terms had been validly incorporated, and therefore the arbitral tribunal was the proper forum for the determination of these disputes. Western’s second argument was that as Capes had appointed an AIC arbitrator as part of an AIC tribunal, it was estopped from pursuing an action in the courts. Both arguments failed. As to whether the AIC Terms were incorporated, the court upheld the view that it was not possible for those (and therefore the arbitration clause) to be unilaterally incorporated into the contract after the essential elements of the contract had been agreed. In particular, the court was not satisfied as to the validity of Western’s ‘course of dealing’ arguments, rejecting these. Consequently, no arbitration clause existed. In relation to the estoppel point, Western argued that the appointment of an arbitrator was a clear representation by Capes that the parties were bound by the provisions to arbitrate the dispute under AIC rules. The court did not accept this conclusion, as it was unsupported by the facts. The court decided, somewhat unusually, that both sides were treating the commencement of the arbitration as a provisional step, which might in the event prove to be unnecessary. Whilst it seems that the court’s unwillingness to read into such conduct an unequivocal representation by Capes that it wished to arbitrate might have rested to a large extent on the fact that Capes were erroneously advised by the NFU Call Centre, Western’s application was nevertheless dismissed. In addition, it is worth noting that Capes’ rather novel arguments as to the AIC Rules themselves, and in particular, the requirement that each arbitrator must be AIC qualified, and that this did not therefore comply with Article 6(1) of the European Convention on Human Rights. Although the court did not provide a definitive view on this, it nevertheless discredited the argument. [Capes v. Western Arable Services \[2009\] EWHC 3065.](#)

Arbitration awards; Enforcement; Limitation periods. The facts of this case are somewhat unusual. National Ability SA (“National”), the appellants, were owners of the *Amazon Reefer*. Disputes arose under a Gencon Charter dated 29 April 1995, Tinna Oils & Chemicals (“Tinna”), the respondents, being the charterers. The Charter provided for London arbitration under English law. Following the conclusion of two separate arbitration references following awards dated 19 November 1998 and 12 October 1999 respectively, the tribunal awarded National approximately USD 820,000 plus interest, costs, and interest on the costs. Whilst the

¹[2009] 1 AC 1138

above references were being progressed, Tinna entered into a scheme of arrangement (in India under the Indian Companies Act) with Tinna Flex Ltd (“TFL”). Proceedings ensued in the Delhi High Court between National, Tinna and TFL, resulting in a decision of the Delhi court that TFL was the party which was required to make payment to National under the above arbitration awards. The court refused to allow National the ability to enforce against Tinna. It should be noted that the decision of the Delhi court is reportedly the subject of an appeal. In the meantime, National sought and obtained an *ex parte* order from Aikens J on 14 July 2008 permitting them to enforce the awards as judgments against Tinna (instead of TFL, as the Delhi High Court had ordered). Such was the age of the matter that the application was made under s.26 of the Arbitration Act 1950 (the “1950 Act”). However, Burton J set this aside for various reasons including material non disclosure, although he allowed the s.26 application to be heard on an *inter partes* basis. Burton J then held that National’s application failed because the 6 year limitation period under s.7 of the Limitation Act 1980 (the “Limitation Act”) had expired, and the terms of s.7 applied to the s.26 application. National tried, in vain, to argue that s.7 only applied to the first of the two possible methods of enforcing awards under the 1950 Act:² (1) by an ordinary action brought in the High court, based on the common law right founded on an implied promise to pay the amounts due under an award; and (2) in the same manner as a judgment. This is a statutory process under s.26 of the 1950 Act (now replaced by s.66 of the 1996 Act). The crux of National’s arguments was that s.7 only applied to (1) above. As to method (2), National attempted to divide the s.26 procedure into two parts: (a) an application to obtain the judgment; (b) an application to enforce that judgement. National’s position was that there were no proceedings actually enforcing the award, only proceedings to obtain judgments, and that s.7 of the Limitation Act did not apply to the application to obtain the judgment. The Court of Appeal rejected National’s arguments out of hand, clearly heavily influenced by the uncertainty that this conclusion would have brought to this area of law. The court held that whilst the provisions of s. 26 of the 1950 Act, and indeed those under s.66 of the 1996 Act were procedural provisions enabling the award to be enforced, were quite different to the hearing of a dispute on the merits in the courts. Secondly, challenges to the enforcement of an award can be made on the basis that there is no arbitration agreement. Thirdly, the clear language of s.24 of the Limitation Act must be

² The provisions are the same in all material respects under the Arbitration Act 1996 (the “1996 Act”).

read in its context, i.e. that an arbitration award, as mentioned above, is essentially an implied promise to pay. For those reasons, the 6 year limitation period applied equally to both methods of enforcing arbitration awards, whether this be by an action under the common law doctrine, or under the 1950 Act (or indeed the 1996 Act). *CNational Ability SA v. Tinna Oils & Chemicals Ltd CA [2009] EWCA CIV 1330*.

Substantive Jurisdiction; Correctness of partial award. The Republic of Serbia (Serbia) sought an order from the court declaring the Arbitrator in an ICC arbitration between itself and ImageSat International N.V. (“ImageSat”) lacked substantive jurisdiction and setting aside the partial award. The arbitration arose from a contract between ImageSat and the State Union of Serbia and Montenegro (the “State Union”) concluded on 4 June 2005 where the State Union agreed to purchase a ground control station and to acquire exclusive rights to two of ImageSat’s satellites. The contract contained an arbitration clause specifying ICC rules would apply and English law as the governing law and England as the location for arbitration. The State Union failed to pay sums due under the contract and in early February 2006 stated it was not bound by the contract. On 24 May 2006 ImageSat requested arbitration from the ICC Court of Arbitration alleging breach of contract. Three days prior to ImageSat’s request for arbitration a referendum was held in Montenegro which favoured independence. On 3 June 2006 Montenegro declared itself an independent state and thereafter the two independent states of Montenegro and Serbia were formed. As a preliminary issue, the arbitrator directed that the issues concerning succession and proper parties to the arbitration be determined. The arbitrator found that Serbia is the continuation of the State Union under international law and if the agreement with ImageSat was binding on the State Union, it was therefore binding on Serbia. Had the arbitrator found Serbia to be a successor state of the State Union, the agreement between ImageSat and the Union State would not have been binding on Serbia. Serbia then sought a court order setting aside the partial award, arguing the Arbitrator lacked substantive jurisdiction to rule on Serbia’s status as successor or continuator state. The court undertook to analyze a series of issues in deciding whether to set aside the partial award. It first considered whether ImageSat was estopped or precluded from contending that Serbia is the “continuator” in law of the state Union by estoppel by convention or is Serbia’s challenge was precluded by a submission to jurisdiction. Estoppel by convention provides relief to one party when both parties have acted in their relationship upon the

agreed assumption that a given state of facts or law is to be accepted between them as true, and one party would be harmed if the other disavowed the agreed assumption. The court found that estoppel by convention had not been established because the dealings between Serbia and ImageSat failed to establish a mutually agreed assumption that, because of Serbia's status in international law, Serbia was not a party to the contract and the arbitration agreement with ImageSat. Furthermore, the dealings between ImageSat and Serbia failed to show that Serbia was only "participating in the arbitration as a successor state," to the State Union, not as a continuator state in which case Serbia would be liable for contracts formed the State Union. Additionally, the court considered the question whether Serbia's challenge to the arbitrator's jurisdiction is precluded by Serbia's submission to jurisdiction in the Terms of Reference which granted the arbitrator substantive jurisdiction to deal with the "continuator/successor" point. The court also considered the question whether Serbia is the "successor" or the "continuator" of the State Union was non-justiciable or nonarbitrable under English law. The court concluded that Serbia's challenge to the arbitrator's jurisdiction was precluded by Serbia's submission to jurisdiction in the Terms of Reference in terms granting the arbitrator substantive jurisdiction to determine *inter alia* the "continuator/successor" issue. The court found a lack of evidence within the Terms of Reference indicating that Serbia's participation in the arbitration was conditioned on Serbia being recognized as a successor State to the State Union. The court held that Serbia, by contractually submitting to the arbitrator's jurisdiction through its agreement in the Terms of Reference meant that Serbia gave the arbitrator substantive jurisdiction to determine Serbia's status as a "successor" or "continuator" state. However, the court analyzed the issue in the hypothetical where there was an absence of a contractual submission to jurisdiction. Absent contractual submission to jurisdiction, the issue becomes whether an arbitrator can deal with an issue that in another context would not be justiciable under English law. The court stated that where there is no issue whether the parties have entered an agreement to arbitrate but a jurisdictional issue nonetheless arises, the arbitrator has the competence under Section 30 of the Arbitration Act of 1996 (1996 Act) to rule on the matter even in a case where the determination involves consideration of a question which, in another context, would be non-justiciable. The court noted that it would be striking if an arbitrator lacked authority to make a provisional determination under a Section 30 basis whether a person or entity that has raised an objection is a party to the underlying contract and

arbitration agreement. Furthermore, the court noted that the court's lack of authority to exercise its powers under Section 67 of the 1996 Act because it involves a question that would be non-justiciable in other contexts would create a significant gap in the court's supervisory powers. The result would be that the court would be unable to both uphold a challenge to and set aside an award or to find that a challenge lacked foundation which would render an arbitrator's provisional determination meaningless. *The Republic of Serbia v. ImageSat International NV, High Court of Justice, Queen's Bench Division, 16 November 2009.*

Norway

Arbitration clause by reference dismissed. A shipping contract made reference to GENCON for international voyages and a harmonized Norwegian charter party for domestic voyages. Consequently, all charter parties were governed by arbitration clauses. The shipping contract itself, however, contained no arbitration clause. A claim for damages for breach of the shipping contract was brought before the ordinary courts in Norway. The defendant claimed that the dispute should be referred to arbitration in London according to cl. 19 of the GENCON charter party. It submitted that the clause was applicable for the dispute, as the shipping contract made express reference to GENCON. The Court of Appeal ruled in favour of the plaintiff, and held that the mere reference to GENCON could not be taken as an incorporation of its arbitration clause into the shipping contract. The Court of Appeal restated that arbitration clauses require evident basis in an agreement in order to be applicable, since they deprive the parties of the fundamental right to a trial before ordinary courts. The wording of the arbitration clause in GENCON did not indicate that the parties had agreed upon arbitration in London for disputes rising from the shipping contract. Furthermore, the shipping contract made reference to two different charter parties, which would create uncertainty as to which of the arbitration clauses the parties intended to incorporate in the shipping contract. Thus, the Court of Appeal held that the shipping contract was not governed by the arbitration clause in GENCON through reference. *Tinfos Jernverk AS v Wilson Eurocarriers AS, LA-2009-155061 (CA), 22 October 2009.*

4. NOTES:

A commentary of one of our contributors has been posted [online](#) about the the *SK Shipping (S) Pte Ltd v. Petroexport Ltd.*

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

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