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1. NEWS

ICSID Caseload Statistics

The International Centre for Settlement of Investment Disputes published the ICSID Caseload – Statistics (issue 2010-1) as of 31 December 2009. In aggregate, ICSID had registered 305 cases under the ICSID Convention and Additional Facility Rules, out of which 25 were registered in 2009. The basis of consent invoked to Establish ICSID Jurisdiction in ICSID cases registered in 2009 came, in 64% of cases, from bilateral investment treaties. The document contains other relevant data like the geographic distribution of ICSID cases by the State party to the dispute, the economic sectors involved in ICSID disputes, the outcomes in ICSID cases, and the nationality and geographic origins of arbitrators.

ICC Issues Arbitral Awards Checklist

The International Court of Arbitration has issued a two-page checklist that serves to remind arbitrators of key information that must be included in an ICC award. Key elements of the checklist include details about the relevant arbitration agreement, a complete history of the proceedings, decisions concerning jurisdiction, the disposal of the parties' claims and, in final awards, the costs of the arbitration. The checklist

also addresses matters of presentation, emphasizing the importance of clarity and consistency. The checklist is intended to serve as a guide and is neither mandatory nor binding upon arbitrators.

LMAA 50th Anniversary Celebrations

LMAA celebrated its 50th Anniversary with a conference and black-tie dinner event at the historic Guild Hall in London on the 18th of March, 2010. Distinguished speakers at the conference addressed such topics as controlling costs and delays, ensuring LMAA's competitive advantage in the future, the challenges of recruiting new arbitrators, the use of evidence protocols, and whether the LMAA ought to be a more prominent appointing body. A sold out gala dinner was held following the conference in the spectacular Guildhall, which has been the seat of the City of London's government for over 800 years. Guest speakers attending the dinner included Lord Clarke of Stone-cum-Ebony and Mark Jackson, Chairman of the Baltic Exchange. A good time was had by all.

Ecuador Loses Arbitration Claim Against Chevron

The Permanent Court of Arbitration in The Hague has ruled in favour of the Chevron Company in a dispute with Ecuador concerning oil operations by Chevron's subsidiary, Texaco Petroleum Company. The tribunal ruled that Ecuador, in failing to provide an effective means of asserting claims and enforcing rights, had violated the US-Ecuador Bilateral Investment Treaty. This ruling stems from the tribunal's finding that Ecuador's courts had violated international law by their delay on ruling on certain commercial disputes between Texaco Petroleum Company and the Ecuadorian government. The courts had continually delayed and refused to rule on Texaco Petroleum's cases, which was found to have constituted a breach of Ecuador's treaty with the US. Eleven claims seeking more than US \$6.5 billion in damages have been filed against Ecuador, making it the second largest arbitration docket in the world. Ecuador is only the second country to have withdrawn from the World Bank's arbitration

program and it has signalled its intention to cancel many bilateral investment treaties that provide for international arbitration of investment disputes.

New Arbitration Center Opened in Bahrain

The Bahrain Chamber for Dispute Resolution (BCDR) was officially opened on 10 January, 2010, by the Kingdom of Bahrain's Ministry of Justice in the capital city of Manama. The opening of the BCDR represents part of a national plan to foster alternative dispute resolution and international commercial arbitration. The jurisdiction of the BCDR to settle disputes was established by Legislative Decree No. 30 in 2009. This decree provides for statutory as well as consensual arbitrations, and gives the BCDR-AAA the status of "arbitration free zone" whose awards will not be subject to challenge by the domestic courts of Bahrain.

2. LAWS & TREATIES

India-Korea Comprehensive Economic Partnership Agreement

The free trade agreement between India and Korea was signed on 7 August 2009 and came into effect on 1 Jan. 2010. The Chapter 10 is dedicated to investment and includes a section on settlement of investment disputes which gives investors the choice among ICSID, ICSID ad hoc, Uncitral, or any other upon which the parties agree, to conduct their claims against either of the Member States.

New Rules concerning the Recognition & Enforcement of Foreign Arbitral Awards in Ukraine

The Law of Ukraine No. 1837-VI "On amendments to Certain Legislative Acts in Respect to Regulating International Private Law Issues" (the Act No. 1837/ the Act) became effective on 16 February, 2010. The Act introduced changes to rules regulating recognition and enforcement of foreign judgments in Ukraine, and expressly extended the application of the rules to the recognition and enforcement of foreign arbitral awards. Thus, since 16 February 2010, the Ukrainian Code of Civil Procedure relating to rules regulating recognition and enforcement of foreign judgments directly apply to recognition and enforcement of awards issued by

foreign or international arbitration tribunals. The Act No. 1837 has also changed the list of conditions for recognition and enforcement of foreign judgments (arbitral awards). The new Act sets forth that, in cases where an international treaty does not provide for recognition and enforcement of a foreign judgment, such recognition and enforcement is dependent on the principle of reciprocity which is presumed to exist unless proved to the contrary.

New BIT between India and Latvia

A new Bilateral Investment Treaty (BIT) was signed between India and Latvia on 18 February, 2010. It is hoped that the agreement will increase investment between the two countries. India's minister of commerce and industry, Anand Sharma, and Latvia's minister of economics, Artis Kampars signed the ten-year agreement. The pact was formed to increase investment and technology flows between the two countries through the creation of conditions that will be favorable for investors. The BIT also creates a dispute resolution scheme to resolve disputes between investors and the host State. The dispute resolution scheme includes negotiations, a domestic dispute resolution mechanism and international arbitration. The agreement will remain in force for ten years and thereafter automatically renew barring written notice by either country of their intention to terminate the agreement.

New Austrian VAT Treatment of Arbitration Services

Following the implementation of a number of European Directives, various important VAT (Value Added Tax) rules changed on 1 January, 2010. The new rules regarding the place of supply for services affect arbitration services. Prior to the new rules, arbitration services had been subject to Austria's 20% VAT if the arbitrator was established or resided in Austria. Under the new rules, business to business supply of services will be taxed where the customer is located. Thus, arbitrators will no longer be subject to the Austrian VAT provided that 1) the parties to the arbitration qualify as "business recipients", and 2) the parties have their place of business outside Austria.

New BIT between Austria and Kazakhstan

On 13 January 2010 the two countries signed a Bilateral Investment Treaty. Austria has been helping the central Asian state in its preparations to

chair the Organization on Security and Cooperation in Europe (OSCE) this year. The Austrian Foreign Minister Michael Spindelegger sees room for more bilateral cooperation in the energy area and facilities for industry and mining.

Kazakhstan President Signs Amendments Modernizing Arbitration Courts

Nursultan Nazarbayev signed a law on 5 February, 2010, concerning the immunity of the state and its property and the modernization of the arbitration courts and international commercial arbitration. The law addresses questions of immunity of the state and its property from international arbitration, the execution, suspension, revision, appeal and cancelation of arbitration decisions, and also the possibility of repeated arbitration or arbitration trials. The law brings the country into conformity with international legislation.

US Defense Appropriations Act limits Arbitration Agreements for Major Defense Contractors and Subcontractors

President Obama signed the Department of Defense Appropriations Act of 2010 on 19 December, 2009. Included in the legislation is a provision that bars federal contractors and subcontractors receiving Department of Defense funds for contracts exceeding \$1 million from requiring that an employee or independent contractor arbitrate certain employment claims. As a result of the legislation, claims arising under Title VII of the Civil Rights Act of 1964 and any tort related to or arising out of sexual assault or harassment must go to court. This new provision may signal a growing trend in Congress against mandatory arbitration agreements with employees, a trend that may lead to additional future legislation.

New “2010 SCC Rules” published

The Stockholm Chamber of Commerce issued a new set of arbitration rules with effect as of 1 January 2010. It comprises new versions of the Arbitration Rules and the Rules for Expedited Arbitrations. They include special provisions regarding the appointment of an Emergency Arbitrator whereby the parties may apply for an emergency decision on interim measures up until 30 days prior to filing a request for arbitration. The Emergency Arbitrator shall be appointed within 24 hours and a decision shall be rendered within 5 days. English is the original drafting language of these new rules.

3. COURT CASES

China

Applicability of Arbitration Clause in the Marine Insurance Subrogation Cases: Chinese Court

Judicial Practice: The Chinese Supreme Court has generally viewed arbitration clauses in marine insurance subrogation cases negatively. For example, in MV “JANDLUGOSZ” (2004), cargo arriving at the discharge port in China was found to be damaged and short. The insurer PICC compensated the cargo interest and initiated suit in Guangzhou Maritime Court against the ship-owner CHIPOLBROK. CHIPOLBROK then argued that the Guangzhou Maritime Court lacked jurisdiction based on the London arbitration clause provided in the bill of lading (B/L). Under Chinese law, if the lower court intends to deny the applicability of an arbitration clause that involves foreign factors, the lower court shall report internally to the high people’s court; and if the High People’s Court still intends to deny, it shall then report to the Supreme Court. Following this “internal reporting system”, the case then was referred to the Supreme Court. On 2 December, 2004, the Supreme Court delivered its Reply (MSTZ[2004]No. 43) that: “B/L arbitration clause is a procedural clause that is independent of the rights under the B/L...when the insurer gets the subrogation right, the rights and obligations under the B/L will be accordingly be transferred to the insurer. On condition that the insurer did not clearly accept the B/L arbitration clause, it shall not be binding on the insurer.” It is a controversial issue among Chinese judicial and academic circles about the B/L arbitration clause in the subrogation case and this landmark case, although being criticized as not pro-arbitration, makes it clear that the B/L clause is not applicable in the subrogation case unless the insurer clearly accepts it. However, how “clear acceptance” of the insurer is to be interpreted is still a problem. On 26 June, 2009, the Tianjin Maritime Court upheld the applicability of B/L arbitration clause in a subrogation case. Accordingly, this case is worth introducing to the readers.

Company A concluded a contract with transport company B for the carriage of equipment and the contract contained an arbitration clause under the China Maritime Arbitration Commission (CMAC). Because the cargo was damaged during shipment, A initiated arbitration before CMAC in 2007. Afterwards, insurance company C compensated A

pursuant to the insurance policy issued. C applied to join in the arbitration on 24 June, 2008, and B then raised objection to C's application. CMAC decided to accept C's application and B lodged suit before the Tianjin Maritime Court requiring the court to ascertain that there was no arbitration agreement between it and C. On 26 June, 2009, the Tianjin Maritime Court delivered the judgment ([2008]JHFQZ No. 1) that: "...although C was not a party to the arbitration clause, C's application to join the arbitration indicated that it accepted the arbitration clause." Therefore, the court decided that the arbitration clause was binding on the insurer C and dismissed B's complaint.

In brief, under Chinese law, the applicability of a B/L arbitration clause in the subrogation cases depends on the insurer's attitude, i.e., if it wants to avoid the B/L arbitration clause, e.g., London arbitration clause, it may simply bring a suit before a Chinese court. On the contrary, if it wants to make use of the B/L arbitration clause, e.g., CMAC arbitration clause, a simple application to join the arbitration will be sufficient. Although this judicial practice in China is unfair to the carriers, it should be paid attention to by the carriers and their lawyers.

The Enforcement of Convention Awards against Non-Party States: Arbitral awards against the Democratic Republic of Congo (DRC) were made in France and Switzerland in April 2003. The awards were the result of the DRC's breach of contract with Energoinvest, at the time a Yugoslavian company. Both France and Switzerland are parties to the New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards. The plaintiff company FG Hemisphere Assets LLC (FG) acquired the benefit of those awards in 2004 and obtained leave in Hong Kong to enforce the awards. The DRC claimed immunity from jurisdiction and from the process of execution of the awards. The Court of First Instance set aside leave and the injunctions. FG appealed the judgment. On appeal, the court held that the transactions that gave rise to the ICC award against the DRC were commercial and consequently, the DRC had no immunity from the jurisdiction of the Hong Kong courts to enforce the award. Furthermore, on remand, the court of first instance would be able to find that all or part of the DRC assets located in Hong Kong and against which execution of the award was sought, enjoyed no immunity from execution because the assets were dedicated to commercial rather than sovereign purposes. *FG Hemisphere Assoc. v. Democratic Republic of the Congo, High Court of Hong Kong Special Administrative Region, CACV 373/2008 & CACV 43/2009, 10 February, 2010.*

Germany

Jurisdiction over execution of a judgment when unspecified in the Arbitration Agreement: The question before the Higher Regional Court in Munich was which court has jurisdiction over an order for the execution of a judgment when the arbitration agreement between the parties concerned was silent on the matter. In this case the court held that the court that lies in the district where the arbitration award was issued has jurisdiction. This location is determined pursuant Section 1054, Paragraph 3 of the German Code of Civil Procedure concerning arbitration awards. If the parties have failed to agree on a location for the arbitration proceedings, the arbitration can take place in the location which the arbitrator finds suitable in accordance with Section 1043, Paragraph 2 of the German Code of Civil Procedure. *OLG München, Judgment from 03.02.2010, Case Ref. Az. 34 Sch 24/09*

Slovenia

Slovenian Court approves Arbitration Agreement with Croatia. On 23 March 2010 the Slovenian Constitutional Court ruled that a maritime border agreement reached through arbitration which resolves the border dispute with Croatia is constitutional. The ruling frees the Slovenian parliament to commence proceedings to ratify the agreement.

Spain

Arbitration Agreement; Waiver by Acquiescence: The parties entered into a contract which incorporated an arbitral agreement. After some differences, they decided to bring their case to the judicial courts. The respondents applied for a stay of proceedings based on the arbitration agreement, but the judge affirmed his competence and the respondents' application was dismissed. There was never an objection to the dismissal order and thus it became final. The case reached the appellate courts of Seville and, thereafter, the Supreme Court. The respondents attempted to re-open the jurisdictional issue, but the Supreme Court refused to hear it. By not objecting to the dismissal order given by the court of first instance, the respondents had lost their right to call upon the arbitral jurisdiction, and, therefore, they were subsequently precluded from doing so at the Supreme Court. *Order of the Supreme Court, 12th Jan. 2010.*

Vacation of Award; Misdelivery of Service: The Appellate Court of Murcia annulled an award due to an error in the arbitral process. Neither the notice of arbitration nor the appointment of the arbitrators ever reached the respondents' domicile. The record showed that the notices which were addressed to the respondents had all been returned undelivered, as they had been sent to their former domicile rather than their current one. In its judgment, the Court reproved the fact that the arbitral tribunal did not conduct any search of the respondents' true domicile. *Judgment of the Court of Appeal of Murcia, Jan. 13th, 2010.*

United Kingdom

General Words Sufficient to Incorporate Arbitration Clauses: This case presented the question whether general words were sufficient to incorporate an arbitration clause into a contract of sale. Sometal formed a contract with Habas to sell Habas scrap steel. Key terms were included in the contract. The contract ended with the general words, "all the rest will be the same as our previous contracts." These words were an allusion to the fourteen contracts the parties had previously formed. The first three of these contracts were written on Habas's letterhead and included either Istanbul or UNCITRAL arbitration clauses. The eleven subsequent contracts were written by either Sometal or were on the letterhead of Sometal's agent. Some of these contracts contained a London arbitration clause while others were silent on the matter. The court held that general words of incorporation may sufficiently incorporate an arbitration clause from one contract into another. However, the court distinguished the incorporation of terms from a different contract made between the same parties, so-called one-contract cases, from the incorporation of terms from a contract of different parties, or between one of the parties and a third party, so-called two contract cases. Clearer words are necessary to incorporate an arbitration clause in the second category of cases. *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal Sal [2010] EWHC 29 (Comm) (18 January, 2010).*

Extension of time limitations of arbitration claims. The facts relate to two contracts for the purchase of sunflower seed oil to be shipped from Ukraine to Spain. The contracts incorporated an arbitration agreement according to the rules of the Federation of Oils, Seeds and Fats Association (FOSFA). The Buyers later discovered the presence of mineral oil in both sunflower seed oil shipments and initiated two arbitration proceedings. Despite the fact that under Article 2 of the FOSFA Rules, both

arbitrations were time-barred, the arbitrators concluded in two separate awards that they should exercise their discretion under Rule 2(d) of the FOSFA Rules to allow the claims to proceed. The Buyers appealed and a FOSFA Board of Appeal published two appellate awards reversing the first tier awards, ruling that the claims were time-barred. The Buyers appealed to the High Court. On appeal, the court noted that there was a significant delay in proceeding with claims for arbitration even after the Buyers became aware of the mineral oil contamination which involved a high degree of fault on the part of the Buyers. Furthermore, the Buyers should have been familiar with the terms of the contract, especially considering the fact that they had a legal department. Given these factors, the court ruled it would be unjust to extend the time in which Buyers could file an arbitration claim. *SOS Corp. Alimentaria, S.A. & Mataluni SPA v. Inerco Trade SA, [2010] EWHC 162 (Comm) (27 January, 2010).*

United States

Excessive and Direct Award of Attorney's Fees, Rational Basis Test: 5th Circuit Reinstates Arbitral Award: Claus, and an employee of Institutional Capital Management (ICM), entered into an agreement to buy and sell bonds. Claus acquired bonds with the intent to sell them to Sterling Financial Investment Group, Inc. (Sterling). The plan failed. Claus subsequently filed claims against ICM and Sterling. A National Association of Securities Dealers arbitration panel ("the panel") awarded Claus \$25,000 in compensatory damages, and awarded \$70,000 in attorney's fees directly to Claus's attorney. Claus was also charged \$22,000 in arbitration fees. Sterling and ICM's motions to vacate the award were granted because "the arbitration panel exceeded its authority" by awarding attorney's fees directly to Claus's attorney in violation of Texas law. On appeal, the court held that the fact that fees were paid directly to Claus's attorney was not a reversible legal error because a party who has been ordered to pay attorney's fees in this manner lacks standing to challenge this aspect of the attorney's fee award. Because it is usually immaterial to the party paying attorney's fees how those fees are handled by the prevailing party, any such error is harmless. The court also held that a disproportionate fee award is not tantamount to an excessive attorney's fee award under Texas law. The court also declined to vacate the award based on the argument that Claus suffered no losses. Citing a previous case which held that "if an award is rationally inferable from the facts before the arbitrator, the award must be affirmed," the court

found that Claus “could have suffered damages in the form of lost opportunities or commissions,” and thus there was a rational basis for the award. *Institutional Capital Management Inc, v. Claus, U.S. Court of Appeals, 5th Circuit, 11 February, 2010.*

Estoppel and alter ego theories as basis to compel arbitration: US Airways initiated arbitration proceedings against Oppenheimer & Co. for damages stemming from the sale of Auction Rate Securities to US Airways. Third-party claims were asserted by Oppenheimer in the same arbitration against Deutsche Bank (DB) and its affiliate Deutsche Bank Securities, Inc., which was required to arbitrate the dispute owing to its FINRA membership. The court first analyzed estoppel as a basis for compelling DB to arbitrate. Under New York State law, a party must knowingly accept the benefits of an agreement containing an arbitration clause, and the benefits must flow “directly” from the agreement for the basis of estoppel to be established. The court held that any benefits DB gained were “indirect” because DB benefited “indirect[ly]” from the client relationships established by its U.S. affiliate rather than directly by availing itself of any rights created by the arbitration agreement. Thus estoppel failed to establish a basis by which to compel DB to arbitrate. The court then considered whether DB and its affiliated U.S. securities broker were alter egos justifying a piercing of their corporate veil. The court ruled that mere ownership control and direction of policies and management were not sufficient to compel arbitration based on the theory of alter egos because there was no proof of “actual domination,” undercapitalization, or evidence that DB disregarded corporate formalities or used the affiliate’s funds improperly. *Oppenheimer & Co. v. Deutsche Bank AG, S.D.N.Y. 2 March, 2010.*

US Supreme Court Refuses to Hear Rule B Attachment Case. The US Supreme Court refused to grant certiorari to hear an appeal of the October 2009 decision by the US Court of Appeals in *Shipping Corporation of India vs. Jaldhi Overseas Corporation* which ruled ETFs passing through banks in New York City were not subject to Rule B attachment proceedings. New York banks welcomed the appellate ruling as the cases of ETF attachment had grown exponentially following the onset of the recession. In the first three months following October 2008 almost 1,000 ETF attachment cases were brought in New York. Rule B attachment is an *ex parte*, preliminary maritime remedy in the US which allows a plaintiff to obtain security for a claim

by attaching the assets of the defendant. Rule B attachments of ETFs were particularly attractive in the Southern District of New York which includes Manhattan because most of the world’s dollar-denominated ETFs pass through banks located there and thus, prior to the Jaldhi ruling, were attachable under Rule B.

Enforcement of an Award against Albania. A court in the District of Columbia ruled in favour of GE’s petition to enforce the \$20.6 million judgment against the Government of Albania for breach of the 74.1 Euro contract signed between the two parties in September 2003. The government of Prime Minister Sali Berisha rescinded the contract in 2005, claiming the price of the contract was exorbitant and that Albania lacked the funds to honour the contract. The subject of the contract involved the modernization of the Tirana-Durres railway segment which would have linked with the Mother Theresa International Airport.

4. NOTES

An article of one of our contributors has been posted [online](#) under the title “Rule B Third Episode: some get vacations, others have to pay”.

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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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