

CONTENTS

1. News
2. Laws & Treaties
3. Landmark rulings
4. Contributors in this issue

1. NEWS:

[Arbitration in the EU](#): "Green Paper on the Review of Council Regulation (EC) No 44/2001" and the "Report of the Commission on the Application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters" were published on 21 April 2009. Both documents, the Green Paper and the Report, deal with the interface between arbitration and the Regulation No. 44/2001. Although the recognition and enforcement of awards are not expressly governed by the Regulation, this should not prevent it from addressing certain specific points relating to arbitration, not for the sake of regulating arbitration, but to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings. According to both papers, provisional measures adopted to secure an award may be granted under Article 31 provided that the subject-matter of the arbitration falls within the scope of the Regulation. Anti-suit injunctions are deemed incompatible with the Regulation if they unduly interfere with the determination by the courts of other Member States of their jurisdiction under the Regulation. The Report also consider uncertain and short of uniformity the treatment by EU Member courts of issues like the allocation of jurisdiction in proceedings ancillary to or supportive of arbitration proceedings, the recognition and enforcement of judgments given by the courts in disregard of an arbitration clause or the recognition and enforcement of judgments on the validity of an arbitration clause or setting aside an arbitral award

[ABA Disclosures for Arbitrators](#). The American Bar Association Draft Guidelines on arbitrators' disclosures have not been approved. The draft was rejected by the Council of the Dispute Resolution Section and, therefore, becomes not eligible for adoption by the ABA House of Delegates. While the draft has been removed from their website, the Disclosure Checklist can be freely consulted and downloaded, although expressly noticed it has not been adopted by ABA as Policy.

[CEPINA](#). Cepina, one of the most important institutes for arbitration and mediation in Belgium, and the Belgian MLA (the Belgian Maritime Law Association) consider entering into a cooperation agreement with regard to the founding of ALMACCepina (Antwerp Logistic and Maritime Arbitration Center Cepina). The new centre is intended to be based in Antwerp and to focus on transport related disputes.

[ICMA XVII](#) The Seventeenth International Congress of Maritime Arbitrators will take place in Hamburg, Germany, from 5 to 9 October 2009. The updated internet website gives all necessary details concerning the venue, the costs and the social program, as well as the titles of the papers.

2. LAWS & TREATIES:

[Canada-Peru](#): On May 29, 2008, The Honourable Helena Guergis, Secretary of State for Foreign Affairs and International Trade, signed, on behalf of Canada, the Canada-Peru Free Trade Agreement (FTA). This was the second FTA signed by Canada in 2008 and Canada's sixth FTA with countries of the Americas. The Agreement contains an ADR self-regime and Model Rules of Procedure. Chapter 8 rules substantive obligations in investment, along with dispute settlement provisions offering ICSID, ICSID AF and UNCITRAL. In the same ceremony, an [Agreement on Labour Cooperation](#) was signed by The Honourable Jean-Pierre Blackburn, Minister of Labour and Minister of the Economic Development Agency of Canada for the Regions of Quebec. In addition, an Agreement on the Environment was

signed by Secretary Guergis, on behalf of The Honourable John Baird, Minister of the Environment.

EU: On 1 April 2009 the Czech Minister of Justice, H.E. Mr. Jirí Pospíšil, signed on behalf of the European Community the Hague Convention of 30 June 2005 on Choice of Court Agreements. After the EU signing, only one more ratification or accession is needed for the entry into force of the Convention.

Mauritius: Enactment of the International Arbitration Act 2008 following the benchmark of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law ("UNCITRAL") of 21 June 1985, as amended on 7 July 2006. The new Act departs from the law applicable to domestic arbitration (the "Code de Procedure Civile of Mauritius") and faces the challenge of addressing international arbitration in the African region.

Peru-Singapore: According to official reports, on August 1st, 2009, Peru signed Free Trade agreements with Singapore. These international agreements contain the commitment of both countries to solve the conflicts that could arise by bilateral negotiations. If the settlement is not possible, the procedure of arbitration is immediately activated and it is directed by an experts' panel chosen by both States. These free trade agreements are examples of Peru's economic aperture policy that Peru has been practicing during the last fifteen years. Other important agreements are those with the United States of America and People's Republic of China in 2009, Chile in 2006, and Thailand in 2005. There's also a concern in Peru's government to promote commercial ties with other countries. Thus, Peru is currently negotiating with free trade agreements with South Korea, Japan, Russia, Taiwan, and the European Union, in order to sign also bilateral agreements of economic support and cooperation.

Scotland: The Arbitration (Scotland) Bill 2009 was published on 30th January 2009, representing the first comprehensive arbitration statute in Scotland's history, its present arbitration law being a mixture of case law and piecemeal statute dating back over 800 years. The Bill (derived from the UNCITRAL Model Law) represents not only the best of modern arbitration law covering both domestic and international arbitration in a single unified regime and minimising the involvement of the Courts. It offers some novel features e.g. a confidentiality obligation (parties can opt out) and several improvements on the nearest neighbour's Arbitration Act 1996. Arbitrating in Scotland becomes a genuine alternative.

Ukraine: In Ukraine the matters of international

arbitration have hitherto been determined by the Law of Ukraine of 20 February 1994 №4002-XII "On International Commercial Arbitration", which mirrors the UNCITRAL Model Law on International Commercial Arbitration 1985. In April 2009 some amendments related to domestic arbitration (*courts of the third one or in French "tiers arbitre"*) have been enacted. The new act has added a number of areas which had been traditionally excluded from domestic arbitration (real estate, labour, corporate, etc.). Moreover, the Code of Commercial Procedure has also been amended so as to permit submission of disputes among shareholders in Ukrainian entities to arbitration. The question whether foreign holders of all shares in Ukrainian companies can submit their disputes to arbitration seems now to be resolved. No doubt a role has been played by the precedent of New York proceedings in the *Telenor Mobile* case (Kyivstar shareholder) and the decision (in the negative) of the High Commercial Court of Ukraine on this matter.

3. LANDMARK RULINGS:

Belgium

Appointment of arbitrators. On 29 May 2009 the Supreme Court of Belgium upheld a decision rendered by the Court of Appeal of Ghent. Pursuant to Belgian procedural law an arbitration agreement is unlawful when provides for a privileged position to one of the parties in the appointment of the arbitrator(s). The Court of Appeal examined whether the membership of one of the parties to an arbitration institute (which was designated in the agreement) influenced the choice of the arbitrator by the arbitration institute. As the rules for arbitration of that institute did not provide for the appointment of an arbitrator from their midst, the Court of Appeal ruled that the Belgian law had not been violated by the arbitration agreement.

Germany

Arbitrability of shareholders' disputes. In an about-face from its previous decisions the German Federal Civil Supreme Court ruled that disputes regarding the validity of shareholders' resolutions may be resolved by arbitral tribunals instead of state courts. So far, the Court held that such disputes are not arbitrable. Since awards of an arbitral tribunal would become effective vis-à-vis all shareholders and all bodies of the respective legal entity even if not all of the shareholders and representatives participated in the arbitration proceedings, arbitration clauses

regarding disputes about shareholders' resolutions would be null and void (*"Arbitrability I"*). In its decision dated 6 April 2009 (*"Arbitrability II"*) the Court departed from this former decision. The Court held that disputes about shareholders' resolutions may also be decided by arbitral tribunals. However, it would be a requirement that legal protection comparable with the legal protection by state courts is granted. Such legal protection would include that the arbitration clause provides for a minimum standard of the right for all shareholder to participate. It would, in particular, be required that all shareholders of the company affirm the arbitration clause. Further, each shareholder would have to be informed about the commencement of arbitration proceedings. Additionally, it must be assured that each shareholder can become party to the arbitration proceedings and can participate in the selection and nomination of the arbitrators. Finally, according to the Court it must be ensured that all other claims concerning the validity of the resolution brought by each individual shareholder are decided by the same arbitral tribunal to avoid conflicting decisions. This reversal confirms the broad acceptance of arbitration in Germany. It will now be the lawyers' task to provide the pertinent accurate advice to the clients on the wording of arbitration clauses to ensure their validity. [Decision of the German Federal Civil Supreme Court \(Bundesgerichtshof\) dated 6 April 2009, file no. II ZR 255/08.](#)

Hong Kong

The Civil Justice Reform is the collective term that refers a number of important changes to Civil Procedure Rules governing the conduct of litigation in Hong Kong. The CJR came into force on 2 April 2009. The main thrust of the changes as they are thought to affect foreign court and arbitration jurisdiction, where there are reciprocal enforcement provisions such as, for example, under the New York Convention 1958, is that interim measures will be available, such as injunctions and orders for attachment and inspection, in support of the foreign court or arbitration proceedings, subject to certain strict criteria.

Israel

Appeal. In a recent judgment signed by Judge Danziger and dated 17 June 2009, the Supreme Court has denied the request for an appeal on the District Court's decision upholding an arbitration award. It was held that the Court shall not grant permission to appeal on arbitration matters unless there are special grounds considering righteousness or fundamental principles. According to the precedent, such permission would be granted under exceptional and unusual circumstances only. It was further held by

Judge Danziger that a calculation error in an arbitral award is not, in itself, a sufficient ground for setting aside an arbitral award, as such mechanism must be restricted and limited to the grounds specified under section 24 of the Arbitration Law. [*Asher Green Buildings Ltd. v. Stakplast Ltd., Nevo, Civil Appeal 1469/09.*](#)

Norway

"Honourable engagement clause". A reinsurer filed a lawsuit for the annulment of an arbitration award, claiming that the court of arbitration was both materially and procedurally unable to rely on an "honourable engagement clause" in its decision. The Court of Appeal upheld the arbitration award, holding that (1) the clause covered the question at hand, (2) the clause was sufficiently express to satisfy the wording of the Norwegian Arbitration Act sec. 31 para. 3, which gives the court of arbitration power to rely its decision on equity, (3) that the plaintiff in fact had invoked the clause in the arbitration proceedings and (4) that, even though the plaintiff did not expressly invoke the clause with regards to the question at hand, the principle of contradiction was not infringed. [*Trygg Hansa Försäkringsaktiebolag vs. If Skadeförsäkring AB, LB-2008-136865 \(CA\), May 18, 2009.*](#)

Arbitration clause. In a lawsuit regarding call price for shares, the plaintiff filed a lawsuit directly to the ordinary courts. However, the agreement between the parties provided for "*a joint appointment of an independent, qualified appraiser to value the price with binding effect on the parties*". Case dismissed from ordinary courts with reference to the Norwegian Arbitration Act sec. 7, as the court held that the clause in its effect was an arbitration clause. [*OH Group AS and X vs. HRL AS, LA-2009-90969 \(CA\), June 18, 2009.*](#)

Spain

By an award issued by the "Junta Arbitral de Transporte" in Valencia, the plaintiffs MDL became bound to pay freight charges to Transportes R. H. Carmona. On the grounds of public order, MDL sought the annulment of the award arguing that (i) there had been no prior arbitration agreement, and (ii) the award appeared signed by two arbitrators only. The exceptions contained in Article 41.1 a) and f) of the Spanish Arbitration Act 60/2008 were called upon by MDL. But the Court of Appeal declined granting the annulment to MDL. With regard to the first question, the Court held that MDL had waived, by voluntary submission to the arbitral tribunal, its jurisdiction. On the second question, it was determined that the award was valid and effective despite having been signed by just two arbitrators.

The Court found that the arbitral tribunal had been successfully composed by an odd number of arbitrators and that two signatures were sufficient to uphold the award. [MDL Distribucion y Logistica S.L. v. Transportes R. H. Carmona, Court of Appeal of Valencia \(April 16, 2009\).](#)

Ukraine

Recognition/Enforcement of foreign awards. On March 27, 2009 the Commercial Court of Donetsk Region in the *Fratti-Export* case ruled to recognize and enforce in Ukraine an arbitration award issued by the ICC in Moscow. In the reasoning the trial judge referred to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and to the European Convention on International Commercial Arbitration. If approved, this case can start the new practice as for enforcement foreign arbitration awards. Now there are no any procedure rules in this matter and all foreign arbitration awards are enforced only by civil courts under the procedure rules regarding recognition and enforcement of foreign judgments.

United Kingdom

Seat of arbitration; Anti-suit injunctions. This case concerned a dispute arising from an arbitration clause contained in a shareholders agreement governed by Indian law to set up a joint venture in India. The arbitration clause provided for the International Chamber of Commerce (ICC) rules with venue for arbitration to be London and for each party to bear its own costs. The claimant filed for arbitration in accordance with the clause and a costs award was made against the defendant. The defendant applied unsuccessfully to the ICC court seeking to annul the award. The claimant then obtained an interim anti-suit injunction restraining the defendant from bringing proceedings outside the jurisdiction to challenge the award. The defendant submitted that the juridical seat had to be India and that the curial law had to be Indian law. Furthermore that following the recent decision by the ECJ in *West Tankers Inc v Riunione Adriatica di Sicurtà SpA* (case C 185/07) the landscape on anti suit injunctions had changed. Having considered the evidence, the court held that in this matter it was appropriate case for an anti-suit injunction to be granted. The defendant had not established a good reason why such an injunction should not be granted. Furthermore he had submitted to the jurisdiction of the English courts and sought its assistance in the past in relation to the arbitration. There was nothing in the *West Tankers* case which impacted upon the law as developed in the UK in relation to anti suit injunctions which prevented parties from pursuing proceedings in the courts of a country which was not a member state of the

European Community, whether on the basis of an exclusive jurisdiction clause, or an agreement to arbitrate or the agreement of the parties to the supervisory powers of the instant court by agreeing London as the seat of arbitration. [Shashoua and others v Sharma, \[2009\] EWHC 957 \(QBD, Comm. Court\).](#)

Arbitration Agreement. A first tier arbitration award from the Federation of Oils, Seeds and Fats Associations Ltd. (FOSFA) held that the claimant as seller had repudiated a sale contract with the defendant as buyer and that the defendant was entitled to damages. On 12 September 2007 the second defendant sent a copy of the award to the claimant's business address in Bulgaria which had previously been used for correspondence. The claimant alleged that it had never received a copy of the award and on 7 December purported to appeal. The defendants contested that the claim should be time-barred as under the rules there was only a 28-day time limit for appealing against an award. The court held that the arbitrators were correct in finding that the address was valid according to the relevant rules of the FOSFA rules of arbitration and appeal. Accordingly the claimant's claim was unsuccessful. [Papas Olio JSC v Grains & Fourrages SA and another \[2009\] EWHC 1257 \(QBD, Comm. Court\).](#)

Arbitration Agreement. Classic had sought summary judgement against both defendants in respect of losses incurred under a contract of affreightment. The issue between the parties was whether Limbugan, a subsidiary of Lion, had agreed to vary the arbitration agreement by virtue of the guarantee given by Lion to Classic or in the negotiations for that guarantee, or had represented in the guarantee or negotiations that it would accept the English court's jurisdiction, either instead of or in addition to the provision for disputes to be resolved by arbitration. The court held that Limbugan and Lion were attempting to preserve Limbugan's right to arbitrate with Classic under the arbitration clause but to override Classic's right to litigate with Lion under its contract with Lion. That was not acceptable and there was no good reason, whether for case management purposes or otherwise, why Classic should be prevented from pursuing its claim against Lion. [Classic Maritime Inc v Lion Diversifield Holdings \(Berhad\) \[2009\] EWHC 1142 \(QBD, Comm. Court\).](#)

Powers of Court; Challenging the award: Serious irregularity. In a dispute arising in relation to a services agreement between the parties, the court held that an ICC tribunal had exceeded its powers (for the purposes of section 68 of the Arbitration Act 1996, which allows challenges by reference to serious irregularity) in purporting to correct its mistaken

failure to award pre-award interest on damages. However, the correction would not be set aside because it had not caused any substantial injustice to the applicant. The judgment examines to what extent an ICC tribunal has powers to correct awards under Article 29 of the ICC Rules. It also discusses the distinction between a tribunal acting without jurisdiction and exceeding its powers. [CNH Global NV v PGN Logistics Ltd and others \[2009\] EWHC B8 \(QBD, Comm. Court\)](#)

Anti-suit injunctions; Recognition of foreign awards. Having sustained damage, National Navigation's ship failed to deliver a cargo of coal to Endesa, who were entitled to take possession as holders of a bill of lading. The bill expressly incorporated the terms of a charterparty, in particular as to the governing law and dispute resolution. The head charter and the voyage charter contained a London arbitration agreement, and the head charter was expressed to be subject to English law. Endesa sought recovery for the cost of alternative coal supply and commenced court proceedings in Almeria, Spain. Unaware of the arbitration clause, National Navigation lodged a claim for a declaration of non-liability in the Commercial Courts of England. The Court of First Instance in Almeria found that Spanish law was applicable, that the arbitration clause had not been validly incorporated in the bill of lading, and that, by submitting to the English courts, National Navigation had waived their right to claim in arbitration. National Navigation then commenced arbitration in London, along with an application to the English courts for an injunction to restrain Endesa from proceeding in Almeria. After considering the West Tankers ECJ case, Gloster J declined to grant an anti-suit injunction restraining the pursuit of proceedings in Spain. However, she determined that it would be contrary to public policy in the UK to recognize the Spanish judgment, which clearly contravened the arbitration agreement. It was incumbent to the English courts, and not to the Spanish, to decide whether the arbitration agreement was effective and whether there had been any waiver of the arbitration agreement by National Navigation. On the facts, the court held that English law applied and that the arbitration agreement had been effectively incorporated in the bill of lading. [National Navigation Co v Endesa Generacion SA \[2009\] EWHC 196 \(Comm\)](#)

The Commercial, Shipping & Investment **ARBITRATION WATCH**

United States

Enforcement of foreign awards. On June 4, 2009, the New York Court of Appeals, in response to a certified question presented by the United States Court of Appeals for the Second Circuit, issued an opinion that will surely have a significant impact on the enforcement of foreign arbitration awards in New York. The NY Court of Appeals held that under New York State law, a New York court, with personal jurisdiction over either a judgment debtor or a garnishee that is in possession of the debtor's property, may issue an order requiring the return and turn over of both local and/or out-of-state property (including assets located abroad) to the judgment creditor in satisfaction of an award or judgment. This decision is certain to be a useful tool to parties holding unsatisfied arbitration awards and judgments. [Koehler v. The Bank of Bermuda, 2009 N.Y. LEXIS 1751 \(June 4, 2009\)](#)

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