

CONTENTS

1. News
2. Laws & Treaties
3. Court Cases
4. Notes
5. Contributors

1. NEWS

IBA Rules on the Taking of Evidence in International Arbitration

On 29 May 2010, the International Bar Association adopted the new IBA Rules on the Taking of Evidence in International Arbitration. The revised IBA Rules saw the light after a two-year review process undertaken by the IBA Arbitration Committee and a public consultation turn. They update and supplement the 1999 version to reflect current practices and challenges. Among other features, they require the tribunal to consult the parties as early as possible with a view to agreeing on an efficient, economical and fair process for taking evidence. They provide greater guidance on how to address requests for documents or information maintained in electronic form ("e-disclosure"), and for documents in the possession of third parties. The confidentiality protections for *ex parte* documents have been expanded and a greater clarity is achieved in the treatment of expert reports. The use of videoconference or similar technology is approved for witness appearance. There is more specific guidance respecting issues of legal impediment or privilege, and an express mandate of good faith emerge in taking evidence. The revised

IBA Rules will apply to all arbitrations in which the parties agree to apply the IBA Rules.

"Latest Developments in Investor-State Dispute Settlement"

A paper has been published by the UNCTAD under the title "Latest Developments in Investor-State Dispute Settlement", IIA Issues Note No. 1(2010). It is based on a draft prepared by Federico Ortino, King's College London. The work provides an insight to investment treaty arbitration on the 2009, the recent trends, some statistics, and how substantive issues like Most Favourable Treatment or Fair & Equitable Treatment, and procedural ones like jurisdiction or interim measures, have been decided lately.

25th Anniversary of the Hong Kong International Arbitration Centre

To celebrate this special occasion, the HKIAC will host a series of events from 17-20 November in Hong Kong. The festivities include a series of conferences and lectures with the participation of eminent practitioners like Jan Paulsson, Lord Hoffman, Lord Goldsmith QC, Prof. Dr Gabrielle Kaufmann-Kohler, Arthur Marriott QC, Albert Jan van den Berg, David W. Rivkin, Dominique Brown-Berset, Hon. Charles Brower and others. A mock arbitration will also be held with the support of the ICC and the Chartered Institute of Arbitrators, East Asia Branch.

New arbitration centre in Cyprus

In April 2010 the Cyprus International Arbitration Centre (CIAC) has been registered as a new arbitration centre for domestic and international arbitrations. CIAC has its own Arbitration Rules, but it can convey arbitrations also under the UNCITRAL Arbitration Rules. The CIAC is a not-for-profit company funded by a group of businesses and professionals in Cyprus. The former Cypriot Judge and member of the Permanent Court of Arbitration, Sotos Demetriou, is leading the

management committee. Cyprus has recently announced the establishment of the Cyprus International Arbitration Centre (CIAC). The CIAC is set up by a group of leading businesses and professionals in Cyprus and constitutes a non-profit company. Cyprus adopted the UNCITRAL model law on International Commercial Arbitration and ratified the New York Convention of 1958 through the Law No. 84 of 1979

Maritime Arbitration in West Central Africa

A specialized Maritime Arbitration and Alternative Dispute Resolution Centre is to be established in Lagos for the West and Central African Sub-Region. This decision was disclosed in the Communiqué issued at the end of the two-day International Conference on Promoting Maritime Arbitration and Alternative Dispute Resolution in the West and Central African sub-region, which took place in Lagos in May 2010. The Director General of the Nigerian Maritime Administration and Safety Agency, NIMASA, Mr. Temisan Omatseye restated the Agency's resolve to create an enabling environment for Arbitration and ADR, as first options in dispute resolution in the maritime industry. Last year the Lagos State of Nigeria enacted two new laws, the Arbitration Law (Law No 10 of 2009) and the Lagos Court of Arbitration Law (Law No. 8 of 2009), to contribute to the promotion of Lagos as the hub of commercial arbitration in the West African region.

Confidentiality in the Market Arbitration Panel of São Paulo, Brazil

In 2001, the São Paulo Stock Exchange (BM&FBovespa) created its own arbitration chamber (the so called "Market Arbitration Panel"), seeking to provide the market with a proper, fast and safe alternative forum for resolving disputes. Although the arbitration chamber was originally created for settling disputes arising in specific listing segments (segments earmarked for the trading of shares issued by companies that have voluntarily undertaken to abide by specific practices of corporate governance and transparency), it can now be used for settling any kinds of dispute relating to capital markets and corporate law issues. In 2008, an administrative proceeding was filed with the Brazilian Securities Commission requesting recognition that, contrary to other arbitration proceedings, the Market Arbitration Panel proceedings could not be confidential. The request was based on the assumption that, due to the practices of corporate governance and transparency that are deemed necessary both by law and by São

Paulo Stock Exchange rules, confidentiality would be incompatible with such proceedings. On February 2, 2010, the Brazilian Securities Commission denied the plea and ruled that confidentiality is part of the very nature of most arbitration proceedings and is not incompatible with the practices of corporate governance and transparency which can be observed regardless of said confidentiality. Such ruling was recently confirmed by a decision dated April 27, 2010, which denied a motion for review filed against the Brazilian Securities Commission's previous decision. Ref. Administrative Proceeding CVM # RJ 2008/0713.

Changes at the GMAA

Christoph Hasche takes over as Secretary of the German Maritime Arbitration Association (GMAA). Shortly after the establishment of the GMAA in 1983, Dieter Griebel took on the post of Secretary and, by supporting the Board, managed the matters of the Association. With effect from 1 May, Dieter Griebel passed on his post as Secretary to the Hamburg lawyer and Board member, Dr. Christoph Hasche. The headquarters of the GMAA have recently moved across to the Hanseatic Trade Center in Hamburg's HafenCity.

Publication of ICSID Decisions and Awards with the Parties' Consent

“The ICSID Secretariat has initiated a project to make more ICSID jurisprudence publicly available. To date, ICSID has published decisions and awards on the ICSID website or in the ICSID Review-Foreign Investment Law Journal, with consent of the parties involved. The Centre also publishes excerpts of the legal reasoning in an award where a party does not wish to publish that award (see Arbitration Rule 48(4)). The purpose of the current project is to provide access to as much ICSID case law as possible, including procedural and substantive rulings. To that end, the Secretariat will be contacting parties in concluded cases to seek their authorization to publish decisions, orders and awards not yet published by the Centre. This case law will be posted on ICSID's website if both parties agree to publication. ICSID is aware that parties may view some information as confidential, in which case it will seek their consent to publish the rulings with appropriate excerpts or a general description of the relevant information, in lieu of the full text of the ruling.” Source: [ICSID's website](#).

Investment trends and policy developments

The UNCTAD Investment and Enterprise Division has reported that between December 2009 and March 2010, 73 economies concluded 37 International Investment Agreements, 7 of which were bilateral investment treaties (BITs) and 23 double taxation treaties (DTTs). Apart from the agreement between Bahrain and Uzbekistan, each new BIT involved either a G-20 country (Germany, India and Turkey) or a member State of the European Union (EU). Two BITs are South-South agreements.

2. LAWS & TREATIES

Belize at odds with arbitration

The Supreme Court of Judicature (Amendment) Act of 2010 has been passed in Belize. Chapter 91 of the Act vests domestic courts with power to vacate any arbitral award, whether in Belize or elsewhere, which disregards injunctions eventually be ordered in the territory. Under the Act, disobeying an injunction becomes an offence and attracts punishments which range from severe daily fines to five years imprisonment. That could be a cause for concern to the parties in a dispute, to arbitrators, or to both. The new Act is blatantly hostile to corporate ventures and erodes the confidence in investments. Foreign direct investment has played a key role in the development of the sugar industry, citrus, energy and tourism sectors of Belize. In 2008 the records show capital and financial flows up to US\$109M.

New Commercial Arbitration Act in Vietnam

On 17th June 2010, the National Assembly of Vietnam ("Parliament") approved a New Act on Commercial Arbitration, which will come into force on 1st January 2011. The New Act replaces the current Ordinance on commercial arbitration of 2003 and introduces innovatory changes.

Ireland Arbitration Act 2010

The Arbitration Act 2010 entered into force on 8 June 2010 in Ireland. The former statutory regime, which has been entirely replaced by the 2010 Act, drew a distinction between domestic and international commercial arbitrations. This was viewed as not helpful in presenting Ireland as a modern venue for arbitration in the 21st century. The

new Act will apply the UNCITRAL Model Law (as amended in 2006) to all arbitrations - both domestic and international - which take place within Ireland. Thus, the Act is intended to create a more streamlined, cost-effective and user-friendly arbitral system. It remains to be seen, of course, whether the Act will provide the necessary legal underpinning for the development of Ireland as a leading arbitration centre. However, the successful hosting of the ICCA conference in 2008, the growing pool of international arbitration practitioners in Ireland, and a growing awareness of Dublin as a suitable venue, all bode well for the future.

Legislative Changes in Spain

On May 5th, 2010, the Spanish Act 13/2009 came into force. Among others, it turned effective a number of changes in arbitration, the most relevant of which relate to the action of annulment of awards and to conservatory measures. As far as the latter is concerned, the new Act acknowledges generally the right to obtain interim measures in Spain for anyone that, after fulfilling the ordinary requirements, becomes a party to an arbitral dispute abroad. Such right will nonetheless be denied in the event that it is proved that the merits of the dispute must fall under the sole jurisdiction of the Spanish courts.

Cyprus removed from the Russian List of "offshore" countries

Cyprus was officially removed from the Russian List of "offshore" countries as of 29 March 2010. The development was preceded by the signing of a protocol updating the Double Tax Treaty (DTT) between the two countries in April 2009. The current DTT between Cyprus and Russia has been in effect since 1998. The new DTT, which is expected to come into effect sometime in 2010 or 2011, shall retain most of the favourable provisions that currently exist and shall remain one of the best -if not the best- DTTs that Russia has with another country. Consequently, Cyprus shall continue to be the prime springboard for inward and outward investments in Russia. The signing of the protocol followed the inclusion of Cyprus on the White List of the Organization for Economic Co-Operation and Development (OECD) and the subsequent conclusion of a series of protocols with selected countries that had kept the island on their targeted list of offshore jurisdictions.

3. COURT CASES

Australia

No duty of reasoning the award. According to the NSW Court of Appeal, there is no basis for setting aside an arbitral award for the failure to give reasons. The degree of reasoning of an award cannot be compared to that of a judgment. *“Though courts and arbitration panels both resolve disputes, they represent fundamentally different mechanisms of doing so. The court is an arm of the state; its judgment is an act of state authority, subject generally in a common law context to the right of appeal available to parties. The arbitration award is the result of a private consensual mechanism intended to be shorn of the costs, complexities and technicalities often cited (rightly or wrongly, it matters not) as the indicia and disadvantages of curial decision making. That some difficult and complex arbitrations tend to mimic the procedures and complexities of court litigation may be a feature of some modern arbitration, but that can be seen perhaps more as a failing of procedure and approach rather than as reflecting any essential character of the arbitral process that would assist in a conclusion (erroneous in principle) that arbitrations should be equated with court process and so arbitrators should be held to the standard of reasons of judges.”* [Gordian Runoff Limited v. Westport Insurance Corporation, April 1, 2010 \[2010\] NSWCA 57.](#)

England

Challenge to the arbitrators’ jurisdiction. In a GAFTA arbitration, Toepfer claimed damages for the non-performance by Broda of a contract, the existence of which Broda disputed. Broda started proceedings in Russia for a declaration that there was no contract. Following Toepfer’s submission to GAFTA of its claim, Broda wrote to GAFTA disputing jurisdiction and requesting a stay. Toepfer replied rejecting Broda’s arguments and Broda responded maintaining its position. GAFTA made an award on jurisdiction in Toepfer’s favour. Thereafter, Broda (a) made submissions on the substantive issues and (b) continued to challenge the tribunal’s jurisdiction. When the final award on the substantive issues came out (in Toepfer’s favour), Broda appealed to the GAFTA appeal tribunal. In due course, Broda applied to the High Court for a declaration that the arbitrators had no jurisdiction. They relied on section 72 Arbitration 1996 which provides that a person alleged to be a party to

arbitral proceedings but who takes no part in them may challenge whether there is a valid arbitration agreement. “Taking part” includes not only making submissions on the substantive dispute but also making submissions on the dispute as to jurisdiction. Broda also applied for an extension of time for the purpose of a challenge to the tribunal’s jurisdiction under section 67 of the Act. The application was refused and the judgment contains a convenient summary of the criteria applicable to such extensions of time. [Broda v. Toepfer \[2009\] EWHC 3318 \(Comm\).](#)

Court powers in support of arbitral proceedings. Under section 44 of the Arbitration Act 1996, in relation to and for the purpose of arbitrations the English court has powers that are the same as those that it has in relation to and for the purpose of court proceedings. Those purposes include: the taking of evidence from witnesses; the preservation of evidence; orders in relation to property the subject-matter of the proceedings; the sale of any such property; and the granting of an interim injunction. This case arose out of a complex web of agreements, the legitimacy of some of which was challenged by the claimant. Pending the establishment of an arbitral tribunal charged with determining that challenge, the claimant sought from the court an injunction. The effect of the injunction would be, *inter alia*, to restrain the defendant from completing and implementing the relevant contractual agreements. The court decided that if the defendant proceeded with some of the agreements and the claimant’s challenge were found subsequently (by the tribunal) to be valid, damages would not adequately compensate the claimant. The judge granted the injunction, (*inter alia*, until further order of the arbitral tribunal). In doing so, he gave effect to the principle that the preservation of evidence (for which the Act gives specific power) includes the preservation of contractual rights. [Sabmiller Africa BV v. East African Breweries Ltd \[2010\] 1 Lloyd’s Rep. 392; \[2009\] EWHC 2140 \(Comm\).](#)

Serious irregularity... A charterer alleged that the shipowner had (i) failed to carry two cargoes of direct reduced iron and (ii) been in breach of warranties as to the vessel’s size. The charterer relied on alleged oral variations of the relevant charter-parties. The owner asserted there had been no oral variations but in any event, the vessel’s size made it impossible for the cargoes to be carried. In the expectation that the tribunal would decide in its favour, the respondent owner did not collect the award within the 28 days allowed for applying for leave to appeal. In fact, the tribunal found in the charterer’s favour. An issue with which the tribunal

failed to deal was whether, owing to its alleged prior knowledge of the vessel's size, the charterer was estopped from relying on the owner's warranty as to the vessel's size. The court decided: (1) owing to the tribunal's failure to deal with all the issues, there was a serious irregularity but it did not result in significant injustice because the argument would have failed; (2) leave to appeal would not be granted because the dispute was a "one-off" and the arbitrators were not obviously wrong; (3) the omission by the tribunal could not be dealt with under the slip rule (section 57 Arbitration Act 1996); and (4) because the shipowner's delay in applying for leave to appeal was the result of its own tactical decision not to collect the award promptly, the court would not have extended the time for appealing. *Buyuk Camlica Shipping Trading & Industry Co. Inc. v. Progress Bulk Carriers Ltd [2010] EWHC 442 (Comm)*.

France

«**Le criminel tient le civil en l'état; mais pas toujours**». By an award delivered by an ICC arbitral in London, Chantiers de l'Atlantique had been ordered to pay moneys due to Gaztransport and Technigaz out of a shipbuilding technology transfer agreement. Chantiers de l'Atlantique commenced enforcement proceedings before the Tribunal de Grande Instance de Paris and they were conceded an exequatur order. Chantiers de l'Atlantique challenged the order arguing that there existed related proceedings, which ran parallel and yet were unfinished. These included a criminal lawsuit filed by Chantiers de l'Atlantique for the alleged falsification of some documents in the course of the arbitration. On that basis, Chantiers de l'Atlantique sought the interruption of the enforcement order. However, the Court refused to stay the enforcement because, under article 4 of the Criminal Code, a criminal action does not necessarily lead to the suspension of any civil proceeding, notwithstanding the potential of the former to influence, directly or indirectly, on the latter. The decision to stay is elective and discretionary to the court, and by no means can it be held as a public international rule. The French Law adage "le criminel tient le civil en l'état" is, therefore, not applicable in arbitration. *Cour d'Appel de Paris, April 1, 2010 (RG no. 09/07068)*.

Exception of jurisdiction; preclusion. The appeal relates to a judgment of the Cour d'Appel d'Aix-en-Provence of 27.11.08. Generally, under article 74 of the French Civil Procedural Code, the respondents that, after appearing in the first instance, elect not to challenge the competence of the courts seized, are precluded to do so at a higher court. On that principle, the court reversed a prior decision that had

granted the stay of the court jurisdiction and had given primacy to an arbitration agreement. The judicial record showed that the respondent's challenge before the Cour d'Appel was novel and could not be tracked down to a lower instance. For that reason the exception was dismissed. It would only become admissible if the prior judgment were issued in absentia, which was not the case here. *Cour de cassation, audience publique du 14 avril 2010 (RG no. 09-12477)*.

Israel

Arbitration clause "survives" a void contract. The plaintiff, Tyco Building Services Pte Ltd ("Tyco"), is a Singapore company, which markets electronic security equipment. The respondent, Alvakes Video Ltd ("Alvakes"), is an Israeli company which imports and markets closed-circuit television. During 2001 Singaporean Authorities published an international tender for the supply of closed-circuit televisions to be used in the Singapore prisons. According to the terms of the Tender, the approved supplier had to enter into a joint venture with a local Singapore company, and establish a permanent Singapore representative. Alvakes agreed to introduce Tyco to a Singapore company "Megason", on condition, that if Tyco/Megason will be awarded the Tender, they will purchase and supply Alvakes's equipment. More specifically the parties agreed that Alvakes will submit the joint venture - Tyco/Megason a purchase offer and if Tyco/Megason will be awarded the Tender, Megason will issue a purchase order to Alvakes. Accordingly, Alvakes purchase offer was sent, Tyco/Megason were awarded the Tender, and Megason sent Alvakes a purchase order. The Order declared as follows: "Please note that this order is subject to (A) complete client approval of your CDR submission and (B) in accordance with the enclosed sub-contract agreement". Under Clause 23 of the Order Singapore law governed the agreement. Clause 23 of the attached sub-contract agreement, was an arbitration clause, as follows: "Any dispute arising out of or in connection with this Sub-Contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore at the Singapore International Arbitration Centre (the "SIAC")"

Alvakes filed a claim against Tyco and Megason in front of the District Court of Tel-Aviv, claiming damages and compensation of 10MUS\$. Alvakes contained that Tyco/Megason deliberately demanded excessive prices (from the Singapore Authorities) for the products, were late in responding to the

Singaporean Authorities requests, and used substitute products of "Philips" instead of Alvakes equipment. Both Tyco and Megason applied for a stay of proceedings in the Israel District Court, relying on the above arbitration clause and the Israeli Arbitration law. A Decision granting a stay of proceeding based on an arbitration clause in an contract, means actually a dismissal of the claim before the Israeli court and the referral of the parties to the arbitration, as agreed between them.

Reversing the District court decision, the Supreme Court began with the finding that although documents were transferred by e-mail and were not signed, the order and the sub-contract agreement, do incorporate a valid arbitration agreement. Alvakes didn't resist the terms presented to it, and intended to contract on the terms submitted, and Alvakes claim itself was based on the existence of an agreement –which included an arbitration clause. But, in this case the contract itself didn't come into force due to the non-fulfillment of the condition established into it by the wording of the order (as stated above – "Please note that this order is subject to (A) complete client approval of your CDR submission"). Therefore, the question the Three Supreme Court Judges had to relate to was- can the arbitration clause "survive" or govern, a void contract. The first Supreme Court Judge Y. Danzinger, held that according to the Israeli law of Contracts, when a contract becomes void the court can still give effect to parts of the contract, if it is justified to do so, according to the circumstances. In this way, for example courts give effect to clauses in a contract that may be void because the contract in part was contradicted to public policy. There is no reason why an arbitration clause will not be given an effect, when a commercial contract does not come into effect as a result of non-fulfillment of a condition, especially when both the wording of the arbitration clause and the governing law clause, clearly determines that any dispute, including "regarding its existence, validity or termination" is subject to arbitration. Therefore the claimant – Alvakes is bound by the arbitration clause. The second Judge, Y. Amit reached the same conclusion, but provided different reasoning: There is no relevance as to why and how the contract wasn't fulfilled. The main point is that under the freedom of contracts the parties agreed in advance upon the mechanism to settle any dispute arising from the contract, and this includes obviously the dispute as to why the condition was not fulfilled, or if one of the parties deliberately frustrated the contract. The third Judge, A. Hayot, agreed both with Judge Danzinger conclusions and Judge Amit remarks. It was held, by the approval of all three Judges, that although the contract wasn't signed, and void, the

arbitration clause is valid and binding. The matter was send back to the District Court to determine the terms for the stay of the proceedings, and the conditions for the referral of the matter to the agreed arbitration forum. *Tyco Building Services V. Alvakes Video Ltd and others, Israel Supreme Court, Appeal No. 4986/08, 12.04.2010.*

Latvia

Validation of an arbitration agreement. A ship owner A and a fuel trader B entered into an contract subject to B's General Terms and Conditions, which included a clause saying: "[...] all disputes shall be referred to court of arbitration in Riga, Latvia, at the choice of the plaintiff, in accordance with the Rules, Regulations and/or Articles of this court of arbitration and Latvian law [...]". B submitted an arbitration claim for bunker supplies due, and A counterclaimed the same arbitration tribunal for technical problems with heavy fuel oil separator after use of bunkered fuel. The arbitral tribunal failed against B, but the award was not abided by voluntarily. A filed at the Riga Northern District Court (*Rīgas pilsētas Ziemeļu rajona tiesa*) an application for a writ of execution of the award B and, but the same was dismissed because the arbitration agreement had not been expressed in writing into the contract. A brought the case to appeal at the Riga Region Court (*Rīgas Apgabaltiesa*), which annulled the decision of the Riga Northern District Court. It stated that the mandatory requirement for the arbitration clause to be in written does not automatically bind the parties to insert arbitration clauses in contracts only. An agreement of the parties to solve all the disputes in arbitration may therefore be induced sometimes from the correspondence exchanged between the parties. Art. 1434(1) of the Civil Law of Latvia specifies that consent may be given not only before the appropriate action, but also when it starts, and even later, in the latter case it is called validation. The court found that the purpose of subsequent confirmation (validation) is to create the same legal consequences, what would exist if the consent is given before that date. Court found that B, by bringing a claim against A in arbitration had accepted its jurisdiction, i.e. with its actual actions clearly expressed its consent to the arbitration agreement. *Riga Northern District Court, Dec. 15, 2009.*

Spain

Competence-competence. Unisteel Trading Co. purchased 5.000 tons of steel bars from Metalúrgica

Galaica S.A. Payment had to be done by letter of credit. The contractual terms had been agreed by phone and, thereafter, recapped by the seller in a contract draft and sent by email to the buyer, who signed and returned it back by email to the seller. The seller, however, never dispatched a signed copy to the buyer. When the buyer opened the letter of credit, the seller refused it and argued that there was no contract at all. He said that he had never received the email with the contract signed by the buyer. Seller's refusal forced the buyer to buy goods in replacement in the market, and to claim the extra price paid. The buyer declared arbitration pursuant to the terms of the contract and appointed an arbitrator. The seller refused to join the buyer's appointment and to appoint his own. The buyer then sought an appointment by default from the court. Reversing a prior decision of the first instance, the appellate court of Madrid gave passage to buyers' application. The court said "the arbitral process can be initiated, at least formally, even if, in reality, there is no conclusive proof of the arbitration agreement but just a prima facie evidence of it." By sending the contract draft by email, the seller was deemed to have given his consent to the arbitration agreement, and, in doing so, he became bound to the arbitration. The court did not pronounce on the existence of the contract as, it recalled, that was indeed a question for concern to the arbitrators only. [Sentencia de la A.P. de Madrid de 20.04.2010.](#)

Switzerland

Due process and the "right to be heard". The case involved a dispute between a Swiss and a German company with regard to the delivery of a steel bloom. Arbitration was initiated in Geneva and Prof. Ingeborg Schwenzer (University of Basel) was appointed as arbitrator. In an award of October 5, 2009, she upheld a claim for damages and the German company appealed to the Federal Tribunal. The Federal Tribunal was faced with a claim that the "right to be heard" (due process) had been violated. This gave the Federal Tribunal an opportunity to recall its frequently stated view that the "right to be heard" (due process) does not entail an obligation for the arbitral tribunal to address each and every argument and to consider every bit of evidence. The Swiss Supreme Court will step in only to the extent that the right to be heard has been rendered meaningless because the record was disregarded, relevant evidence was not taken into account or a party was placed in a situation no better than if its right to present its case had been denied altogether. The Federal Tribunal reiterated what has almost become a mantra by now: "the right to be heard

contains no right to a materially accurate decision". [Federal Court, January 29, 2010.](#)

Public policy; annulment of award. For the first time since PILA came into force in 1989, the Federal Tribunal has set aside an international arbitral award for a violation of public policy. The Federal Tribunal consistently refused to set arbitral awards aside on public policy grounds in numerous decisions, repeatedly stating its views on material public policy and procedural public policy. Essentially, the Federal Tribunal holds the view that material public policy consists of those fundamental principles -pacta sunt servanda, the rule of good faith, etc.- which, according to prevailing views in Switzerland, should be the basis of any legal order, whilst procedural public policy refers to those fundamental and generally recognised procedural principles, which cannot be violated without resulting in a decision fundamentally inconsistent with the basic requirements of a legal system based on the rule of law. As of April 13, 2010, *res iudicata* has acquired the status of a fundamental principle which cannot be ignored without violating procedural public policy. From the facts of the case, Sport Lisboa E Benfica, a well known Portuguese football club, and Club Atlético de Madrid SAD, an equally well known Spanish football club, had a dispute with regard to compensation for a player who had been trained by Benfica and eventually went to play for Atlético. In 2001, Benfica claimed compensation on the basis of the 1997 FIFA Regulations for the Status and Transfer of Players. The FIFA Special Committee awarded compensation in April 2002 but the Zurich Commercial Court overturned the decision, essentially holding in a judgment of June 21, 2004 that the corresponding provision in the FIFA Regulations was void on Swiss and European competition grounds. The judgment of the Zurich Commercial Court was not appealed to the Federal Tribunal and therefore it came into force. A new claim was brought by Benfica in 2004. The FIFA Special Committee rejected it in 2008 and an appeal was made to the Court of Arbitration for Sport (CAS). On August 31, 2009 the CAS awarded compensation in an amount of EUR 400'000 notwithstanding the 2004 judgment of the Zurich Commercial Court. Club Atlético de Madrid successfully appealed. [Federal Court, April 13, 2010.](#)

United States

Class arbitration. The Supreme Court of the United States reversed the Second Circuit Court of Appeals and held that imposing class arbitration on parties

whose arbitration clauses are “silent” on the issue of class arbitration is inconsistent with the Federal Arbitration Act (FAA).

Petitioners shipping companies and respondent shipping customers agreed to arbitrate their antitrust dispute, but questioned whether the arbitration clause in their shipping agreement permitted class arbitration. The parties submitted that question to a panel of arbitrators and stipulated that the arbitration clause was “silent” on the issue of class arbitration. The arbitration panel concluded that the clause in question permitted class arbitration and based its award on the fact that after the Court’s decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), arbitrators have “construed a wide variety of clauses in a wide variety of settings as allowing for class arbitration.”

Before clarifying the panel’s misinterpretation of *Bazzle*, the Supreme Court majority explained that because the parties had not agreed on the issue of class arbitration, the arbitrators’ proper task was to identify and apply the rule of law that controls. More specifically, in the absence of express consent, the arbitrators should have determined whether the FAA, maritime law, or New York law contained a “default rule” that allowed class arbitration. Instead, the arbitration panel “proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied to the situation” and exceeded its powers by imposing its own policy choice on the issue.

As a result, the Court—directed by § 10(b) of the FAA—opted to decide the question that the parties originally referred to the arbitration panel. In its analysis, the Court focused on the basic foundational FAA principle that arbitration “is a matter of consent, not coercion.” *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

The Court also noted that the differences between complex class-arbitration and simple bilateral-arbitration were too great for an arbitrator to presume that the parties’ silence on the issue implicitly authorizes class-action arbitration. In the eyes of the Supreme Court majority, the question before the arbitrators was whether the parties *agreed to authorize* class arbitration. The Court concluded

that class arbitration cannot be imposed where the parties stipulated that there was “no agreement” on this question. *Stolt-Nielsen S.A., et al. v. Animal Feeds International Corp., on writ of certiorari (US Court of Appeals, 2nd Circuit, April 27, 2010)*.

4. NOTES

An article of one of our contributors has been posted [online](#) under the title “*South Africa – Entitlement to arrest property to obtain security for foreign proceedings*”.

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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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