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Pursuant to Article 13(2) of the ICSID Convention, the Chairman of the ICSID Administrative Council, Mr. Robert B. Zoellick (President of the World Bank), announced the new lists of Chairman's designations to the ICSID Panels for Conciliators and Arbitrators. The Chairman can designate 10 arbitrator and 10 conciliators of different nationalities to each Panel. The Panel of Arbitrators include, for instance: Teresa Cheng (China), Allain Pellet (France), Lucy Reed (US) and Tinuade Oyekunle (Nigeria), among others. At the Panel Conciliators we may find Luiz Olavo Baptista (Brazil), Roberto Echandi (Costa Rica) and Jeswald Salacuse (US), among others.

1. NEWS

Independent Arbitral Appointments Committee presented by the Scottish Arbitration Centre

A wide range of nationalities and expertise combine together in the Arbitral Appointments Committee of the Scottish Arbitration Centre. Among the members there are prominent names like David Carrick (UK), Teresa Cheng (China), Kaj Hobér (Sweden), Elie Kleiman (France) or Thomas Halket (USA). It is through the Committee that the Centre expects to assure commercial organizations that they will get the most suitable arbitrator for the job.

The London Maritime Arbitrators Association elects president

Christopher Fyans has been elected as President of the London Maritime Arbitrators Association at the Fifty-First Annual General Meeting held at The Baltic Exchange. The Committee is formed by C. Fyans (President), J. Tsatsas (Past President), R. Gaisford (Past President), C. Aston, B. Buchan, M. Hamsher, P. O'Donovan and B. Williamson. The Honorary Secretary of the Association is Ian Gaunt.

ICSID has created the Panels of Conciliators and Arbitrators

CIArb publishes "Costs of International Arbitration Survey 2011"

The survey was first launched by the Chartered Institute of Arbitrators (CIArb) in 2010 to gather data to inform parties, legal counsels and arbitrators about the costs of international commercial arbitration. It was completed by practising arbitrators and lawyers from five continents and includes information on 254 arbitrations conducted between 1991 and 2010. The results were analysed and presented at an international conference organized by CIArb in September 2011 in London. Amongst other results, the survey shows that "50% of claimants with claims under £1m spent less than £250,000 on their own costs, the other 50% spent more" and also "that the average length of an arbitration is between 17 and 20 months".

Venezuela's seizure policy to drive investment away

The Venezuelan Confederation of Industries (Conindustria) asserts that the Venezuelan government has seized nearly 990 companies between 2002 and 2011. The study reflects that far from diminishing, government's seizures have increased. In 2011 401 companies have been expropriated by Venezuelan authorities, which is 41 percent more than the 284 companies expropriated

in 2010. Conindustria warns that this scenario "only creates legal uncertainty; drives investments away; and reduces the possibility of increasing production".

The Australian Centre for International Commercial Arbitration (ACICA) incorporates clauses on arbitration and mediation in the newly launched booklet

The new ACICA Rules booklet incorporates clauses for arbitration and mediation. The book was launched at the end of August, and it has a new design and contains all of the current ACICA rules and model clauses, collected together. The Centre has addressed the growing demand for a more integrated and comprehensive approach to dispute resolution. The booklet is available at:

Finland changes the name of Arbitration institution in English

Formerly called "The Arbitration Institute of the Central Chamber of Commerce of Finland", it changed its name in English to "The Arbitration Institute of the Finland Chamber of Commerce" in April 2011. The Arbitration Institute's model arbitration clauses have been updated to reflect the new name.,

PDVSA Venezuela seems to be ready to negotiate arbitrations

Some sources estimate that between US\$ 7 billion and 12 billion is the sum Exxon Mobil is seeking from PDVSA in compensation for the assets seized by the Venezuelan state-run oil holding. Venezuelan authorities, on the other hand, assert that Venezuela is willing to reach an agreement with Exxon Mobil and ConocoPhillips, as long as the sum is reasonable. Venezuela's defense within the arbitration proceedings before ICSID, does not mean that the country rejects the payment of the assets involved, states the Venezuelan source.

ICSID releases its publication Caseload-Statistics

The Secretariat has released the new issue (Issue 2011-2) of Caseload-Statistics. Launched in the 3 official languages of the Centre, English, French and Spanish, the publication includes an overview of the cases registered and administered by ICSID as of June 30 2011. The information has been classified

following different criteria, such as basis for consent to ICSID jurisdiction, geographic distribution of cases by State party to the dispute, economic sectors involved and data related to outcomes of the disputes.

New Arbitration Centre in Mauritius

The Commonwealth Secretariat, Marlborough House, in London, the Government of the Republic of Mauritius, the LCIA and a new Mauritian company incorporated for the purpose, Mauritius International Arbitration Centre Limited (MIAC), have all signed an agreement for establishment and operation of a new arbitration centre in Mauritius, which is coined as "LCIA-MIAC Arbitration Centre". The brand new centre is expected to contribute to an uprise in quantity of cases and quality of proceedings in international commercial arbitration within Africa and beyond. The Centre is currently engaged in drafting arbitration and mediation rules, and setting up the physical infrastructure.

New ICC Arbitration Rules

After their last update in 1998, the ICC Rules for the resolution of international commercial disputes have been updated to enter into force in 2012, and they will be applied to any disputes commenced thereafter. The rules have been updated to address the new challenges in international commercial arbitration. They introduce provisions on multi-party and multi-contract arbitration, and attempt to meet the need for expedite and efficient procedures in connection with rapid developments in information technology. Some of the new or amended provisions are: (i) *Emergency Arbitrator*: Article 29 provides for the appointment of an Emergency Arbitrator when a party requires the adoption of *interim* or conservatory measures, and the constitution of an arbitral tribunal cannot await. Such an application should be made pursuant to the Emergency Arbitrator Rules (Appendix V). The order of an emergency arbitrator does not bind the arbitral tribunal with respect to any question, dispute or issue determined in the order. The arbitral tribunal shall decide upon the parties' request any matter arising out or in connection with the compliance or non-compliance with the order. (ii) *Effects of the Arbitration Agreement*: Pursuant to Article 6.3 any claims concerning the existence, validity or scope of the arbitration agreement, or concerning whether all the claims presented in an arbitration claim may be decided in a single arbitration, as well as other

questions of jurisdiction shall be directly decided by the arbitral tribunal (in the 1998 Rules, these issues were decided by the Court). Yet, the Secretary General may still refer some matters to the Court for its decision, pursuant to Article 6.4. (iii) *Submission of the draft Award*: As provided for in Article 27 (b), after the closing of the proceedings the arbitral tribunal shall inform the Secretariat and the parties of the date by which it expects to submit the draft Award to Court for approval. This provision amends Article 22.2 of the 1998 Rules, which allows the arbitral tribunal to indicate the 'approximate date' by which the draft Award would be submitted. (iv) *Written Notifications or Communications*: While email is included as a new means of notification and communication, older facsimile transmission, telex and telegram are removed. (v) *Multiple parties, multiple contracts and consolidation*: Articles 7 to 10 include new provisions with regard to joinder of additional parties, such joinder is subject to Articles 6.3 – 6.7 and Article 9. In conformity with Article 9, claims arising out or in connection with more than one contract may be addressed and decided in a single arbitration proceeding, irrespective of whether such claims originate in different arbitration agreements. Pursuant to Article 10, two or more arbitrations under the Rules, may be consolidated into a single arbitration proceedings, should the parties present a request to that effect. The request shall be considered by the Court and, if granted, consolidation shall be made to the arbitration that commenced first.

VDCC and GMAA conclude a cooperation agreement

The Verband Deutscher Schifffahrts-Sachverständiger (VDSS) (*Association of German Shipping Experts*) and the German Maritime Arbitration Association (GMAA) have announced their intention to cooperate on a closer basis in future. Besides other areas of cooperation, the GMAA members will be able to call upon the expertise of the VDSS if technical expert reports are required in the framework of arbitration proceedings. The organisations will hold an expert workshop on speeding up arbitration proceedings. "The VDSS and the GMAA have the common interest of promoting Germany as a location for maritime services where disputes are settled in a competent manner", stated Mr. Holst, VDSS chair.

Bangladesh to seek rights over resources in Bay up to 400-460 nautical miles from the coast

On 25 August, the United Nations heard Bangladesh's claim on the continental shelf in the Bay of Bengal. On February 25 Bangladesh initiated international arbitration proceedings before the Commission on the Limits of the Continental Shelf (CLCS) following disputes with neighbouring countries India and Myanmar. Bangladesh's claim on the Bay of Bengal continental shelf extends up to 400-460 nautical miles (850 km) from the coast. Bangladesh asserts it should have total rights over the undersea natural resources within this area.

2. LAWS & TREATIES

Arbitration Act amended in Malaysia

The Arbitration (Amendment) Act 2011 which was recently passed in Malaysia has come into force as of July 1, 2011 thus now providing means for securing a claim by way of ship arrest where admiralty disputes are to be resolved via arbitration. Prior to this 2011 Amendment, a series of High Court decisions (namely those related to *The Vinta*, *The Norma Splendour* and *The Swallow*) have held that the admiralty jurisdiction of the High Court cannot be invoked in arresting a vessel as security for an award that may be made in arbitration proceedings save in very limited circumstances where financial incapacity of Defendant is proven.

Liechtenstein's accession to the New York Convention

Liechtenstein has ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Its accession took effect on 7 July 2011 and the Convention entered into force locally on 5 October 2011. Liechtenstein becomes the 146th State party to the New York Convention.

Japan and Taiwan sign Investment Agreement

The agreement was signed on 22 September. Due to the particular diplomatic relations between Japan and Taiwan, the deal was reached between Taiwan's East Asia Relations Commission and the Interchange Association, Japan, which serves as a contact organization with Taiwan. The main purpose of the agreement is to allow companies from both

territories to move investment funds freely between both markets and technology transfer.

3. COURT CASES

Armenia

On 29 July 2011 the Administrative Court of Armenia rendered a decision against the State Register of Legal Entities in Armenia, declaring that the registration of certain property rights linked to the License of the Marjan Property, in favor of the Joint Venture vehicle, Marjan-Caldera Mining, had not been done properly by the State Register, declaring his acts null and void. The Armenian Court stated: "To satisfy the claim of 'Global Gold Mining' LLC Armenian Branch, that is, to declare registration of the change of the sole participant of 'Marjan Mining Company' LLC made in the Register of the Company's Participants by Nork-Marash territorial division of the Agency of the State Register of Legal Entities under the Ministry of Justice of the RA on 11.08.2010 and the state registration of charter amendments of 'Marjan Mining Company' LLC as of 26.08.2010 as completely null and void." (*Translation by Caldera Resources's website*). Caldera states that their legal counsel in Armenia has advised that, contrary to a Global Gold press release stating that the Armenian Court confirmed 'illegal acts by Caldera', the judgment contains no allegations of any wrongdoing by Caldera and its officers. The judgment of the Armenian Administrative Court confirms that the ownership of the shares of Marjan Mining Company LLC is a matter of New York Law and that the matter is the subject of Arbitration proceedings in New York. Thereafter Caldera Resources has filed a complaint with the American Arbitration Association against Global Gold Corporation for unilateral and illegal termination of the Joint Venture Agreement between the parties. The arbitration hearings started on 23 August 2011.

France

Swiss award set aside in Paris; excess of powers.

The French "Cour de Cassation" has adopted, once more, a pragmatic interpretation of the French Code of Civil Procedure, Article 1502 ("Nouveau Code de

Procédure Civile"), which regulates international arbitration awards, enforcement applications and appeals. The present case concerned a French contracting party and a Swiss company, which entered into a trust agreement, containing an arbitral clause. As a result of the proceedings regarding the compulsory liquidation of the society, an arbitral award rendered in Geneva recognized an outstanding debt to the claimant, such amount embedded not only the amount of 80.000 Swiss Francs for fees and expenses incurred by the claimant in carrying out his mandate, pursuant to the agreement, but also 1.307.616,06 Swiss Francs corresponding to other expenses taken outside the scope of the agreement's provisions. However, as was stated during the proceedings, the distribution of losses, which gave rise to such an amount was not determined under the written agreement, but rather under a so called 'tacit agreement'. Following the arbitration proceedings, the claimant sought to obtain an exequatur of the award in France. The case eventually reached the French "Cour de Cassation", which rejected the claim, on the basis that the Swiss arbitrator had interpreted the will of the parties beyond the 'clear and precise' provisions of the written agreement, having added to the written agreement a tacit one. Therefore, the Cour de Cassation, pursuant to Article 1502 of the Code of Civil Procedure, concluded that the arbitrator exceeded his competence and rendered his award outside the scope of the provisions of the trust agreement. *Cour de Cassation, Chamber Civile I, No. de pourvoi: 08-12648.*

India

Interim measures; security deposit of USD 152.8 Million ordered by the High Court of New Delhi.

Delhi High Court has ordered Australian mining firm AMCI PTY Ltd USD, to deposit 152.8 million as security pursuant to an arbitration award rendered by the International Court of Arbitration (ICA) in favour of the state-owned Steel Authority of India Ltd (SAIL). The court rejected the plea of the Australian firm that 'an award, when challenged within time, becomes unexecutable' and said it was necessary to secure the award amount, keeping the financial health of the mining company.

Netherlands

Dutch Court confirms that it has jurisdiction to enforce the DPTG/TPSA Award and Seize Assets of TPSA.

GN Store Nord A/S, a Danish developer of telecom network performance monitoring and hands-free communications solutions, announced that on 1 September 2011, it received a decision from the District Court in Amsterdam confirming its jurisdiction to enforce the DPTG/TPSA Award. The Polish company DPTG (Danish Polish Telecommunications Group I/S), which is 75% owned by GN Store Nord, had launched enforcement proceedings against Polish operator Telekomunikacja Polska SA (TPSA) in the Netherlands last year in the dispute concerning the determination of traffic volumes carried via the NSL fibre optical telecommunications system in Poland. The Dutch court has stated that it will wait the results of the setting-aside proceedings in the Commercial Court in Vienna, Austria. The expected final hearing in the proceedings thereof is scheduled for 8 September 2011.

United Kingdom

Gafta arbitration award; Certificates of quality and condition; sampling and right to reject goods.

During the execution of an FOB contract (the Contract) for the sale of Sunflower Expeller (the Goods) a dispute arose in respect of the quality of the Goods, which was to be determined at the loadport. The key parts of the Contract (the Contract Clauses) governing quality of the Goods were as follows: *“Quality and condition to be final at time of loading as per certificate of first class superintendent approved by GAFTA at seller’s choice and expense. The buyers have the right to appoint their own GAFTA approved supervisor at their expense. In this case the sampling to be done conjointly, as per GAFTA terms and conditions. 2nd analysis, if any, as per Salamon and Seaber, London.”* The Contract also incorporated GAFTA 119, and clauses 5 and 16 in particular, and consequently GAFTA Sampling Rules No.124 (GAFTA 124), however, in the normal way, the written terms of the Contract prevailed should the standard GAFTA terms be contradictory. Clause 5 of GAFTA 119 provided: *“Official... certificate of inspection, at time of loading into the ocean carrying vessel, shall be final as to quality.”* Rule 5, and particularly Rule 5.1.6, of GAFTA 124 provides: *“Buyers may accept Sellers’ analysis but if required by Buyers, any one of the sealed samples together with instructions shall, within 14 consecutive days of sealing, be dispatched to Salamon & Seaber. [...] This analysis shall be final*

and any claim arising from it shall be made within 14 consecutive days of the date thereof, accompanied by the certificate of analysis or a true copy.” At the time of loading Feed Factors International Ltd (Buyers) chose to appoint their own supervisor to act on their behalf. Sampling was then carried out jointly by both the Buyers and R G Grain Trade LLP (Sellers). Sellers’ inspector issued certificates showing the Goods were on specification, but whilst loading was still continuing Buyers informed Sellers that according to their surveyor the Goods were off specification in relation to protein and fibre content. Buyers then sent sealed samples to Salamon and Seaber. Salamon and Seaber produced a certificate showing the Goods to be off specification. Buyers initially rejected the Goods and documents, but the parties later agreed to sell the Goods at a lower price. Sellers subsequently claimed for the balance of the purchase price, whilst Buyers counter-claimed for damages. Although the Seller’s claim was upheld by the first tier arbitration Tribunal, the GAFTA Appeal Board overturned that Award and awarded Buyers the damages they sought. This was therefore an appeal by Sellers in the Commercial Court against the Award issued by the GAFTA Appeal board. The appeal before the Commercial Court was concerned with two questions of law: *“(1) Whether on a true construction of the contract, the certificates of quality and condition issued by the superintendent chosen by the Sellers were final and binding; and (2) Whether the Buyers were entitled to reject the documents and the goods despite the terms of clause 5 of GAFTA No.119.”*

(1) The Commercial Court held that the GAFTA Appeal Board were correct in their finding that the Salamon and Seaber certificate superseded that of Sellers’ surveyor. The starting point was that quality would be final as certified by Sellers’ surveyor and that Sellers’ surveyor’s samples and certificate should be solely relied upon. Rule 4 of GAFTA 124 would operate to disapply Rule 5 of GAFTA 124. However, when Buyers exercised their option to appoint their own surveyor, sampling was to be done jointly and the sampling and certificate of Sellers’ surveyor could not be solely relied upon. Upon Buyers calling for a 2nd analysis Rule 5 would come into effect. Although the Contract Clauses did not specify that the 2nd analysis was Buyers’ right, it appeared that this was what the Contract (and parties) contemplated by placing the clause immediately after that which conferred to Buyers the right to choose their own Surveyor. Furthermore, under GAFTA 124 the right to a 2nd analysis is generally given to the party who had not arranged the first analysis, and the existence of that right,

when not excluded, is inconsistent with a certificate final regime as relied upon by Sellers, and so Rule 5 of GAFTA 124 cannot be excluded. As the Commercial Court stated: “...the effect of conferring a right on the Buyers to call for a second analysis necessarily means that, where that right is exercised, the certificate final regime does not apply.” The effect of this is to make the 2nd analysis by Salomon and Seaber final and binding on the parties in accordance with Rule 5.1.6.

(2) The Commercial Court held that clause 5 of GAFTA 119 was purely a warranty relating to oil and protein and sand and/or silica content. Clause 5 made no warranty as to fibre content or any other characteristic of the Goods and it could not be treated as a blanket “non-rejection clause”. However the Commercial Court did find that the GAFTA Appeal Board had erred in finding that Buyers were entitled to reject the Goods for any failure to adhere to contractual specifications. The right of rejection could only be resolved upon deciding whether the specifications stated in the Contract were a condition, a warranty or an innominate term. The GAFTA Appeal Board had failed to show in their reasoning that they had considered this point and so the appropriate action was to remit this question to the GAFTA Appeal Board to reach a conclusion on the specification term.

In answer to submissions that the GAFTA Appeal Board’s conclusions should be questioned due to its different finding on a question of law to that of the 1st tier tribunal, the Commercial Court reminded the parties of the correct approach the courts should take on such matters: “1. *The court should read an arbitral award as a whole in a fair and reasonable way. The court should not engage in minute textual analysis.* 2. *Where the arbitrator’s experience assists him in determining a question of law, such as the interpretation of contractual documents or correspondence passing between members of his own trade or industry, the court will accord some deference to the arbitrator’s decision on that question. The court will only reverse that decision if it is satisfied that the arbitrator, despite the benefit of his relevant experience, has come to the wrong answer.*” *RG Grain Trade Llp (UK) v. Feed Factors International Ltd. [2011] EWHC 1889 (Comm).*

Injunctions Restraining Arbitration.

Excalibur Ventures LLC (Excalibur) entered into a collaboration, evaluation, and bidding agreement in 2006 (the Collaboration Agreement) with the first defendant Texas Keystone Inc (TKI) with the joint

intention of bidding for Production Sharing Contracts (PSCs) for the exploration and development of oil and gas resources in the Kurdistan Autonomous Region of Northern Iraq (KAR). Excalibur subsequently claimed that it was shut out of bidding for these PSCs. The defendants (1) TKI, (2) Gulf Keystone Inc, (3) Gulf Keystone Petroleum International Ltd, (4) Gulf Keystone Petroleum (UK) (defendants) claimed that Excalibur could not meet the relevant statutory criteria to participate. In December 2010 Excalibur started an action in the Commercial Court against the defendants, alleging breaches of the Collaboration Agreement and contending that it had been wrongfully shut out from a PSC that had been awarded to the defendants, and alleging dishonest conduct. On the same day Excalibur began ICC arbitration proceedings in New York against the defendants under the Collaboration Agreement, claiming that the second to fourth defendants (the Gulf Defendants) were parties to it on various alleged grounds, and therefore bound by its arbitration clause as well as its contractual provisions. The Gulf Defendants disputed this and the ICC’s jurisdiction. TKI did not dispute ICC jurisdiction as regards claims falling within the scope of the arbitration clause, but denied that a number of the claims made against it were within the scope of the clause. Later that month Excalibur made an unsuccessful application to the Commercial Court for a worldwide freezing order. In January 2011, the Gulf Defendants issued an application for an injunction restraining the arbitration proceedings, whilst in February 2011 Excalibur applied to the Commercial Court to stay the Commercial Court proceedings until the final determination of any jurisdictional challenges in respect of the ICC arbitration proceedings. In March, the ICC notified the parties that the ICC Tribunal would determine jurisdiction. The ICC Court was prima facie satisfied that an arbitration agreement under the ICC Rules might exist.

In connection with the applications made by Excalibur and the Gulf Defendants, the Court rejected Excalibur’s arguments that the proceedings were only commenced to protect time and to ensure that there would be an appropriate forum seized of Excalibur’s claims if the ICC Tribunal determined that it did not have jurisdiction, and proceeded on the basis that the proceedings were substantive, not protective. The Court then determined that it had jurisdiction to grant an anti-suit injunction, in the circumstances of the case, restraining Excalibur from proceeding with the arbitration. This power is only exercised in exceptional circumstances and with caution. Excalibur had clearly submitted to the

jurisdiction of the English court by commencing substantive proceedings and the Gulf Defendants had not submitted to the jurisdiction of the ICC. The Court then concluded that it was appropriate to exercise its discretion in granting an anti-suit injunction restraining Excalibur from pursuing the arbitration proceedings and that the Court was the appropriate forum to determine the issue as to whether the Gulf Defendants were parties to the arbitration agreement in the Collaboration Agreement. It would be oppressive or unfair and unconscionable if the New York arbitration proceedings were to continue against the Gulf Defendants, and the right course was for the English court to determine the issue of arbitrability of Excalibur's claims. The Court also determined that it would not be appropriate to grant Excalibur's application for a stay of the court proceedings. Where a claimant is applying to stay proceedings voluntarily brought by it, it needs to show that there are special, rare, or exceptional circumstances to justify a stay. More so where the claimant has voluntarily commenced two sets of proceedings and wishes to stay one set. Excalibur had not shown exceptional circumstances to justify the granting of a stay, and any benefit of a stay was clearly outweighed by the burden the Gulf Defendants would suffer. Furthermore, serious allegations of fraud and conspiracy had been raised against the defendants in the court proceedings and the defendants were entitled to have these determined expeditiously. The Court therefore granted the Gulf Defendants' anti-suit injunction, dismissed Excalibur's application for a stay, and directed a trial of a preliminary issue as to whether the Gulf Defendants were bound by the terms of the arbitration clause of the Collaboration Agreement.

Excalibur Ventures LLC v Texas Keystone Inc. & others [2011] EWHC 1624 (Comm).

Fosfa arbitration award; dismissal of arbitration claim under sec. 67 of Arbitration Act.

This was an application before the Commercial Court by Kruecken GMBH & CO KG (Kruecken) to have its arbitration claim, under s.67 of the Arbitration Act, against Agrital Import Export SRL (Agrital) dismissed. The arbitration claim arose following a decision by a FOSFA umpire in favour of Agrital (represented by Hill Dickinson) that a FOSFA arbitration tribunal in England had jurisdiction to hear a dispute between the parties for non-performance of a contract of sale by Kruecken. Kruecken had argued that the contract between the parties had not provided for FOSFA arbitration, but instead allowed for arbitration in Germany. Following the FOSFA

umpire's Award, Kruecken brought their s.67 challenge before the English court (being the supervising court), and continued to argue for arbitration in Germany. When they ultimately decided to abandon it, Kruecken initially sought a discontinuance in accordance with CPR Part 38.2 without permission of the court by notice. However, because Agrital had previously given an undertaking given to the court, the permission of the court was required in order for the discontinuance to be effective under CPR 38.2(2)(a)(ii). The notice of discontinuance was therefore invalid. It was acknowledged that were the court to grant Kruecken a discontinuance then, under the authority of *Sheltam Rail Company v Narambo Holding Limited* (2008), Kruecken would be required to give an undertaking to the court not to challenge the jurisdiction of the tribunal in subsequent proceedings. Such a step was intended to prevent an abuse of process by the applicant. Rather than continuing to seek discontinuance with permission of the court, and thereby give such an undertaking, Kruecken instead decided to seek a dismissal in the hope that this approach might allow them to preserve the opportunity to challenge the jurisdiction of the tribunal at a future date in Germany. Agrital argued that allowing a dismissal would mean that the court would also have to make a declaration that Kruecken could not challenge the jurisdiction in subsequent proceedings, since such a challenge would be an abuse of process under the principle of *Henderson v Henderson* and that, in dismissing the claim, the court should also confirm FOSFA's award on jurisdiction. The Commercial Court found that, in addition and subsequent to a dismissal of a s.67 arbitration claim, it had the jurisdiction to confirm the award, which it did in the absence of a challenge by Kruecken. The award, as confirmed, not only provided that FOSFA has jurisdiction to decide the substantive dispute, but also confirmed that the original arbitrators were those to whom the substantive dispute should be remitted. The Commercial Court acknowledged dismissed the s.67 challenge, stating that there was no need to make a declaration in relation to the jurisdiction issue beyond confirming the award. In doing so the judge said: "*There is no doubt whatever the consequence of the dismissal of this claim at English law is that the jurisdiction of the tribunal, as found by the tribunal's own award, is established.*" *P. Kruecken GMBH & Co KG v. Agrital Import Export SRL (2011) (QBD) (Judgment 04.05.11).*

United States

Forum Non Conveniens: District court finds that Egypt is not an adequate alternative forum due to recent events.

Tradimpex Egypt Co. filed suit against Biomune Co., for breach of an agency and distribution agreement (“the Agreement”) entered into by the two parties. Pursuant to the Agreement, Tradimpex had become Biomune's agent for the importation and distribution of Biomune's products in Egypt. Biomune moved to transfer the case to Egypt on *forum non convenien* grounds. Resolution of this issue turned on whether Egypt was an adequate alternative forum which would provide sufficient judicial remedies. The court recited that, to be considered an adequate alternative forum, “the alternate jurisdiction must offer reasonable remedies and the defendant must be amenable to process within it.” Biomune asserted that Egyptian law provides remedies for breach of contract and that it would submit to jurisdiction in Egypt. Biomune also pointed out that Egypt had been deemed an adequate alternative forum in many other courts at various times. Moreover, Biomune argued that Tradimpex had filed various suits against Biomune in Egypt, which demonstrated that Tradimpex “has tacitly acknowledged that the Egyptian system can handle claims in a sufficiently expeditious manner.”

The court disagreed with Tradimpex and took judicial notice of the “recent revolutionary events” that have taken place in Egypt – “including the resignation of long time President Hosni Mubarak in January 2011 and the dissolution of Egypt's constitution and parliament in February 2011.” Therefore, the court found that it would not “assume that the prior adequacy of the Egyptian courts necessarily exists today.” The court also observed that Tradimpex's prior filing of suits in Egypt did not, per se, indicate that it still viewed Egypt as providing an adequate alternative forum. The court speculated that it was possible Tradimpex filed suit in Delaware because it now believed that Egypt was no longer an adequate forum. In addition, the court observed that there was no pending action in Egypt which had all of the following: “Biomune has been served,” Tradimpex “is seeking the same or similar relief for breach of contract as” Tradimpex is seeking in this case, “and the action has advanced materially further than has the instant case.” As a result, the court found that Egypt was not an adequate forum at the present time. [Tradimpex Egypt Co. V Biomune Co. D/B/A Ceva Biomune, In The United States District Court For The District Of Delaware, C.A. No. 10-757-Lps](#)

Anti-Suit Injunction: District court enjoins insurers' litigation in a Brazilian court where insureds had entered into agreement to arbitrate in New York.

Stolt Tankers BV v. Allianz Seguros S.A. Stolt, a shipping company, entered into a charter party with a company for the shipment of caustic soda to Brazil. The charter party specified that disputes would be resolved through arbitration in New York and that U.S. law would apply. Stolt also issued bills of lading, specifying Klabin and Suzano as the consignees, that clearly incorporated the charter party's terms. Klabin and Suzano alleged that a portion of the shipment was damaged. A representative of Ace and Allianz, the subrogated underwriters of Klabin and Suzano, commenced litigation in a Brazilian court. Stolt filed a motion in the court in New York to compel arbitration and to enjoin the Brazilian proceedings. The district court considered the insurers' obligations under an arbitration clause and agreements into which the insured entities, Klabin and Suzano, had entered. The court reasoned that, once the insurers became subrogated, they stood in the insureds' shoes and were made a party to the bill of lading. Similarly, the insurers' right of recovery from the carrier of goods was governed by the same terms as the insureds' right of recovery – that is, by the terms set forth in the bill of lading.

The court rejected the insurers' contention that the choice of forum clause (specifying New York) was not binding on them. Because the insureds, Klabin and Suzano, were parties to the bills of lading, and because the New York arbitration clause was incorporated by reference to the charter party using unmistakable language, they were bound by the arbitration clause. And, because Allianz and Ace were responding to the petition to compel arbitration and were litigating in Brazil against Stolt solely in their roles as subrogees, their rights and obligations were no different from those of the subrogators, Klabin and Suzano. Furthermore, by virtue of being bound by the arbitration clause, the subrogees, Ace and Allianz, were subject to the jurisdiction of the federal court in New York.

As to the issue of whether an anti-suit injunction should issue with respect to a court outside the United States, the district court noted that principles of comity dictate that such injunctions should be issued sparingly. Before making such an order, a district court must make a threshold determination that two factors are present. First, the parties to both the U.S. and the foreign proceedings must be the same, and, second, the resolution of the case in the district court must be dispositive of the case in the foreign court. Ace and Allianz argued that the anti-suit injunction could not be issued because neither threshold factor was met. They argued first that, in the Brazilian action, *Stolt Brazil*, Stolt's Brazilian

affiliate, was the named defendant and that the parties were thus different. The court rejected the argument. Because the Brazilian affiliate was named on the basis of its corporate relationship to Stolt, the "same parties" requirement was satisfied. The second factor was also met; an order compelling arbitration would result in a determination of the dispute in the arbitration, and thus the resolution of the case in the district court was clearly dispositive of the Brazilian litigation. The district court thus deemed the threshold standard met to enjoin the Brazilian litigation. However, once that standard is met, several additional factors must also be considered: (1) whether a policy in the U.S. court would be frustrated if the injunction does not issue; (2) whether the foreign action would be vexatious; (3) whether the foreign litigation poses a threat to the U.S. court's in rem or quasi in rem jurisdiction (as in cases wherein U.S. property owned by a foreign party is at issue); (4) whether the proceedings in the other forum prejudice other equitable considerations; or (5) whether adjudication of the same issues in the U.S. and the foreign actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment.

The district court found that most of these factors favored issuing the injunction. Permitting the Brazilian litigation to continue would frustrate the U.S. policy of promoting arbitration. The fact that the Brazilian court would not be expected to apply the same legal standard as would the U.S. court could result in contrary rulings (and in fact, the subrogees appeared to be motivated to litigate in Brazil because of the prospect of the application of Brazilian law, which was more favorable to them). The potential for disparate judgments, and the race to judgment that could ensue, also weighed in favor of issuing the anti-suit injunction. Equitable considerations, such as deterring parties from "shopping" for a forum perceived to be more favorable to their side, also indicated that the anti-suit injunction should issue. The one neutral factor was the third factor; because both courts had personal jurisdiction over the parties, there was no particular threat to the jurisdiction of the district court. However, on balance, the factors clearly favored the issuance of an anti-suit injunction. The district court therefore granted Stolt's petition to enjoin the Respondents' action in Brazil until the conclusion of arbitration in New York. *Stolt Tankers BV v. Klabin S.A. et al, United States District Court Southern District Of New York, 11 Civ. 2331 (SAS)*.

Spain

Arbitrability of contract between private parties and the public administration

The claimant Renfe Operadora requests the Civil-Mercantil Court of Coruña to declare null and void the Arbitral Award rendered by the Xunta Arbitral de Transportes de Galicia on 25 March 2010, which partially decided in favour of Don Sabino (the defendant in this proceedings), setting a compensation of € 4.605, 76, as indemnity for damages occurred during a faulty execution of the transport contract. The Arbitral Tribunal considered that the failure of the transport contract, responds to both, Don Sabino and Renfe Operadora's negligence, giving rise to a lower amount of compensation from the € 6.141,02, originally claimed by Don Sabino. Therefore, pursuant to Articles 3 and 23 of the Ley de Ordenación de Transportes Terrestres (hereinafter LOTT), and 1124 of Spanish Civil Code, the tribunal established that Renfe was liable to pay compensation for the damaged caused to Don Sabino. Renfe appealed the decision of the Arbitral Tribunal before the Court of Coruña arguing that in fact the case was not a commercial dispute within a transport contract, but rather one of extra-contractual liability and physical damages, for which the said tribunal lacked jurisdiction pursuant to Article 38 of the LOTT. Renfe asserted that the case could also be considered as a case of patrimonial responsibility of the public administration, which, as well, was not subject to arbitration. Whatever the relationship between the parties, public or private, the dispute should have been settled under the Act of Administrative Procedure, by the tribunals legally constituted to this effect. The tribunal considered that : 1) the relationship between Renfe and Don Sabino was commercial contract of railroad transport; 2) the claim in which the arbitral award originates, addresses civil liability pursuant to Article 1101 of the Civil Code, which gives rise to compensation for damages. The Court also considered that, while Articles 9.4 of Ley Orgánica del Poder Judicial and 2 (e) Ley de la Jurisdicción Contencioso Administrativa, patrimonial responsibility may be under judicial jurisdiction, there does not seem to be an obstacle for the institution of arbitration proceedings under Article 38 LOTT, since its legal requirements have been met, due to the private contractual relationship between Renfe and the user of the service. This relationship is liable of arbitration, as there is not legal prohibition limiting Renfe's participation in arbitral proceedings. Therefore, the Court dismissed the Appeal introduced by Renfe. *Renfe Operadora v. Don Sabino, Recurso de Apelación no. 4/2010, Seccion 4 Audiencia Prov. A Coruna*.

Extent of the revision of arbitral awards by judicial courts

Repsol YPF S.A. (Repsol) commenced judicial proceedings against Fire Stop Mediterraneo S.A. (Fire Stop), before Sección 10 de la Audiencia Provincial de Madrid, requesting the annulment of the Arbitral Award 45/2009 rendered by the Civil and Commercial Court of Arbitration. The Arbitral Tribunal had decided: i) to rescind the contract between the parties, as requested by Fire Stop, ii) to order to Repsol the payment of € 2.272.219,93 for certifications delivered by Fire Stop, and due to an undue execution of guaranties, as well as interests.

The Court asserted that arbitral proceedings are of an especial nature, which provides the parties with an alternative avenue to seek redress for Civil Law disputes, than the judicial one. In this vein the intention of the Claimant, who seeks the revision of the merits of the arbitral award, by way of recourse of annulment, which is not an appeal, frustrates the whole point of the arbitration proceedings in general. Therefore, it is not the task of the Courts to provide redress for potential deficiencies in the analysis of the merits of the arbitration proceedings.

The instant case the revision of the award by this court can only be to the extent that it considers the compliance with essential formalities, and exercise of the arbitral mandate within the limits of the agreement. In this vein, the Court would only annul those decisions adopted outside the scope of the arbitral mandate; yet, without entering in considerations of the merits. Therefore, pursuant to Article 45 of the Arbitration Act, which does not refer to misjudgment of the evidence, lack or wrong motivation of the award, or faulty arithmetic calculations; this Tribunal confirms the Arbitral Award. *Repsol YPF S.A. v Fire Stop Mediterraneo, S.A., Nulidad Del Laudo Arbitral 5/2010, Sentencia: 00352/2011, Aud. Provincial Seccion N. 10, Madrid*

Sweden

Immunity of foreign state property has limitations

The Supreme Court of Sweden has upheld the decision of the District Court of Appeal in the claim presented by the Russian Federation against Franz J. Sedelmayer. The background of this case can be traced back to 1998, when after arbitration proceedings brought by Mr. Sedelmayer against the Russian Federation, an Award was rendered by the Court of Arbitration at the Chamber of Commerce in Stockholm, pursuant to the Germany – Union of the

Socialist Republic Bilateral Investment Treaty. The Russian Federation initiated challenge proceedings at the Stockholm District Court, regarding the Validity of the arbitration Award. The decision of the District Court was rendered in favour of Mr. Sedelmayer and ordered the Russian Federation to pay compensation in favor of Mr. Sedelmayer, who, in turn, requested the enforcement of the Award, before the District Court. In 2003 the Enforcement Authority ordered the execution of the Judgment of the Stockholm District Court.

In the course of the investigation the Enforcement Authority found, among others, that the Russian Federation owned a real property, which was used as multi-family property, as nearly sixty individuals were registered as residents of such property, as well as two companies. The main question in this matter was whether, due to state immunity with respect to a foreign state's property, distraint of such property of and rentals-payments to the Russian Federation could be barred. The Supreme Court stated that the issue of state's immunity from jurisdiction should not be decided separately from matters of enforcement on foreign state's property. The Supreme Court analyzed extensively issues of immunity and its inherent linkage to states' sovereignty. It, adopted, however, a more limited approach to states' immunity, stating that immunity should apply only to sovereign acts i.e. acts by the state as state. In other words, enforcement may be taken with respect to some state property, which is used for other purpose than government non-commercial uses. The Russian Federation had argued that the property under analysis was used for official purposes, since some premises were used for personnel working at the trade delegation, some as residence for diplomats and some other as residences for students. As to the question of whether the used of property is of the specific nature that distraint of the property should be barred, the Court concluded, among others: (i) there was evidence that the property, under analysis, was a housing property, which was not used for official purposes, at the time of the assessment; (ii) while the property was not under commercial use, yet it was also not either used for official matters. Therefore, it was clear that the property was not, to a substantial part, used for the official purposes of the Russian Federation; (iii) the rental payments constitute an asset of a private nature, and, therefore, they should be considered a commercial asset. In light of such considerations and various others, the Supreme Court concluded that distraint of the property and rental payments, of that property, is not barred; thus upholding the decision of the Court of Appeal. *The Russian Federation v*

Switzerland

Violation of Public Policy in Civil Law Proceedings

This opinion was issued by the Federal Tribunal on April 11, 2011 in the matter of Luis Fernandez versus FIFA. The well-known French football coach was hired by a football club in Qatar in 2005 but he terminated his employment with that Club a few months later. He agreed to pay an amount of € 400'000 to the Qatari Club as a consequence of the termination and he did so in January 2006 upon his representative being given by fax the name of a Curacao company and a bank account in Geneva. The payment was apparently made by a Seychelles company on behalf of the coach. A few weeks later the Qatari Club filed a claim with FIFA, alleging that the € 400'000 had not been paid. The FIFA Players' Status Committee upheld the claim in March 2008 and Fernandez appealed to the Court of Arbitration for Sport ("CAS"). That appeal was struck off because the advances on costs had not been fully paid and a Civil law appeal against that CAS decision was rejected by the Federal Tribunal on February 20, 2009. In May 2009, the Qatari Club sought disciplinary proceedings against Fernandez and he was indeed given sixty days to pay or he would be banned from any football related activity upon first request by his creditor. Fernandez appealed that decision too to the CAS. At first a stay of enforcement was issued by the three members Panel of the CAS (Chairman Luc Argand with arbitrators Joao Nogueira da Rocha and Ruggero Stincardini), but the appeal was eventually dismissed on September 3, 2010. Fernandez appealed to the Federal Tribunal and the following are worth pointing out in the opinion. (i) Appeals to the Federal Tribunal are subject to the Appellant having a present – that means still existing – and legally protected interest to the appeal. As Fernandez had paid the amount requested, although he had filed a criminal complaint for fraud and embezzlement in Geneva, the issue arose as to whether or not he still had a legally protected interest to appeal CAS award. The Federal Tribunal rightly found that it was so (Section 1.2 of the opinion). (ii) Whilst there is no requirement to employ Swiss lawyers in order to file a Civil law appeal, this case shows yet again that there are some technicalities to be taken into account because the Federal Tribunal will not hesitate to refuse to address arguments that are not presented as requested by its case law and practice. Whether this is a good thing or merely reflects some

kind of protectionist attitude is a matter of opinion and debate but it should be borne in mind by potential appellants (Sections 2.2.1 and 2.2.2 of the opinion). As an argument of violation of public policy had been made, the Federal Tribunal emphasized again that simply listing constitutional rights or treaty rights or other rights conceivably belonging to the realm of public policy is not sufficient in a Civil law appeal, which must demonstrate to what extent the "right" relied upon really falls within the definitions of substantive or procedural public policy as contained in Swiss case law (Sections 3.2.1 and 3.2.2 of the opinion). *Luis Fernandez v. Fédération Internationale de Football Association (FIFA), 4A-604/2010, First Civil Law Court, April 11, 2011 (original in French)*

No violation of substantive public policy (argument based on *pacta sunt servanda* rule and on alleged contradiction in the award)

The case involved a claim by a company based in the Cayman Islands concerning some commissions allegedly due for the assistance provided to a construction company with a view to obtaining the works for a water supply system and a highway. The contracts contained an arbitration clause providing for ICC arbitration in Switzerland and a three members arbitral tribunal was constituted with Bernhardt Meyer as Chairman, Pierre-Yves Gunter and Roberto Dallafior as arbitrators. The Arbitral tribunal issued an award on June 24, 2010 essentially rejecting the claim and an appeal was made to the Federal Tribunal. This is a good example of an appeal that should never have been filed, for the following reasons: (i) The Appellant raised an argument of public policy and claimed a violation of the rule of *pacta sunt servanda*. The Federal Tribunal repeated once again its often stated view that the rule of *pacta sunt servanda* does belong to the realm of substantive public policy but that it would be violated only if an arbitral tribunal found that there was a contractual obligation yet refused to enforce it or, conversely, if after finding that there was no contractual obligation, the arbitrators would pretend to enforce one. Obviously, this is most unlikely ever to happen in practice and whilst one can debate whether or not the approach of the Court is too restrictive in this respect, it is well established case law. In other words, the appeal simply did not stand a chance with this argument (see section 3 of the opinion in this respect). (ii) The second argument was equally doomed as the Appellant argued a contradiction in the award

constituting a violation of substantive public policy. The Court merely repeated that even if an award were intrinsically incoherent this would not constitute a violation of public policy (see section 4 of the opinion in this respect). Considering that the Appellant had to fork over CHF 30'000 (\$ 33'000) of judicial costs and CHF 35'000 (\$ 38'500) paid to its opponent, for which security for costs had been requested and obtained in the appeal proceedings, the cost of the appeal actually exceeds \$ 10'000 per page of the opinion. This shows how risky it is to appeal an international arbitral award to the Swiss Supreme Court with an inadequately reasoned claim that public policy was violated. *X. _____ v. Y. _____* 4A_481/2010, *First Civil Law Court, March 15, 2011 (original in French)*

4. NOTES

- The case summaries of United Kingdom have been published in *Trade Advantage* by Hill Dickinson May and July 2011.
- The article “Arbitration Act in Malaysia amended to address arrest of ships in arbitration claims”, by Siva Kumar Kanagasabai, has been posted [online](#).
- The article “The Cairo Regional Centre for International Commercial Arbitration (CRCICA) Newly Revised Arbitration Rules: Incorporating the New UNCITRAL Model Rules of 2010 and Expanding the Centre's Role as an Appointing

Authority,” by S.A.F. Haridi, M. N. Alrashid, A. Bouhabib has been posted [online](#). This article was published in (2011, advance) March 2011, at www.transnational-dispute-management.com (TDM).

5. CONTRIBUTORS:

- Alrashid, Meriam – *Crowell & Moring LLP* (USA)
- Bouhabib, Amal – *Crowell & Moring LLP* (USA)
- Haridi, Samaa – *Crowell & Moring LLP* (USA)
- Hicks, Edward – *Hill Dickinson LLP* (UK)
- Kumar, Kanagasabai Siva– *SKRINE* (Malaysia)
- Leonard, Susan – *Hill Dickinson LLP* (UK)
- Meads, Andrew – *Hill Dickinson LLP* (UK)
- Poncet, Charles– *ZPG Geneva* (Switzerland)
- Reider Mary Ann – *Baker & McKenzie* (USA)
- Rodrigo Pilar– *AACNI Abogados* (Spain)
- Trebuchet, Pierre-Jean – *AACNI Abogados* (Spain)
- Woods, Jonathan – *Hill Dickinson* (UK)
- Zaslowsky, David – *Baker & McKenzie* (USA)

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 always welcome in the upcoming issues. We thank those who contributed to the present edition. Editors: Albert Badia and Ana Maria Daza.

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