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### 1. NEWS

#### **Changes in the FOSFA Rules of Arbitration and Appeal and in the “Guide”**

There has been a number of changes in the Fosfa Rules of Arbitration coming into effect on January 1, 2012. Rule 2(a)(iii) of the Fosfa Rules of Arbitration and Appeal has been deleted to reflect changes introduced to the South American Soyabeans Contracts. Rule 3, the Lapse of Claim Rule, has been amended to limit to a one year period only the claim renewal, as opposed to being open-ended year by year. On the other hand, the Fosfa Guide to Arbitrations and Appeals has been amended to recommend to parties to seek to establish arbitrators' indicative rates prior to appointment.

#### **New FOSFA Contracts**

The following new Contracts have been endorsed by Fosfa and are available for use by the trade from January 1, 2012. They all incorporate a Fosfa arbitration clause. Contract No. 58 for Olive Oils and Olive-Pomace Oils, Collection Ex-Works by Tank Cars (Road and Rail) / ISO Tank Containers and other Intermediate Bulk Containers. Weight, Quality and Condition Final at Loading; Contract

No. 59 for Olive Oils and Olive-Pomace Oils, Free Delivered by Tank Cars (Road and Rail) / ISO Tank Containers and other Intermediate Bulk Containers; and Contract No. 70 for inedible dripping/tallow/animal fat in bulk, by tank car/tank barge delivered ex-works.

#### **ICSID Schedule of Fees revised**

The Centre's administrative fee, which has been in effect since January 1, 2008, has been adjusted to US\$32,000 for all new and pending cases. The administrative fee is levied after the constitution of the conciliation commission, arbitral tribunal, or ad hoc committee and annually thereafter. The Centre has also eliminated the fee it currently charges parties for its legal staff to attend hearings held away from the seat of the Centre. This fee, which is currently US\$1,500 per day of hearing and travel, will be covered by the administrative fee. In addition, the costs of hearing rooms will now be covered by the administrative fee when the proceedings are held in World Bank Group facilities. The Schedule of Fees became effective on January 1, 2012.

#### **New LMAA Terms**

The London Maritime Arbitrators Association (LMAA) has published a new revised Terms and Procedures which are now effective for all references on and after January 1, 2012. The new Terms and Procedures – says the LMAA – take account of many comments made by users and will help to correct anomalies and streamline LMAA procedures. The revised terms have been prepared by a sub-committee of experienced arbitrators under the chairmanship of Anthony Hallgarten Q.C. The LMAA Terms are terms of procedure which are available to parties for incorporation into dispute resolution clauses in their contracts. Where members of a tribunal accept their appointments on the LMAA Terms, those Terms then apply to and govern the procedure to be adopted in the arbitration reference. The LMAA also publishes its Intermediate Claims Procedure (ICP) and the Small

Claims Procedure (SCP), which have also been revised for 2012.

### **CEDR acquires IDRS Ltd. from CIArb.**

IDRS Ltd, one of the UK's leading dispute resolution service providers, has been sold by the Chartered Institute of Arbitrators (CIArb) to the Centre for Effective Dispute Resolution (CEDR) on Nov. 8, 2011, CIArb News says. IDRS Ltd. administers a range of schemes for the resolution of consumer complaints, as well as handling commercial disputes between businesses and public sector organisations. According to CIArb, the move will see IDRS Ltd. added as a going-concern to CEDR Services Ltd (CEDR's commercial arm) while CIArb will be able to concentrate on its core business as a Chartered professional and membership body.

### **States competing to be at the forefront of the arbitration business**

Governments unveil their eagerness to get a share in the international business of arbitration. India, Singapore, or Australia are just an example. According to a survey conducted by Ernst & Young, India can become a preferred arbitration destination with a better focus on improving cost and time efficiencies in dispute resolution. The road to be so is the rapidly changing arbitration environment India is going through and the recent efforts undertaken by the Indian Law Minister towards updating the Arbitration Act. As far as Singapore is concerned, at an Arbitration Dialogue organised by the Ministry for Law on November 1, 2011, Minister K. Shanmugam said that Singapore has taken several steps over the years to root itself on the international arbitration map and that its legal infrastructure is being strengthened to accommodate international arbitration. Turning to Australia, the President of the Australian Centre for International Commercial Arbitration (ACICA), a centre established 12 months ago which has played host to 80 commercial disputes from regions including India, North America and South Korea, joined an Australian delegation to Beijing to show Chinese business leaders the level of support the Australian government and judiciary are giving to international arbitration. The delegation included the president of the NSW Court of Appeal, Justice James Allsop. The initiative aims to take over disputes involving Chinese businessmen, who in the past have preferred to have disputes settled at home or in Hong Kong or Singapore.

### **Commercial Litigation Funding Limited launches Arbitration Funding Facility in UK**

The Arbitration Funding Facility has been introduced by Commercial Litigation Funding Limited (CLFL), last September 2011, in collaboration with its global law firm clients. CLFL offers its clients with specialist Legal Due Diligence work in advance of arbitration cases, providing clients and lawyers with an avenue and the possibility to continue towards resolution of a particular dispute. CLFL announced that since the launch of the Arbitration Funding Facility, it has received four enquires, two of which include dispute settlement at the International Centre for Settlement of Investment Disputes.

### **PCA: New rules of procedure for disputes related to Outer Space Activity**

The project started in 2009 and was promoted by the Permanent Court of Arbitration's (PCA) Secretary-General, Mr. Christiaan M.J. Kröner. The text was developed by the International Bureau of the PCA, in conjunction with an Advisory Group of leading experts in air and space law. The rules are launched in response to a perceived need for specialized dispute resolution mechanisms in the evolving field of outer space activities. The rules are based on the 2010 UNCITRAL Arbitration Rules, which present various changes in order to reflect the specific characteristics of disputes involving the use of outer space by States, international organizations and private entities; also to consider the public international law and international practice related to disputes involving the use of outer space by States, and to provide for the establishment of a specialized list of arbitrators as well as scientific and technical experts, among others.

### **Afghan business men trained in Bahrain in dispute settlement**

The American Arbitration Association and the US Department of Commerce Commercial Law Development Programme have organized a three-day workshop on arbitration and mediation for senior members of the Afghanistan Chamber of Commerce and Industry. The event took place at the Bahrain Chamber for Dispute Resolution and provided the attendants with detailed briefings on ways to approach dispute resolution in the country. Capacity and institutional building are deemed pivotal to attract foreign direct investment to Afghanistan, as well as reforms to the commercial legal sector in the country.

### **India is competing to become a hub for dispute resolution**

The government of India has announced the amendment of the Arbitration and Conciliation Act of 1996. India seeks to encourage alternative dispute resolution and develop the country as a hub for international arbitration. The Minister of Law and Justice, Shri Salman Khurshid, announced some of the amendments to the Act, which provide for the possibility to file applications for execution and appeals before the High Courts, as well as challenge of arbitral awards. Regarding fees, arbitrator may not charge fees per sitting, unless agreed by the parties to the dispute. Chief Justices in High Courts could refer to the arbitration institute matters related to commercial disputes of specific value and with prior approval of the Central Government.

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## 2. LAWS & TREATIES

### AANZFTA enters into force for Indonesia

The agreement establishing the ASEAN-Australia - New Zealand Free Trade Area (AANZFTA) entered into force for Indonesia on January 10, 2012. AANZFTA will then be in force for all 12 signatories: Australia, Brunei Darussalam, Burma, Cambodia, Indonesia, Laos, Malaysia, New Zealand, Philippines, Singapore, Thailand and Vietnam. The agreement contains provisions for the establishment of an arbitral tribunal as a method to settle disputes in accordance with customary rules of treaty interpretation of public international law.

### CIS Countries sign up to Free-Trade Zone

On October 18, 2011, the Commonwealth of Independent States (CIS) unexpectedly came to a successful conclusion of a free-trade arrangement. The establishment of a free-trade zone does not conflict with any obligations under the World Trade Organisation (WTO), which Moscow hopes to join soon. In the travaux préparatoires heads of government from Russia, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, and Ukraine, were involved. Azerbaijan, Uzbekistan and Turkmenistan have asked for a few weeks to consider joining the free-trade agreement.

### Japan-Taiwan BIT

The Arrangement between the Interchange Association and the Association of East Asian Relations for the Mutual Cooperation on the

Liberalization, Promotion and Protection of Investment between Japan and Taiwan was signed on September 22, 2011. Although these two entities are non-governmental organizations, the concerns the relations between Japan and Taiwan on a working basis. Under the Arrangement, “either Side shall facilitate that the authorities concerned in the Area of that Side consents to the submission of an investment dispute by a disputing investor to a conciliation or arbitration (...) including arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law, arbitration under Rules of Arbitration of the International Chamber of Commerce and any arbitration in accordance with other arbitration rules agreed upon by the disputing parties.”

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## 3. COURT CASES

### France

#### Enforcement of a US decision concerning sovereign bonds

On 28 September 2011, the French Cour de cassation has upheld a decision of the Paris Court of appeals (1 October 2009) refusing the enforcement of a US decision concerning sovereign bonds issued by Argentina. It is the French Part of the NML Capital Ltd case which has seen numerous developments in Belgium, Switzerland and, mainly, in the USA and in the UK. Background (partly from a paper published last July in the Financial Times). NML Capital –which is an affiliate of a so-called New York “vulture fund” Elliot Management– bought bonds between 2001 and 2003 issued by the Argentine government at little over half their face value. The bonds contained a clause dealing with jurisdiction and immunity in relation to claims on the bonds and were subject to New York law. Argentina, in the contracts, expressly waived its immunity from execution, except with respect to the reserves on the balance sheet of the Central Bank (Banco Central), properties in the public domain or in connection with the execution of the budget NML then sued the Argentine government for the bond’s full value in New York and won its case for more than \$284m in a Federal Court in 2006. It then sought to enforce the judgment and recover assets, notably in the UK and in France. In the UK, a Court of Appeal ruled that Argentina was entitled to state immunity but this decision was overturned in July this year by the Supreme Court which has ruled that

NML can pursue its legal action. In France NML has seized funds deposited on bank accounts of the Argentine Embassy and of the Argentine permanent delegation to UNESCO. A decision of release has been issued by the Paris Court of Appeals in 2009, decision upheld by the French Supreme Court last week. NML claimed that Argentina waived its immunity from execution regarding diplomatic missions by not including them in the exceptions listed in the waiver clause of the contracts. The Paris Court of Appeals held that Foreign diplomatic missions benefit a special immunity from execution (i.e. distinct from that applicable to immunity from execution otherwise accorded to States) and that the clause included in the contracts do not demonstrate the express and unequivocal intent of the borrower State to waive such an immunity. A special waiver is required. This decision, upheld by the French Supreme Court, is in line with a previous decision rendered by the same Paris Court of appeals in August 2000 in *Noga v. Russia*. But until now, the French Supreme Court did not have the opportunity to rule on this issue. With this 28 September decision, it is done. (link to the decision, in French). [La société NML Capital Ltd v La République Argentine, Arrêt n° 867 du 28 septembre 2011 \(09-72.057\) - Cour de cassation - Première chambre civile.](#)

## Hong Kong

### Enforcement of a Chinese arbitration award, originally challenged on public policy grounds

The Hong Kong Court of Appeal recently overturned the decision in *Gao Haiyan and Another v Keeneye Holdings Ltd and Another* in which the Court of First Instance ("the CFI") had refused on public policy grounds to enforce an arbitration award by the Xian Arbitration Commission. The CFI had held that a dinner meeting between the secretary general of the Xian Arbitration Commission and one of the arbitrators in the tribunal nominated by Gao with one of Keeneye's representatives three months before the award created an appearance of bias in Gao's favor. Hence, the CFI had refused to enforce the arbitration award as a matter of public policy, ruling that enforcement of such an award would bring justice into disrepute. The Court of Appeal said that it is not for the CFI to express an opinion on the correctness of the arbitral tribunal and that such an award should only be blocked if it has been proven that enforcement of the award would be contrary to public policy. In reversing the decision of the CFI, the Court of Appeal held that the arbitration award could be enforced in Hong Kong

based on two main grounds: (i) **Waiver**. The Court of Appeal took the view that a party to an arbitration that wishes to complain of non-compliance with the rules governing the arbitration must do so promptly and must not proceed with the arbitration, keeping the point of non-compliance up its sleeve for later use. The latter point was also stated in the Xian Arbitration Commission Arbitration Rules, which indicate that failure to submit an objection initially will result in the party being deemed to have waived his or her right to object. The Court of Appeal took the view that Keeneye should have complained about impropriety or bias, real or apparent, against the arbitral tribunal or the secretary general prior to the making of the award and that Keeneye's attack of Gao's integrity was not a substitute for a complaint. By failing to complain at that time, Keeneye waived the right to do so. On this basis, the Court of Appeal allowed the appeal and set aside the order of the CFI. (ii) **No Apparent Bias**. The Court also disagreed with the CFI's ruling that apparent bias had been established. The CFI's ruling was based on the fact that the mediation was held in an informal manner during dinner at the Shangri-La hotel with "related parties" rather than with the parties themselves or their legal representatives. In addition, during the dinner the secretary general and the arbitrator appeared to propose that the award would be in Keeneye's favor if Keeneye was prepared to pay compensation of RMB250 million. Keeneye refused, and subsequently the award was issued in favor of Gao with a recommendation that Gao make a payment to Keeneye of RMB50 million. On these grounds the CFI concluded that there was apparent bias and refused to enforce the award. The Court of Appeal rejected the suggestion of bias on the following grounds:

- It is not meaningful to compare the two figures (i.e., RMB250 million and RMB50 million), and there were justifications in coming to the two figures.
- There might be unease about the way the mediation was conducted because mediation is normally conducted differently in Hong Kong, but whether that would give rise to an appearance of bias may also depend on an understanding of how mediation is normally conducted on the Mainland.
- The Mainland court is better able to decide whether holding a mediation over dinner at a hotel is acceptable. There was no complaint to the Mainland court about the venue of the mediation when Keeneye unsuccessfully attempted to set aside the award before the Xian Court.

- Due weight must be given to the decision of the Xian Court, which had refused to set aside the arbitration award for bias.

The Court of Appeal stressed that enforcement of an award should only be refused if to enforce it "would be contrary to the fundamental conceptions of morality and justice" of the forum. And one should not be too quick to block enforcement of an award on the basis of one's notion of what amounts to apparent bias. The Court of Appeal will consider local mediation/arbitration practices when deciding whether to enforce an award. The Court of Appeal decision reinforces the view that Hong Kong courts are keen to support the enforcement of arbitration awards and that challenging enforcement on grounds of public policy and apparent bias remains an uphill task. *Gao Haiyan and Another v Keeneye Holdings Ltd and Another*

## Israel

### Can shareholders bind the company and other shareholders to arbitration proceedings?

The Plaintiff, Bluesnow Services limited and the Respondents are the shareholders of a company named Xmatic Inc which was incorporated and registered under the laws of the State of Delaware, USA ("the Company"). The Plaintiff is the holder of 28.5% of the Company's shares and each of the Respondents (six respondents) holds between 5.7%-17.8% of the company's shares, and together hold the remaining 71.5%. The Company was established by the respondents who engaged into a Founders Agreement which included an arbitration clause according to which all disputes arising will be brought in front of an Arbitrator which would be appointed by the District Court of Tel-Aviv ("the Founders Agreement"). Later on, the Company signed an Investment Agreement with the Plaintiff according to which the Plaintiff will invest, in few steps, a total of US\$ 1,000,000.- and will hold accordingly up to 50% of the Company's shares ("the Investment Agreement"). The Company also entered into a Distribution Agreement with a company named "Medituch" according to which the Company would be the sole and exclusive distributor of products manufactured and produced by "Medituch" ("the Distribution Agreement"). The Distribution Agreement, and the Investment Agreement, provided in the applicable law and jurisdiction clause that all disputes arising would be brought in front of the Courts of London and will be governed by English law. Eventually, disputes arose between the Respondents themselves: respondents 1-4 claimed that respondents 5-6 took control over the

company and deprived them from their legitimate rights as shareholders. They brought arbitration proceedings, in front of a (former) District Court Judge Mr. Arbel who granted the claimants -the respondents 1-4- Restraining Orders, according to which any activity regarding the distribution of Medituch's products are forbidden, and that any disposition in the company's management and statues are forbidden too. The Plaintiff -the major shareholder and the Company, were not part to the Arbitration proceedings, but on a preliminary Judgment the Arbitrator held that even though he is authorized to give orders according to which the parties must enter into voluntary Liquidation procedures and to order upon the cancelation of the Investment Agreement and the Distribution Agreement, and that the Plaintiff and the Company must obey such Arbitration Awards. The plaintiff and the Company (as a second plaintiff) filed a claim before the District Court of Tel Aviv. They sought remedies, stating that the Arbitrator was beyond jurisdiction to rule against them, and for the cancelation of the restraining orders, granted by the Arbitrator. The District Court held that although the respondents signed the Founders Agreement and were bound by the Arbitration Clause, such a clause does not appear in the Investment Agreement and the Distribution Agreement. Therefore an implied consent to the Arbitration proceedings cannot be implied, and on the contrary, it seemed the Plaintiff explicitly did not agree so. The District Court held that indeed, situations in which parties are called into Arbitration proceedings even if they did not sign the relevant Arbitration agreement are not extraordinary, and sometimes a company can be joined to an arbitration regarding to a dispute between its shareholders. In the current situation, however, the Arbitrator erred in his findings that all the shareholders were within the dispute. The respondents were not the only and whole shareholders. The Plaintiff who held the major part of the Company's shares was not a party to the dispute and did not want to take part in it, so the Respondents could not be seen as "one unit" which reflects the Company's interests. If the Respondents thought that the Plaintiff and the Company were part to the Arbitration proceedings, they should have joined them to the claim and give them the opportunity to argue against the requested orders and remedies, but they did not do so. The Arbitrator concluded that he is authorized to rule against the Company and third parties (the plaintiff and Medituch) without them being heard. Therefore, the Arbitrator's ruling that all the company's shareholders must obey its Arbitration Judgments was problematic; specifically where both, the Investment Agreement and the Distribution

Agreement, include jurisdiction clauses nominating the London Courts and the English Law as the law and jurisdiction which will rule over the Agreements. The Court held that indeed the fact that only the Respondents are part to the Arbitration proceedings narrows the scope of the Arbitration and damaged the efficiency of the Arbitration especially when the Arbitration was a well experienced Arbitrator who could see the whole picture and rule accordingly for the benefit of all parties. But efficiency is not of the essence. One could not extend the borders of an Arbitration Agreement towards third parties who did not agree so. The District Court held that the Arbitrators Judgments do not oblige the Plaintiff and the Company, and that the Arbitrator cannot rule upon the Liquidation of the Company. *Bluesnow Services Limited and others v. Mr. Gioora Ein-Zvi and others, Tel-Aviv District Court, civil claim No. 20981-09-11, 8/11/2011.*

## Norway

### Enforcement of unclear arbitration award

Two plaintiffs (A & B) sued for the enforcement of an arbitration award. The award was, however, not perfectly clear, and the Court of Appeal agreed with the defendants (C & D) that the Norwegian Enforcement Act section 4-2 para. 1 litra b was applicable. This provision does not allow the enforcement of judgments when the reasons are “ambiguous or contradictory, or if execution is impossible for other reasons”. The question was brought before the Supreme Court, which, after interpreting the relevant provisions of the Enforcement Act, the Arbitration Act, and their respective travaux préparatoires, concluded that the said provision in the Enforcement Act does not apply to arbitration awards. It is thus permissible also under Norwegian law to enforce arbitration awards, even when the judgment is unclear. *A and B vs. C and D. Rt. 2006-986 (Supreme Court) June 29, 2011.*

### Counterclaims; waiver of an arbitration agreement

A Portuguese company (Celulose Beira Industrial S.A. – “Celba”) sued its Norwegian contracting party for non-payment of two invoices under an agreement for successive delivery of wood pulp. The defendant counter-sued, claiming that it was entitled to damages for partial non-delivery under a preceding order. In court, Celba demanded that the disputed counter-claim be solved by arbitration, according to the agreement between the parties.

Simultaneously, Celba required that the Norwegian court determine the claim regarding non-payment of invoices, which was not disputed per se. The court referred to case law, which does not permit Celba to sue for payment of invoices, while at the same time referring its contracting party to international arbitration, when the parties’ claims originate from the same contract. Thus, the court decided to hear both cases despite the arbitration clause in the agreement. *Celulose Beira Industrial S.A. vs. Hunsfos Fabrikker AS. LA-2011-130822 (CA) December 1, 2011.*

## Spain

### Construction of arbitration agreements: formation of the arbitral tribunal.

The case concerns the legality of the constitution of an arbitration tribunal by virtue of an arbitration agreement originated in a ‘Sales Contract’ –of a private character– signed between the parties to the dispute. The said Sales Contract was later elevated to the category of Public Document; yet, with some modifications among which the arbitration clause – which had been initially included in the original contract- was thereafter omitted. The Court held that the constitution of the arbitration tribunal was not illegal. It considered, among others, the provision of Article 1124 of the Spanish Civil Code, which states that a public document which recognizes private contracts -such as the Sales Contract- does not constitute evidence against the provisions of the latter, when omissions or additions are not fully reflected in the content of the public document, unless there exist explicit intention of the parties to modify the original document. The Court considered that the parties should have expressly stated their intention to withdraw the arbitration agreement from Sales contract. However, in the absence of such expression of intention, the court promoted the *arbitri*, in the light of the preamble of the Arbitration Act, which advances a favorable approach to the validity of arbitration agreements for the effective settlement of disputes. *Tribunal Superior de Castilla, TSJ de Castilla y León, Burgos (Sala de lo Civil y Penal, Sección 1ª) 25 de octubre, 2011*

## Switzerland

### Arbitral agreements and third parties

The case involved a complicated dispute between the partners of a private bank and ultimately a plan

to carry out a complex set of agreements. This triggered a first arbitration, held in Geneva on the basis of the applicable arbitration clause and in July 2009 a new arbitration was initiated. As you will see from the statement of facts in the opinion, the Claimants were essentially requesting the Respondent to bring certain shares into a company, as this was a necessary requirement of the implementation of the previous agreement, at least in their view. A three members arbitral tribunal was constituted in Geneva with Alexis Mourre as Chairman and Henry Peter and Charles Poncet (contributor) as arbitrators. On December 10, 2010, the Arbitral tribunal found that it had jurisdiction as to the company into which the shares were to be brought and ordered the Respondent in the arbitration proceedings to do so. An appeal was made to the Federal Tribunal and whilst I have to exercise some restraint in expressing a view on the award or on the opinion of the Federal Tribunal because I was an arbitrator in both arbitrations in this case, I would like to point out that the opinion is quite interesting with regard to one issue at least: (i) Under Swiss law, a party can cause another party to commit in favour in a *third party*. This contractual pattern is known as *stipulation pour autrui* in the Swiss Code of obligations and constitutes a contract in favour of a third person. (ii) The issue in this case was whether or not the third party is bound by or entitled to rely on the arbitration clause. The Federal Tribunal set forth its previous approach to similar issues and found in favour of the Respondents in this respect. *Case: 4A\_44/2011, First Civil Law Court, Judgment of April 19, 2011.*

### **Decision of the arbitral tribunal not capable of appeal (procedural order)**

The case involved a contract signed in 2006 (“the Protocol”) by which certain shares were assigned to a French company by a Luxemburg company. Litigation in French courts ensued and in November 2009 the Luxemburg company initiated arbitration proceedings in Switzerland pursuant to an ICC clause contained in the Protocol. Two months later, litigation was also started in Luxemburg with a view to obtaining a finding that, if granted, would have voided the Protocol and indeed, probably, the very company the shares of which had been transferred. An ICC Arbitral tribunal had been constituted with Pierre Mayer and Lai Kamara as arbitrators and Pierre-Yves Gunter as chairman. The French company asked the arbitrators to stay the proceedings and they issued “a Procedural Order nr 1” on October 5, 2010, refusing to do so. The French company appealed to the Federal Tribunal and the

following is interesting in the opinion: (i) As you know, final awards and jurisdictional awards can be appealed to the Federal Tribunal. Other “awards” may or may not be “awards” for the purposes of Swiss appeals and if the decision appealed is not an “award”, the appeal is not admissible. (ii) The distinction between “easy” awards – an award on the merits, a jurisdictional award or an award disposing of some issues at hand in a way that cannot be rescinded – is not of the utmost clarity and the Court restates the basic principles in the opinion. (iii) The issue here was whether or not the procedural order refusing to stay the proceedings constituted an “award”. Whilst it was probably inevitable, case law has not made things much clearer by holding that a procedural order is normally not an “award” but that if it “implicitly” decides a jurisdictional or a substantive issue, then it may well become an “award”. This is what was argued in this case but the Court rejected the argument. Considering that a litigant faced with a decision which may or may not be an “award” forfeits his right to appeal at a later stage if he disregards the thirty days deadline, some clarification may be needed here, which will probably have to be done by the legislature. One cannot blame the Federal Tribunal for creating some subtle distinctions where they were necessary but the result is a somewhat confusing situation, which causes litigants to undergo unnecessary expenses. Indeed as you will see in the opinion, the Appellant ended up spending about USD 100’000 – legal fees not included... – to be told by the Federal Tribunal that the decision it was appealing was not an award. *Case: 4A\_614/2010 First Civil Law Court, Judgment of April 6, 2011.*

### **Ukraine**

#### **Enforcement of Arbitral Awards: Permit or Prohibit – That is the Question**

Adoption of the Law of Ukraine on January 21, 2010 “On Amending Certain Legislative Acts of Ukraine in respect of Regulating Private International Law Issues” (effective since February 16, 2010 and hereinafter referred to as the Law), has facilitated much and to certain extent stabilized Ukrainian courts practice referring recognition and enforcement of foreign court decisions and international arbitration awards in Ukraine. Nevertheless sometimes the participants of litigation processes find themselves in a tight corner, as similar cases can have dissimilar outcomes in different Ukrainian courts. On September 15, 2011 the Court of Appeal of Khmelnytsky region prohibited the enforcement of an international

arbitration award. The Court held that the award of the International Commercial Arbitration Court at the Ukrainian CCI (hereinafter referred to as the ICAC at the UCCI) had not come into force, as the appropriate documents required for its coming into force had not been attached by the claimant to his request. In its position the Court referred to Article 394 of the Civil Procedural Code of Ukraine (hereinafter referred to as the Code), prescribing an obligation to attach an official document proving the international arbitration court award's coming into force (unless it is not specified in the award itself). Shortly after, on September 30, 2011 the Court of Appeal of Donetsk region recognized and enforced an international arbitration award. As it was mentioned in the decision, the award of the ICAC at the UCCI comes into force upon its signature, is unappealable and has to be executed (as it is provided by Article 32 of the Law of Ukraine "On international commercial arbitration". The Court came to the conclusion that the requirement to present confirmation to the effect that the award came into force is unnecessary and does not conform to the rules of Article 394 of the Code. As we see, the Ukrainian courts differently interpret the same provisions of the procedural law. The fact of such controversies is the evidence of equivocal intendment of the Ukrainian relevant legislation. In our opinion it is time for the Supreme Court of Ukraine to update its official recommendations (last one dated in 1999) in order for Ukrainian courts to adopt clear reasoning of how to hold judgments regarding the enforcement of foreign arbitral awards. Such recommendations should be grounded but not limited to the provisions of the new Law of Ukraine 'On Amending Certain Legislative Acts of Ukraine in respect of Regulating Private International Law Issues' and the New York Convention. Thus it might contribute not to make such divergent decisions happen

## United States

**District court allows discovery of embassy's bank accounts to determine whether an exception to the Foreign Sovereign Immunities Act might allow their attachment in connection with arbitration award; sanctions applied for failing to comply with discovery order**

Petitioner sought discovery of Respondent's embassy's bank accounts during an action to confirm a foreign arbitration award issued in Kuala Lumpur, Malaysia. Magistrate Judge ordered discovery, but Respondent objected that the discovery was inappropriate because the accounts were protected

by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq., and refused to comply with the order. Petitioner moved for sanctions on multiple grounds based on Respondent's failure to comply with the discovery order. The district court found that discovery of the embassy's bank accounts was appropriate, and granted Petitioner's motion for sanctions under Fed. R. Civ. P. 37(b)(2). The court first addressed Respondent's objection to the Magistrate Judge's discovery order. Petitioner sought discovery related to Petitioner's embassy's bank accounts to determine whether an exception to the FSIA applied that would render them susceptible of attachment to satisfy the arbitration award. Respondent had submitted an attorney's affidavit stating that the embassy's bank accounts were only used for diplomatic purposes, and were therefore immune from attachment under the FSIA. Respondent argued that therefore the "uncontested record" showed that the bank accounts were immune under the FSIA, and discovery was inappropriate. The court disagreed, holding that the attorney's affidavit did not establish an "uncontested record" because the attorney admittedly did not have personal knowledge of the uses of the embassy bank account. The court further found that limited discovery was appropriate to determine whether the bank accounts may not be immune to attachment under the FSIA because they had been used for commercial activity as defined by the FSIA. The court next turned to Petitioner's motion for sanctions. It found that although it had not upheld Respondent's objections to the Magistrate Judge's discovery order, those objections were nonetheless "substantially justified" and therefore sanctions were not appropriate under Fed. R. Civ. P. 37(a)(5)(A). However, under Fed. R. Civ. P. 37(b)(2), sanctions must be applied in any case in which a party does not comply with a discovery order; merely filing an objection to such an order does not excuse a party from complying with that order. The court therefore sanctioned Respondent and ordered Respondent to pay Petitioner's costs related to Respondent's failure to comply with the Magistrate Judge's order. *Thai Lao Lignite (Thailand) Co. v. Government of the Lao People's Democratic Republic, No. 10 Civ. 5256 (S.D.N.Y. Sept. 12, 2011)*

**Forum Non Conveniens: District court dismisses shareholder derivative suit under forum non conveniens**

This case is a shareholder derivative suit brought on behalf of nominal defendant BP to recover damages and other relief from various current and former officers and directors of BP and BP's United States subsidiary for alleged breaches of their

fiduciary duties. Plaintiffs alleged that the individual defendants engaged in a pattern of disregard for safety, leading to a series of safety violations which culminated in the Deepwater Horizon explosion and subsequent oil spill in the Gulf of Mexico. Plaintiffs alleged that the individual defendants: (1) acted ultra vires and caused BP to engage in unlawful conduct, and (2) failed to exercise independent judgment and due care by allowing BP to engage in dangerous activities without adequate process safety. These obligations are derived from the recently enacted United Kingdom Companies Act of 2006 (the "Companies Act"), which governs the fiduciary duties that officers and directors owe English companies. Defendants moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(1), 12(b)(2), 12(b)(6), and 23.1, contending that: (1) Plaintiffs lack standing to sue derivatively because they have failed to secure permission from the English High Court to continue the suit, or alternatively, because they failed first to make a demand on the BP Board of Directors before bringing the suit; (2) under the doctrines of *forum non conveniens* and international comity, the court should refrain from exercising jurisdiction; and (3) the court lacks personal jurisdiction over the individual defendants. The court concluded that the English High Court was a more appropriate forum for this litigation and dismissed Plaintiffs' Complaint on *forum non conveniens* grounds, therefore finding it unnecessary to address Defendants' alternative grounds for dismissal. Citing *De Aguilar v. Boeing Co.*, 11 F.3d 55, 59 (5th Cir. 1993), the court noted that a federal court sitting in diversity applies the federal law of *forum non conveniens* in deciding a motion to dismiss in favor of a foreign forum. When a plaintiff sues in its home forum, that choice is generally entitled to greater deference in balancing the private conveniences of the parties because it is assumed to be convenient. The court noted, however, that this increased deference normally accorded to a home plaintiff's choice of forum is not necessarily applied where the plaintiffs are a portion of thousands of shareholders who could have brought the lawsuit on behalf of the corporation. While the plaintiffs in this case are American, more than 60% of BP's shareholders are not. The court stated that the record suggested that Plaintiffs were merely "phantom plaintiffs," as they did not demonstrate that they had a substantial interest of their own to protect or any knowledge that would aid in the prosecution of breach of fiduciary duty claims on behalf of BP. Thus, the court found the deference due to Plaintiffs' home forum was considerably weakened. The court first determined that Plaintiffs would not be deprived of all remedies or treated unfairly in English courts, and therefore

the that there was an adequate alternative forum, subject to proof of Defendants' amenability to service there. The court then considered the private factors, weighing the deference given to the plaintiff's initial choice of forum. The private factors the court considered were: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive. The court found that the first factor favored England as a forum. While the court acknowledged that technological advancements had made the ease of access less significant, it had not been rendered inconsequential. Defendants successfully argued that the evidence relating to this litigation would be the records regarding BP's Board of Directors, which met in England, despite the fact that the records regarding the Deepwater Horizon spill's location were in the U.S. Regarding the second factor, none of the individual defendants lived in Louisiana and many of the key witnesses would likely be non-US nationals. However, the court noted that the expense of participation for the American individual defendants in an English litigation would be high. Thus this factor only slightly favored England as a forum. The court, therefore, found that the private factors did not tip the scales in favor of dismissing in favor of an English suit. However, the court held that the public interest factors were found to strongly favor dismissal. First, the court found that the increased oversight required in shareholder derivative actions would burden the court. Second, the court found that the English courts had a greater interest in resolving this dispute, as it related to the internal governance of an English company. Third, the court found that English law governed the individual defendant's duties, a fact that favored England as a forum. This was especially true given the unsettled nature of the Companies Act, as a recently enacted statutory corporate governance scheme that has replaced the common law derivative action, with little guidance from English courts. Finally, the court considered the burden on the citizens of the current forum, finding that the only party who stands to gain was BP, not the citizens of Louisiana, who would be required to sit on the jury. The court therefore determined that England was the appropriate forum for the action, and granted dismissal based on *forum non conveniens* conditioned on Defendants either (1) proffering adequate proof that they are, in fact, amenable to process in England, or (2) submitting a stipulation that they will submit to the jurisdiction of the appropriate English court. *In re BP Shareholder*

### **Salvage contract. Interpretation of the arbitration clause**

A shipowner contracted with a salvage company to remove a stranded vessel from a reef. When removing the vessel the salvor allegedly damaged the reef. The U.S. government sought damages under federal law from the shipowner, who then filed suit in federal court in Hawaii seeking indemnity from the salvor for the damages sought by the government. The salvor filed a motion to compel arbitration based on the following clause in the salvage contract: Any dispute arising under this Agreement shall be settled by arbitration in London, England, in accordance with the English Arbitration Act 1996 and any amendments thereto, English law and practice to apply. The District Court denied the motion, holding that, under federal arbitrability law, the scope of the arbitration clause did not cover the shipowner's claim for indemnity. The salvor appealed to the Ninth Circuit on two grounds: (1) that the District Court erred in deciding that federal law, instead of English law, applies to the issue of arbitrability, and (2) in the District Court's application of federal arbitrability law. The Ninth Circuit affirmed, finding that the agreement was ambiguous as to whether English law applies to determine whether a given dispute is arbitrable in the first place. Faced with such ambiguity, it concluded that federal law applies to determine arbitrability. Applying federal arbitrability law, it then concluded that the shipowner's indemnity claim was not arbitrable. The Court noted that since the agreement provided for arbitration of "[a]ny dispute arising under this Agreement," its interpretation of the phrase "arising under" was controlled by its prior decisions in *Mediterranean Enterprises, Inc. v. Ssangyong Construction Co.*, 708 F.2d 1458 (9th Cir. 1983) (arbitration provision covering disputes "arising under" the subject agreement covers only those disputes "relating to the interpretation and performance of the contract itself") and *Tracer Research Corp. v. National Environmental Services Co.*, 42 F.3d 1292 (9th Cir. 1994) (holding that when a tort claim constitutes an "independent wrong from any breach" of the contract, such claim "does not require interpretation of the contract and is not arbitrable" under arbitration provision limited to claims "arising under" the contract). Based on this precedent, the Ninth Circuit held that the phrase "arising under" in the arbitration agreement should be interpreted narrowly. As such, and because the indemnification dispute did not turn on an

interpretation of any clause in the salvage contract nor on the salvor's performance under the contract, the Court held that the dispute was not arbitrable. *Cape Flattery Ltd v. Titan Maritime, LLC, No. 09-15682, 2011, U.S. App. LEXIS 15360 (9th Cir. July 26, 2011).*

### **Retroactivity of an arbitration provision. Application to prior claims or conduct**

The Court noted that even a broad arbitration clause, such as one covering claims "arising out of or relating to" the subject agreement, does not necessarily apply retroactively: "Courts construing arbitration clauses have refused to subject claims to arbitration where the claims arise from or relate to conduct occurring prior to the effective date of the agreement, and where the clause is limited to claims under 'this Agreement.'" However, where an arbitration clause goes further, for example, by also covering "other services provided by" a party, the arbitration clause might apply retroactively. In the case at hand, "the plain language" of the arbitration agreement applied to claims "arising out of or relating to this agreement or the Google Program(s)." The term "Google Programs" was defined by the parties to include the claims at issue in the case, and thus the Second Circuit affirmed the district court's finding that the arbitration clause applied retroactively to cover those issues. *Tradecom.com LLC v. Google, Inc., 2011 WL 3100388, Second Circuit.*

## **United Kingdom**

### **Existence of an arbitration agreement and issues of jurisdiction**

*Sovarex S.A.* (the Claimant) made an application before the High Court of Justice for permission to enforce an arbitration award, issued by the FOSFA Tribunal, pursuant to s. 66 of the Arbitration Act 1996 (the Act). Mr Romero Alvarez (the Defendant) sought the annulment of the said arbitration award, arguing that no contract was concluded, and alternatively he requested the stay of proceedings on the basis of *lis pendens* and *forum non conveniens*. In 2008 the Claimant and the Respondent concluded a sales contract of sunflower seeds, such contract provided for an arbitration agreement under English Law, as the applicable law, before the London FOSFA arbitration. The Defendant, however, contended that no contract was concluded, bringing proceedings before Spanish Courts for the repudiation of the sales contract. Conversely, the

Claimant stated that the sales contract was concluded via phone and e mail through the intermediary of a broker and sought remedy before FOSFA tribunal in London, obtaining a favorable award. It is worth noting that FOSFA appointed an arbitrator on behalf of the Defendant and the process was substantiated until the issuance of the arbitration award. During, this time the Defendant challenged the jurisdiction of the arbitration tribunal. The issues examined by the English Court were, among others: i) whether the Defendant had lost the right to object to the enforcement of the award under s. 66 (3) of the Act by participation in the arbitration.’, ii) whether the court should stay proceedings, as requested by the defendant. In order to address the first issue, the question arose as to whether the Defendant took part in the arbitration proceedings. If the answer was negative, the Defendant would preserve his right, under s. 72 and s 66(3). The court concluded that the Defendant’s submissions to the arbitration proceedings were directed to challenge the jurisdiction of the arbitration tribunal and not a submission to the jurisdiction of the tribunal. It, therefore, accepted that the Defendant had not lost his right to challenge jurisdiction. As to the issue of whether the procedures should be substantiated under s. 66 of the Act, due to questions of fact. The court concluded that that s. 66 of the Act constituted an appropriate procedure to deal with the questions of fact arose in the case at hand. As to issue ii) the court rejected the stay of proceedings, on the basis that the Spanish court had rejected the submission of the Defendant, and that the current state of facts was that no determination would be made as to the existence of an arbitration agreement. Likewise, it would be improper to stay proceedings on the basis of a hypothetical outcome from the Spanish High Court. *SOVAREX S.A. v. Romero Alvarez S.A., Case No: 2010 Folio 1231 High Court of Justice, Queens Bench Division, Commercial Court, 29/06/2011.*

#### 4. NOTES

The Authorized Translation of the Norwegian Arbitration Act of 2004 has been posted [online](#) amongst other National Statutes. Thanks to Kyrre Kielland of Kluge Advokatfirma DA.

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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 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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