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Additional Facility Rules in 2010, one more than in 2009. As of 31 December, 2010, ICSID had registered 331 cases under the ICSID Convention and Additional Facility Rules. The jurisdictional basis for ICSID Administration historically stemmed in 62% of the cases from Bilateral Investment Treaties, the second greatest jurisdictional basis being investment contract between the investor and the host-state at 22%. Other relevant data contained in the summary includes geographic distribution of all ICSID cases by state party involved, distribution of all ICSID cases by economic sector involved, and outcomes of ICSID arbitration and conciliation proceedings.

1. NEWS

ICSAS Issues New Rules

ICSAS (The International Commodity & Shipping Arbitration Service) has issued new sets of Arbitration Rules for 2011. The main change from earlier Rules is that non-practising lawyers have become eligible to act as arbitrators at ICSAS, subject, as with all prospective Members of the Arbitrator Panels, to admission by the Council and subject to their having at least ten years' experience in issues arising from the physical commodity trades or shipping and at least three years' practice as an arbitrator under the auspices of a recognised arbitration forum. Following the very sad demise of Mr. R. G. L. Grayson, membership of the ICSAS Council has recently changed and Mr. D. G. O' Meara, a Past President (2002–2004) of FOSFA, has now been elected.

ICSID Caseload Statistics

The International Centre for the Settlement of Investment Disputes published the bi-annual ICSID Caseload-Statistics (Issue 2011-1) which analyze the cases historically in addition to the period from 1 January to 31 December, 2010. The ICSID had registered 26 cases under the ICSID Convention and

Scottish Arbitration Centre Opens

Following the new arbitration law recently passed in Scotland, the Scottish Arbitration Centre was launched on 17 March, 2011. The centre is a joint initiative of the Scottish Government, the Chartered Institute of Arbitrators, the Law Society of Scotland, RICS Scotland and the Faculty of Advocates. The stated purpose of the arbitration centre is the promotion of arbitration in Scotland and the promotion of Scotland as a destination for conducting international arbitration.

Two Fosfa New Contracts

The Federation of Oils, Seeds and Fats Association Limited has announced that "the Oilseeds Committee's proposals to withdraw the current Contract No. 25 and introduce two new Contracts have now been endorsed by the Contracts Committee and adopted by the Council, and will become effective on and from 1 Sept. 2011." The two new Contracts are No. 23 for South American Soyabeans in Bulk CIFFO (replacing current No. 22), and Contract No. 25 for Soyabeans in Bulk, CIF Delivered Weight (replkacing current No. 25). Fosfa Contracts contain arbitration agreements for disputes to be heard in London.

IBA Guidelines for International Arbitration Clauses Now Available Online

The International Bar Association (IBA) has made their guidelines for drafting international arbitration clauses available online. The guidelines were developed by a task force appointed by the IBA to develop the guidelines which were approved in October 2010 by the IBA Council during the IBA's Annual Conference in Vancouver. The purpose of the guidelines is to aid in the drafting international arbitration clauses in five areas: basic drafting guidelines, optional elements, multi-tier dispute resolution clauses, and multi-party and multi-contract arbitration clauses.

The Singapore International Arbitration Centre Statistics

The Singapore International Arbitration Centre (SIAC) has released new statistics for 2010 contained in the "CEO's Annual Report." The statistics indicate a rise in the number of international disputes for the tenth consecutive year, with 198 new filings compared to 160 in 2009. The three largest sectors in terms of disputes were commercial, trade, and maritime and shipping with each representing 27%, 26%, and 15% of the new filings respectively. The centre has also appointed a new deputy registrar, Kua Lay Theng, and promoted its head of South Asia, Ankit Goyal, from assistant counsel to counsel.

Study on dissenting opinions

A recent article analyzing dissenting judgments in investment arbitrations by Dutch arbitrator Albert Jan van den Berg titled, "Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration", appearing in Mahnoush Arsanjani et al. (eds.), "Looking to the Future: Essays on International Law in Honor of W. Michael Reisman," by Prof. Dr. Albert Jan van den Berg (Brussels, Belgium), suggests that almost all such dissenting opinions are written by the arbitrator nominated by the losing party. The article gives support to the view held by an increasing number of practitioners that the appointment of arbitrators should be left to institutions rather than the parties to the dispute. Prof. Dr. Albert Jan van den Berg's article can be viewed in the website of the International Council for Commercial Arbitration.

Cairo Regional Centre for International Commercial Arbitration: new director and new arbitration rules

A new Acting Director has been announced for the Cairo Regional Centre for International Commercial Arbitration while the former director, Nabil Elaraby, serves as Egypt's foreign minister. Dr. Mohamed Abdel Raouf, the Deputy Director of the Centre since 2008 and its Secretary-General since 2005, has been appointed as Acting Director to assume, as of March 8, 2011, the functions of the Director during Mr. Elaraby's interim governmental tenure. In addition, the Cairo Centre has also unveiled new revised arbitration rules on procedure and costs which take account of the 2010 version of the UNCITRAL Arbitration Rules.

2010 CEPANI Statistics

CEPANI has released its arbitration statistics for 2010. Half of the requests the organization received for arbitration dealt with collaboration agreements, with the next most often subject of arbitration being business law (transfer of shares). One-third of the disputes introduced in 2010 were valued between 100.000 and 500.000 Euros and 43.5% of the procedures were conducted in Dutch, followed by French with 28.2% and English being used at 28.2% of the procedures. The seat of arbitration was in 86% of the cases Brussels. Of the procedures introduced in 2010, 50% are national in character in that they were between Belgian parties. 44.7% of the procedures involve Belgian and international parties, and 5.3% of the procedures are purely international in character. It took the arbitral tribunal an average of 7 months and 20 days to render an award for procedures closed in 2010.

International Commercial Arbitration Centre Opens in Iraq

The International Commercial Arbitration Centre in Al- Najaf has recently been opened with the purpose of settling any disputes arising from investment contracts or between companies located inside and outside Iraq. In the words of the head of the arbitration council, Mohammed Jawad Al- Turahi: "Iraq witnessed today the opening of the first arbitration centre which shall make it much faster to find a solution to any commercial arbitration thus saving time and money". The director of Al- Najaf Chamber of Commerce, Eng. Zuhair Mohammed Rudha Shurba, said that, "It is very important to have an arbitration centre for the vast commercial and economic development in Iraq the matter that will cause disputes that should be settled as fast as possible; Moreover, the opening of such centre will encourage investments in Iraq".

Bar to Foreign Lawyers Removed in Russia

Russia's Federal Chamber of Lawyers has ended restrictions on the admittance of foreign lawyers to domestic courts. Foreign lawyers have been able to obtain an associate status pursuant to the Russian act on the practice of law, but their further activity had been banned by the Federal Chamber of Lawyers. However, the Chamber's decision will not result in foreign specialists flooding Russian courts. An examination of Russian civil and arbitration law, legal proceedings and other disciplines still must be passed by foreign specialists wishing to practice in Russia. Furthermore, the exam will be conducted entirely in the Russian language. Experts are in agreement that the addition of foreign specialists will result in an increase in the overall professional standard of lawyers in Russia.

UNCTAD Publishes Annual Review of Investor-State Dispute Settlement Cases

UNCTAD's annual review of investor-State dispute settlement (ISDS) cases which provides current, country-specific information about ISDS developments in 2010 was published on 24 March, 2011. The review indicates that the number of new treaty-based ISDS cases filed under international investment agreements was the lowest since 2001. In terms of decisions rendered in 2010, twenty awards, five decisions on liability, and 11 decisions on jurisdiction were rendered in 2010, as well as 11 other decisions on interim measures, discontinuance of proceedings, and costs. A brief overview of the most important substantive and procedural issues addressed in 2010 is also contained in the UNCTAD review. Included in the overview, for example, were such issues as interpretation of the fair and equitable treatment standard, prohibition of unreasonable or discriminatory measures, and treaty-based emergency exceptions. The review also comes to the conclusion that States are becoming increasingly proactive in the ISDS process, with States now aiming at managing and controlling cases from the beginning, and/or actively question the tribunal's reasoning once a case has been concluded.

UK to Promote its Arbitration Services

In his budget speech for 2011, the Chancellor Exchequer, George Osborne, indicated that the United Kingdom will be promoted as, in his words, a "...global centre of legal arbitration..." The details of the plan contained within the larger budget "Plan for Growth" include coordinated efforts by the

Ministry of Justice and UK Trade & Investment within the professional and business services sector "to promote the UK's world-leading business arbitration and commercial law services." The plan also includes the use of the opening of the new Rolls Commercial Court building which will provide facilities for commercial, property and business disputes to be used as an opportunity to build on the marketing of UK legal and dispute resolution services both in the UK and overseas. In addition, as a part of the plan the UK Government will also seek to maintain the supremacy of English contract law in an effort to promote UK legal services internationally.

IBA Guidelines for Drafting International Arbitration Clauses

These Guidelines were approved at the IBA Annual Conference in Vancouver on 7 October 2010. According to the IBA, "they address not only basic guidelines on the essential elements of an arbitration clause, but also in subsequent sections those features which are considered 'optional extras', as well as multi-tier dispute resolution clauses, multi-party arbitration clauses and arbitration clauses appropriate for transactions involving multiple contracts. A statement of each guideline is provided, supplemented with explanatory comments and including specific recommended clauses." They are currently being translated into various languages.

2. LAWS & TREATIES

Italy Implements European Mediation Directive 2008/52/EC

According to the latest World Bank report of countries, Italy ranked 80th for ease of doing business and 157th for enforcement of contracts. An explanation for Italy's poor showing partly lies with the backlog of cases in Italy's court system. In response, Legislative Decree No. 28, dated 4 March, 2010 ("the Decree") which is designed to ease the backlog of cases by requiring mandatory mediation, with or without lawyers, and which implements the European Mediation Directive 2008/52/EC has gone into effect. The Decree contains mediation procedures which cover both cross-border and domestic disputes and is restricted to claims/rights which are freely disposable by the relevant parties

("Dritti Disponibili") in contrast with rights which are not able to be freely disposed of by the relevant parties, e.g. Italian family law. The Decree contains two types of mediation procedures: mandatory and non-mandatory procedures. Mandatory mediation procedure applies to any possible litigation related to insurance, banking and financial arrangements and other matters such as joint ownership, property rights, division of assets among others. Non-mandatory mediation procedure applies to any civil and commercial litigation regarding matters other than those falling under mandatory mediation procedure.

Changes to Mexican Commerce Code

On January 27 2011 the Commerce Code was modified to include a chapter entitled "Judicial Intervention in Commercial Transaction and Arbitration", which includes several provisions regarding judicial involvement in arbitration procedures. The effects of the revision are mainly procedural; its aim is to regulate the cases and circumstances in which judicial intervention is required. The revision was necessary, but many commentators have criticised the changes relating to injunctions. In particular, the code states that all injunctions ordered by an arbitral tribunal must be considered binding and must be enforced at the competent judge's request, unless the arbitral tribunal instructs otherwise. A party that requests the enforcement of an injunction before a judge must give notice of the revocation, suspension or modification of the injunction. A judge who is called on to rule on the recognition or enforcement of an injunction is entitled to request a guarantee from the requesting party. Among other reasons, a judge may refuse the enforcement of an injunction for one of the reasons set forth in Article 1462 of the code for rejecting recognition of an arbitral award - namely: incapacity of one of the parties; failure to give notice of appointment of the arbitrators; an attempt to arbitrate a dispute that is not covered by the arbitration agreement; or an arbitration procedure or composition of the arbitral tribunal that is contrary to the agreement. A judge may also refuse enforcement if: a guarantee requested by the arbitral tribunal has not been provided; the arbitral tribunal has revoked or suspended the injunction; the injunction is incompatible with the judge's judicial powers; and the enforcement of the injunction is contrary to legislation or public order. The arbitral tribunal and the requesting party are liable for the injunction and any damages that it causes to the other party.

The Democratic Republic of Congo to Ratify New York Convention

During a meeting with representatives of the World Bank and the International Monetary Fund about improving the country's business environment, Prime Minister Adolphe Muzito made an announcement that the Democratic Republic of Congo intends to ratify the New York Convention rules on the recognition of international arbitration rulings, according to an e-mailed statement from the Prime Minister's office on 26 March, 2011. This announcement comes in the backdrop of two international arbitration cases being pursued against the country. A third of the world's cobalt resources and 4 percent of its copper is located in the Democratic Republic of Congo.

Ukraine sets a precedent

On the 30th of July, 2010 the new Law of Ukraine 'On the Judicial System and the Status of Judges' became effective. Pursuant to the Law a number of legislative acts related to the judicial system and legal proceedings in Ukraine have been overturned, as well as some procedural laws have been amended. Ukrainian lawyers' attention has been presently drawn by the provisions of Article 111-28 of the Economic Procedural Code of Ukraine that has been introduced by the Law. The Article specifically defines that "judgments of the Supreme Court of Ukraine that review a lower court's decisions due to different application of one and the same provisions of the substantive law in similar legal relations shall be binding for all power agents applying the specified rule of law in their practice, as well as for all courts of Ukraine. The courts should adjust their court practice in compliance with the judgments of the Supreme Court of Ukraine. Failure to enforce judgments of the Supreme Court of Ukraine entails liability stipulated by the law." Thus, it may be stated that the specified amendments will not only considerably influence current court practice in Ukraine, but have officially fixed the position of the Supreme Court' judgments as the source of law (precedents), hence interfering the Ukraine's status as a country with the merely continental law tradition.

Iraq drafting arbitration law

With a view of acceding to the International Convention on Recognition and Enforcement of Arbitration Awards, Iraq has begun drafting an arbitration law. According to a spokesman of Iraq's High Judicial Council, Mr. Abdel Sattar al-Berigdar, Iraq is eager to join the 1958 New York Convention

on international arbitration and the country's first commercial arbitration court has been created in Baghdad to hear disputes between non-Iraqi business partners and future courts are planned for other Iraqi provinces having foreign investment potential. Judge Delissa Ridgway of the U.S. Department of Commerce and former chairwoman of the U.S. Foreign Claims Settlement Commission held a three-day workshop for Iraqi judges on international commercial arbitration in Baghdad in February 2011 and stated that, "Iraq is poised to be a leader in the international business community and it is being very smart, it is now looking around the world at whatever countries are doing and is picking the best and making it its own."

French Arbitration Procedures Reformed

Decree n. 2011-48 (13 January, 2011) reforms and modernizes the French Arbitration law for intra-state as well as international matters and has come into force on 1 May, 2011. The Decree makes more flexible the rules pertaining to requests for arbitration, to presentation of exequaturs and in regard to the notification of arbitral awards. The decree asserts the arbitral panel's whole authority: arbitral panels are now allowed to decide the adoption of provisional and conservative measures, with the exception of seizures ("saisies conservatoires") and mortgages. French magistrates have become "support judges" of arbitration procedures. In addition, rules relating to appeals have been clarified and improved.

3. COURT CASES

Germany

Invalidity of arbitration agreement. The Respondent is a brokerage house subject to the New York Stock Exchange supervisory authority having its place of business in the State of N, USA. The brokerage house works with different brokers around the world, enabling the brokers access to the New York Stock Exchange through Respondent's online trading platform. The brokers can initiate buy and sell orders at the request of their clients through the Respondent's online platform, in addition to entering the fees and commissions payable to the brokers which are automatically calculated and booked by the system. Two of these brokers are the B.L.S. GmbH ("BLS") and the P. AG ("P"), both of which were granted authority to operate

independently in Germany as providers of financial services by the German government. The Plaintiff, an "independent" civil engineer, formed a contract with BLS and P for the purchase of futures contracts on US stock markets through the Respondent's trading platform. The agreement formed included general terms and conditions which contained an arbitration clause which the Plaintiff signed. Subsequently, the Respondent-Brokerage House sent the Plaintiff account statements every three months which also contained a leaflet titled "Terms and Conditions" which also contained an arbitration clause which differed from the one the Plaintiff had previously signed, the choice of law being New York State law. The Plaintiff subsequently experienced losses and sought damages from the Respondent Brokerage House before a German court. The Respondent argued that the court lacked jurisdiction given the arbitration and choice of law clauses. The Court held that the arbitration clause the Respondent sent with the account statements was not binding because pursuant § 37 WpHG the Plaintiff is not a merchant and thus the dispute is not arbitrable. Furthermore, the arbitration clause was found invalid because it did conform with the formal requirements of § 1031 paragraph 5 ZPO which serve to protect consumers. The notice of arbitration clause contains other terms and conditions which are unrelated to arbitration and both contractual parties failed to sign the document. *BGH, Decision from 25.1.2011 – XI ZR 350/08; OLG Düsseldorf.*

Greece

Parties to arbitration, waiver of right to set aside award. In 1956 Greece and Aristotle Onassis entered into a concession agreement ("the Agreement") which conferred on Onassis's Olympic Airways privileges regarding its operation as an aviation company. The Agreement expressly provided (in Article 4.2, as amended in 1969 and approved by Parliament), inter alia, that all privileges conferred originally to the concessionaire (Onassis) would equally apply to Olympic Airways and all its subsidiary companies pursuing the same activities. It was further agreed (in the same provision) that such companies were those in which Olympic Airways held at least 51% of the shares. One such company was Olympic Catering. For the needs of its business activities, Olympic Catering constructed buildings at Hellenikon Airport. In the 1970s Onassis sold and transferred Olympic Airways and its subsidiaries to Greece. The concession agreement was renewed twice and remained in force until 2006. Meanwhile, Greece decided to build the new Athens International Airport, ("AIA") and in 1995 entered into a new

concession agreement with a consortium led by Hochtief that undertook to build and operate the airport for 30 years. Olympic Airways and its subsidiaries (including Olympic Catering) were forced to move to the new airport five years before the expiration of their concession agreement which resulted in various disputes arising between Olympic Airways, its subsidiaries and Greece involving compensation claims made by Olympic Airways and its subsidiaries.

The concession agreement between Onassis and Greece contained an arbitration clause, Article 27 of which provided, inter alia, that: "Without prejudice to those cases for which a different way of settlement is provided in the present Agreement, any difference, dispute or disagreement between the Greek State and the Concessionaire arising out of the application of the present Agreement, even if not specifically provided in the present Agreement, in relation to the performance or interpretation of its terms, the extent of the rights and obligations based on it and in general any matter arising out of the present Agreement, is exclusively resolved by arbitration."

The Agreement also provided (in Article 27) that the right to request the setting aside of an arbitral award was waived. Olympic Catering started negotiations with Greece and received two payments of approximately €3.7 million and €1.3 million in 2000 and 2001, respectively. In 2002 Olympic Catering was privatised and under its new ownership reverted on the relocation issue and raised new claims against the state in 2007 in which it initiated domestic arbitration proceedings in Athens against Greece claiming additional compensation of approximately €50 million.

Greece submitted that the dispute was not covered by the concession agreement's arbitration clause as at the time of both the commencement of the arbitration and the arbitration hearing, Olympic Airways no longer held at least 51% of Olympic Catering's shares as required by the concession agreement. Therefore, Olympic Catering could not refer the dispute to arbitration under Article 27 of the concession agreement, and as a consequence the arbitral tribunal lacked jurisdiction.

In 2007 the arbitral tribunal held by majority that it had jurisdiction to hear the dispute as it arose between Greece and Olympic Catering, which at the time of the relocation to the new airport was a subsidiary of Olympic Airways. The tribunal awarded Olympic Catering approximately €10.4 million as it found that Greece had breached the 1956 concession agreement by forcing Olympic

Catering to relocate to the new airport in 2001 and prohibiting use of the old airport, resulting in actual damage and loss of profits.

Greece sought to set aside the award, and alternatively to have the award declared non-existent before the Athens Court of Appeal. The main request that the award be set aside was made under Article 897 of the Code of Civil Procedure, as the tribunal lacked jurisdiction and thus exceeded the powers conferred on it by the arbitration agreement. The state submitted that the waiver of the right to request the setting aside of the award, although approved by an act of Parliament, violated the Constitution, particularly the right to have recourse to the state courts. The alternative request that the arbitral award be declared non-existent was made under Article 901 of the code as the dispute could not be referred to arbitration. Article 901 provides that an arbitral award can be declared non-existent if: 1) an arbitration agreement was not entered into; 2) the award was issued on a dispute that cannot be referred to arbitration; and 3) the award was issued in an arbitration against a non-existent party.

The Athens Court of Appeal dismissed the state's petition. The court held that despite the state's arguments, the right of the parties to request the setting aside of the arbitral award had been waived and the agreement which contained this waiver had been approved by an act of Parliament and thus had the force of law, without violating the Constitution. As to the state's alternative request, the court held that it was groundless because the lack of jurisdiction of the arbitral tribunal did not trigger the application of Article 901 of the code, which renders an arbitral award non-existent. The court noted that the grounds specifically submitted by the state for the application of Article 901 included only the parties' inability to dispose of the subject matter of the dispute freely or the non-arbitrability of the dispute, neither of which was asserted by the state.

The state appealed to the Supreme Court. The appeal court's ruling on the motion to set aside the award was not questioned by the Supreme Court. Regarding the alternative request, the Supreme Court first confirmed that the combined reading of Articles 4.2 and 27 of the Agreement led to the conclusion that the arbitration clause was extended to the subsidiaries of Olympic Airways, which would pursue the same activities for which the privileges to Olympic Airways were initially conferred. Olympic Catering was one such subsidiary. Nevertheless, the Supreme Court held that the appeal court did not apply the first ground of Article 901 of the Code of Civil Procedure as it failed to address a request of the state that was

"included" in its motion, namely the application of Article 901 on the grounds of lack of an arbitration agreement, to which the Supreme Court held that the request of the state also referred. Thus, the Supreme Court redirected the case to the court of appeal solely on the issue of whether this ground of Article 901 was satisfied. *Supreme Court judgment no. 1308/2010*

India

The dispute involved non-payment of royalties by an Indian trademark licensee to an Arizona-based trademark licensor. The trademark license agreement contained an arbitration clause referring all disputes to the International Chamber of Commerce in Paris, and was to be governed by Austrian law. Pursuant to invocation of the arbitration clause, the dispute was referred to a sole arbitrator. Much depended on the interpretation of a clause setting out restrictions on the sub-licensing of the trademark to third parties. The sole arbitrator, while refusing to entertain the Indian licensee's written submission counterclaim for non-payment of an advance on costs, rendered the award in favour of the Arizona-based licensor. During the proceedings, a challenge was made under Section 48 of the act on the grounds that the award was contrary to public policy, insofar as it was contrary to the express terms of the agreement between the parties.

Before considering the substance of the Delhi High Court judgment, it is useful to consider the scheme of the act and the law laid down by the Supreme Court in relation to the enforcement of foreign awards. Part I of the act pertains to domestic arbitration, while Part II pertains to the enforcement of foreign awards. Section 34 governs the challenge of a domestic award, while Section 48 sets out the various objections that may be made to prevent enforcement of a foreign award. The grounds for refusal of enforcement under Section 48 are similar to those of the New York Convention. Both sections provide for an award to be challenged on the grounds of public policy. In *Renusagar Power Plant Co Ltd v General Electric Co*, AIR 1994 SC 860, the Supreme Court, while construing the term 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, applied the principles of private international law and held that an award is contrary to public policy if: 1) its enforcement would be contrary to: the fundamental policy of Indian law; the national interest; or justice or morality; and 2) it cannot be set aside on the merits.

However, the expression 'public policy' became a cause of concern when it was interpreted by the Supreme Court in *ONGC v SAW Pipes Ltd.*, AIR 2003 SC 2629. The judgment in this case expanded the concept of public policy to add encompass awards whose enforcement would be "patently illegal". The Supreme Court distinguished *SAW Pipes* from *Renusagar* on the grounds that the *Renusagar* judgment concerned a foreign award, while the reasoning of *SAW Pipes* was confined to domestic awards only.

Further, the Supreme Court in *Venture Global Engineering v Satyam Computer Services Ltd*, AIR 2008 SC 1061, held that to apply Section 34 to a foreign award would not be inconsistent with Section 48 of the 1996 act, or any other provision of Part II, unless Part I of the act has been expressly excluded. The court also stated that the judgment debtor cannot be deprived of its right under Section 34 to evoke the public policy of India in order to set aside the award. Thus, the court in *Venture Global* held that a foreign award can be challenged as a domestic award under Section 34 of the act, in which case it could be argued that the broader interpretation of public policy would be applicable - that is, public policy would be held to be violated even if the award were only patently illegal.

In the case at hand the court held that when it comes to challenging the enforcement of a foreign award under Section 48 of the act, a party cannot ask for the foreign award to be set aside on the grounds of public policy, stating that the award contravenes Indian law. The award must be proved to be contrary to the fundamental policy of Indian law, national interest, justice or morality, and cannot be set aside on the merits to deny recognition and enforcement of a foreign award. The Delhi High Court has thus adopted a non-interventionist approach and affirmed that public policy in the context of foreign award enforcement is to be construed narrowly. However, it distinguishes this case from *Venture Global* only on the grounds that the award did not suffer from any patent illegality, without attempting in detail to interpret and distinguish the law laid down in that case. Avoiding a detailed debate on *Venture Global*, the court merely recorded the submission of the decree holder that *Venture Global* applies only if the substantive law applicable to the agreement is Indian law and then proceeded to issue its decision essentially on the basis that interpretation of the contract terms was exclusively within the arbitrator's power. The court went on to say that even assuming that the ratio of *Venture Global* applied to the facts of the present case, the award did not suffer from patent illegality based on its merits. *Penn Racquet*

Malaysia

Arbitrator impartiality; removal. An application was filed to remove an arbitrator from an arbitration. The grounds put forward in support of the application included allegations of misconduct by the arbitrator regarding: the manner and procedure under which the proceedings were conducted, which disregarded the requirements and wishes of the applicants and contravened the rules of natural justice; cross-examination in the absence of counsel, and continuation of proceedings when new solicitors had just been appointed; the scheduling of the matter for hearing when the case management had not been completed; and failure to disclose a previous injunction restraining the arbitrator from continuing with arbitration proceedings pending the disposal of an application for removal for misconduct.

The court found that a case for removal had not been made and the conduct of the arbitrator did not warrant the interference of the court. In so doing, the court reiterated the House of Lords decision in *Bremer Vulkan Schiffbau v South India Shipping Corp Ltd*, [1981] Lloyd's 909, with regard to an arbitrator having full discretion to determine the conduct of the arbitration. However, in considering the removal application, the court allowed the arbitrator to be heard and concluded that it was difficult to conclude objectively that the arbitrator's continued presence and authority over the arbitration "will not be seen as an act of miscarriage of justice". There was also concern that if the arbitrator continued to preside over the arbitration, the ultimate award may be liable to be set aside. It was on this ground that the High Court exercised its discretion to revoke the authority of the arbitrator and to hold that the arbitration agreement would cease to have effect with respect to this dispute.

The High Court relied on its powers under the 1952 Arbitration Act, which provide for the removal of an arbitrator on grounds of misconduct or lack of impartiality. A reading of the judgment does not appear to reflect that this conduct was found as a fact. *Ng Chee Yew Sdn Bhd v IJM Corp Bhd, High Court, Kuala Lumpur, [2010] 7 MLJ 122.*

Peru

Arbitration Procedures and Constitutional Appeals: Ivesor S.A ("Ivesor") filed a constitutional appeal in relation to an arbitral award issued by the

Lima Chamber of Commerce's High Council of Arbitration. The Constitutional Court of Peru ruled that, even though the procedures associated with the appeals of arbitration awards must be exhausted before a constitutional appeal can be filed, this rule is not applicable when the constitutional appeal does not touch on matters dealing with the cancellation of an award according to the Arbitration Law.

In the present case, the plaintiff requested the nullity of an arbitration award, administrated and issued by the Lima Chamber of Commerce's High Council of Arbitration. He argued that the present award violated his constitutional right to an equitable trial, and alleged that this award had not been issued by an impartial panel. This lack of partiality stemmed from the fact that Ivesur lacked an opportunity to appoint an arbitrator, with the appointment instead being made by the Arbitration Council of an arbitrator who was the representative attorney of the opposing party.

The "amparo" constitutional appeal had been rejected, in the first and in the second instances. Ivesur had not exhausted the appeal process in previous proceedings, which consisted in contesting the arbitration award through the special cancellation trial for such awards. However, the Peruvian Constitutional Court overruled the decision of the lower courts, and admitted the appeal, on the basis that "(...) an affectation which is not a cause of award's cancellation, but seriously threatens a constitutional right and may be settled through the "amparo" constitutional appeal, cannot (and must not) be attended to like a cancellation process. So, in such cases the "amparo" constitutional appeal is admissible, as an efficient means to guarantee the basic rights of the defence".

So ordered, the ruling clearly states the impossibility of filing an "amparo" constitutional appeal against an act occurring within the framework of an arbitration in process in order to preserve the arbitrator's autonomy and their power to make decisions regarding their own competence. In such cases, the validity of the act should be discussed within the framework of the arbitration process, or be stayed until the Arbitral Court pronounces its definitive sentence. *Constitutional Court Decision, Affair n. 02851-2010-PA/TC, 15 March, 2011.*

Portugal

Arbitrability, disposable and non-disposable rights. According to Portuguese law arbitration cannot apply to disputes concerning non-disposable rights, and any arbitration agreement to that effect is

invalid. Nonetheless, the Lisbon Court of Appeal recently held that in such cases the invalidity of an arbitration agreement relates only to those rights which are absolutely non-disposable, not to those which are relatively non-disposable, such as rights that involve an economic interest - these are arbitrable.

The plaintiff brought proceedings against the defendants, seeking indemnity for damages and commission arising out of an agency contract. The defendants objected, claiming that an arbitration clause had been breached. The court found this to be true and dismissed the proceedings against all defendants. The plaintiff appealed, stating that the arbitration agreement was invalid. The plaintiff maintained that not all disputes can be resolved by arbitration, as the law states that disputes concerning non-disposable rights are not arbitrable. In this case, one of the claims in the plaintiff's petition referred to indemnity for damages arising out of the termination of an agency contract, which it regarded as a non-disposable (and therefore non-arbitrable) right. It was argued that, as a result, the arbitration agreement should be deemed invalid and unenforceable.

The Lisbon Court of Appeal confirmed the first instance decision, stating that only rights which are absolutely non-disposable result in the arbitral convention being null and void. As a result, disputes are non-arbitrable only where the parties have no freedom whatsoever to establish or dispose of their rights. The appellate court correctly observed that the concept of non-disposable rights must be determined on a case-by-case basis. In this case, the right to be indemnified for damages caused by the termination of the agency contract was a right with an economic interest. This made it a disposable right, which could therefore be submitted to arbitration.

The Lisbon Court of Appeal decision is well reasoned and entirely accurate. As in many other jurisdictions, arbitration cannot apply to disputes concerning non-disposable rights. Nevertheless, as was correctly noted, the legislative project for a new Arbitration Law, which is being debated in Parliament, establishes a different criterion for arbitrability: disputes are arbitrable if they are related to economic interests. The question of the best criterion for determining arbitrability opens up a further issue for discussion; however, on the basis of existing law the appellate court's interpretation on non-disposable rights was correct. *Lisbon Court of Appeal decision of January 11, 2011, Case 3539/08.6TVLSB.L1-7, (Judge Abrantes Geraldés).*

Spain

Award not being a public sentence; right to effective justice. The plaintiff Sogecable S.A. ("Sogecable"), a satellite television distribution company, sought the award of a public service contract which would allocate to it a certain share of the available broadcasting spectrum. The award of the contract was subject to the satisfactory presentation of a detailed performance plan as required by the Spanish Communications Agency. Sogecable was awarded the contract, the terms of which obligated Sogecable to share a portion of the available channels with competitors. Telecable de Asturias S.A.U. ("Telecable"), one of Sogecable's competitors, requested access to certain channels allocated to Sogecable. When Sogecable failed to respond to the request, Telecable sought and was awarded an arbitral award against Sogecable. Sogecable subsequently sought to appeal the arbitral award, arguing that its right to effective judicial protection as guaranteed by the constitution had been violated. The Constitutional Court denied the appeal due to the impossibility under Spanish law of directly contesting an arbitration award before the Constitutional Court. The Court noted that an arbitral award is not a public sentence, and an arbitration court lacks public jurisdiction. Subsequently, the basic right to efficient judicial protection as guaranteed by the Constitution was not infringed upon in this case. Consequently, arbitral awards are not subject to "amparo" constitutional appeals. Appeals concerning arbitral awards must first be considered by the appellate courts ("audiencia provincial"). *Judgment of the Constitutional Court, Nr. 136/2010, Affair 771-2007, 2 December, 2010.*

Switzerland

Preliminary issues, ultra petita, and the right to be heard. The case involved a Consortium Agreement between an Austrian and a German company. The contract was governed by Swiss law and it contained an ICC arbitration clause with venue in Zurich. The Consortium was established by the parties to construct a biomass power plant on a turnkey basis as general contractor for Z. __ GmbH. The project subsequently experienced technical problems and delays and a dispute arose with the German company being ordered to pay some amounts to the Austrian company. The German company appealed.

The Court confirmed that by addressing a preliminary issue an arbitral tribunal will not

necessarily exceed its jurisdiction if the preliminary issue were outside the scope of the arbitration clause should it be addressed on the merits. Needless to say, the preliminary issue may be addressed only with a view to solving another arbitrable issue subject to the preliminary issue. In addition, the Federal Tribunal confirms its often stated view on *ultra petita*: remaining within the quantum of the submissions albeit on a different legal basis is not a case of *ultra petita*. Furthermore, the Court held the right to be heard is not violated when the parties are not specifically heard as to the legal assessment of some of the facts at hand. To violate the right to be heard, an arbitral tribunal has to resort to some totally unexpected legal basis on which the parties could not express their views and that they could not have reasonably anticipated. *X. ___ GmbH v. Y. ___ GmbH & Co. KG*, First Civil Law Court of the Swiss Federal Tribunal, 9 November 2010.

Interpretation of arbitral agreements. The case involved a contract which contained a dispute resolution clause providing for "...binding arbitration through the American Arbitration Association or to any other US court", yet under the ICC Rules. The contract was concluded on January 21st, 2008 and it involved various financial instruments. At least one of the companies involved was Swiss (ISC Holding AG) and another one was from the Netherlands Antilles (Nobel Biocare Inv. N.V.). Since the matter was the object of litigation in the United States their names are matters of public record, whilst the Swiss Supreme Court omitted them from the opinion in accordance with Swiss practice.

A dispute arose and in July 2008, a criminal complaint was filed in Switzerland for alleged fraud and embezzlement. Funds were blocked in Switzerland and a civil attachment was obtained in the Netherlands Antilles. Arbitration was initiated with the AAA Center for Dispute Resolution in New York in the summer of 2008. However the Center refused to accept the arbitration because the reference in the arbitration clause to the ICC Rules, which were to govern the arbitration, would not correspond to the AAA Rules.

ISC Holding then went to the US District Court of the Southern District of New York to compel arbitration but the Court rejected the request on April 2nd, 2009. The decision was subsequently appealed and the Court of Appeals for the Second Circuit reversed the decision on October 27, 2009 (351 Fed. Appx. 480).

In the meantime, a claim had been filed in the ordinary courts of Zug on January 6, 2009. An application was made for a stay in view of the

proceedings in the US and the Zug Court was asked to deny jurisdiction on the basis of the arbitration clause.

The Zug Court refused to do so on December 14, 2009 and its decision was confirmed by the Zug Court of appeals on April 8, 2010. ISC Holding AG then appealed to the Federal Tribunal. The Federal Tribunal decided the case on the basis of the New-York Convention (Art. II (3)) as the Swiss court had been seized and the arbitral tribunal involved would be sitting elsewhere. The Court reiterated that the choice to go to arbitration is "of great consequence" and it advanced two reasons in this respect: judicial remedies are limited in international arbitration, as opposed to State courts, which provide for automatic appeals and the costs are higher. Furthermore, the Court stated that an arbitration clause must be interpreted like any other contract and it must contain a clear manifestation of the intent to arbitrate, excluding State courts, with at least a clear indication of what arbitral mechanism reflects the agreement of the parties. This was not the case in relation to the agreement before the Court. *X. ___ Holding AG, X. ___ Management SA, A. ___, B. ___, v. Y. ___ Investments N.V.*, First Civil Law Court, 4A_279/2010, Judgment of October 25, 2010.

United Kingdom

FOSFA clause 29, Security/Interim Measures.

Does the standard FOSFA clause 29 (known as a "*Scott v Avery* clause") exclude the possibility of any court proceedings unless and until an arbitration award has been issued? This was question before the English Commercial Court in the recent case *B v S* (23 March 2011), in which HFW acted for the successful defendant, S.

S sold two consignments of sunflower seed oil to B on the terms of FOSFA 54. B alleged that S had defaulted and started FOSFA arbitration, claiming damages. B obtained a worldwide freezing injunction over S's assets in support of its claim, making use of s. 44 in the Arbitration Act 1996, which gives the English courts supervisory powers in relation to arbitration, including the power to grant interim injunctions.

S applied to set aside the injunction on the basis that, under the terms of the FOSFA contract, B had agreed not to bring proceedings in England seeking security for its claims.

Clause 29 of the FOSFA contract states: "Neither party... shall bring any action or other legal proceedings against the other... until such dispute

shall first have been heard and determined by the arbitrators... and it is hereby expressly agreed and declared that the obtaining of an Award from the arbitrators... shall be a condition precedent to the right of either party ... to bring any action or other legal proceedings against the other..."

S argued that s. 44 in the Act did not apply if the parties had agreed it should not, and that, by contracting on FOSFA 54 (including clause 29), the parties had agreed that s. 44 would not apply. S therefore contended that the Court had no jurisdiction to grant the freezing injunction and that it had been obtained in breach of contract. B argued that there was case law to the effect that ancillary Court proceedings in England under s. 44 (as opposed to substantive proceedings) did not breach clause 29.

The Judge concluded that the wording of clause 29 was wide enough to exclude all proceedings whether in England or abroad and whether substantive or ancillary. He found that under the Arbitration Act 1996, in contrast to the position under earlier legislation (specifically the Arbitration Act 1950), parties had autonomy to exclude the powers set out in s. 44 and thereby to contract out of the opportunity to seek injunctive relief through the Court. The Judge held that that was precisely what B and S had done by incorporating clause 29 into their contract. He added: "the fact that a conclusion that the FOSFA/GAFTA *Scott v Avery* clause does amount to an agreement to exclude the court's powers under section 44 may be surprising to some of those who trade in the commodity markets, is no reason not to give the words of the clause their meaning and effect. Any concerns in the market or of individual trading parties can be addressed by amendment of the clause, if that is thought desirable".

FOSFA arbitration is intended to be an informal and expeditious process with minimal involvement from lawyers. There is logical sense in the parties agreeing that other methods of dispute resolution should be excluded until that process had concluded. B was given leave to appeal against the Court's judgment, but has decided not to pursue the matter further. *B v. S* [2011] EWHC 691 (Comm) 23 March, 2011.

United States

Irreparable injury, disqualified parties. Trustmark and Hancock, both insurance companies, disputed certain details of a reinsurance contract between them. The dispute was submitted to arbitration and

the panel ruled in favor of Hancock in March 2004, a decision confirmed by a district court. As a result of the decision in its favor, Hancock sent invoices to Trustmark, which Trustmark disputed, leading to a second arbitration in October 2004. In this second arbitration, Hancock appointed as an arbitrator Mark Gurevitz, who it also chose to arbitrate the first dispute.

The second arbitration panel first had to determine whether the ruling in the first arbitration was dispositive of the issues in the second arbitration. This task was complicated by a confidentiality agreement the parties had agreed to during the first proceeding, which prevented the parties from disclosing anything related to the first proceeding, including the evidence, the proceedings, and the award. There was no arbitration provision contained in the confidentiality agreement. The parties debated whether the agreement covered all disclosures, even to lawyers and successive arbitrators, or only disclosures to the outside world. The majority of the second panel, including Gurevitz, determined that it was entitled to know and consider the evidence presented and results reached in the first arbitration.

Before the arbitration panel commenced its hearing on the merits, Trustmark filed suit in district court asking the court to enjoin arbitration on the grounds that Gurevitz was not a "disinterested" arbitrator, as required by the contract, because he participated in the first arbitration. Trustmark also argued that, because the confidentiality agreement did not contain an arbitration clause, only a court, and not an arbitration panel, could determine the scope of the confidentiality agreement. The district court agreed and issued an injunction. Hancock appealed to the Seventh Circuit.

In considering the district court's decision to enjoin the arbitration, the Seventh Circuit first considered whether Trustmark adequately proved irreparable injury, a necessary showing before an injunction will issue. The district court found irreparable injury because Trustmark was forced to arbitrate the confidentiality agreement, which the court said it had not agreed to do. This would have "unalterably deprive[d] the party of its right to select the forum in which it wishes to resolve [the] dispute." The Seventh Circuit found two problems with this conclusion. First, the Seventh Circuit noted that that the parties had agreed to arbitrate the contractual dispute. Second, if a party believes that the arbitrators exceeded their authority, it can seek in federal court to deny enforcement of the award. In other words, they are not left without a remedy. The only injury to the party is delay and out-of-pocket

costs of paying arbitrators and attorneys, which are not considered "an irreparable injury."

Though the absence of irreparable injury would have been sufficient to overturn the district court, the Seventh Circuit turned to the question of whether Gurevitz was a disinterested arbitrator. According to the court, "disinterest" in the context of adjudication means lacking a financial or other personal stake in the outcome. Knowledge of the first arbitration did not meet these standards. The court compared arbitrators to judges, noting that knowledge acquired in the judicial capacity does not lead to disqualification. The court held that knowledge acquired in arbitration similarly should not qualify someone as "interested" in the outcome. The court also reiterated that it takes more to disqualify an arbitrator than to disqualify a judge since, in arbitration, the parties are contractually entitled to choose their arbitrators.

The court reversed the district court, lifting the injunction and allowing the second arbitration to proceed. *Trustmark Insurance Co. v. John Hancock Life Insurance Co., No. 09-3682 (7th Cir. January 31, 2011)*.

Enjoinder of foreign arbitration proceedings.

The Southern District of Texas (TX) has denied an *ex parte* emergency application for a temporary restraining order which sought to enjoin a pending foreign arbitration proceeding because the party seeking the order failed to meet its burden under Rule 65 of the Federal Rules of Civil Procedure.

S&T Oil Equipment and Machinery, Ltd. ("S&T") entered into an investment contract with Juridica Investments Limited ("JIL") under which JIL would provide S&T with partial funding for the costs and fees arising from an arbitration proceeding between S&T and the Romanian government. The arbitration was held before the ICSID in Washington, D.C. between 2007 and 2009, during which S&T was represented by King & Spalding.

The investment agreement between JIL and S&T required the arbitration of all disputes in Guernsey, Channel Islands, where JIL was incorporated. Additionally, the agreement stated all arbitrations were to be conducted through the London Court of International Arbitration ("LCIA"). JIL initiated arbitration proceedings against S&T on December 22, 2010. S&T sought to enjoin the arbitration by filing an *ex parte* emergency application for a temporary restraining order in the Southern District of TX.

S&T alleged the arbitration clause in the parties' investment agreement was unenforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as implemented through 9 U.S.C. §§ 201-208, procured by fraud and substantially and procedurally unconscionable under TX law. According to S&T, the arbitration agreement was substantively unconscionable for three reasons: 1) It would be significantly more expensive to arbitrate before the LCIA in Guernsey; 2) JIL had the ability to influence the selection of arbitrators through a shared board member with the LCIA, which presented an undisclosed conflict of interest and fraudulent inducement in the formation of the agreement; and 3) Holding the arbitration in Guernsey would deprive S&T of its day in court. S&T also argued procedural unconscionability on the basis that its counsel, King & Spalding, acted in its own interest when it advised S&T to enter into the funding investment agreement with JIL.

According to the court, because S&T merely presented LCIA's schedule of arbitration costs and a comparison of air travel costs, but did not provide an estimate of the total costs of arbitration, the company failed to demonstrate the expense of arbitration before the LCIA in Guernsey would be materially greater than federal litigation in Houston, TX. Additionally, no estimate regarding the expense of domestic litigation was offered. The court also stated travel costs were not necessarily implicated in the matter because the arbitration provision at issue provided for alternatives to in-person hearings.

Next, S&T asserted that a non-disclosed conflict of interest existed since one of JIL's non-executive Board of Directors was also a member of the Board of Directors for LCIA. LCIA's board members are responsible for appointing the LCIA Court which then appoints arbitrators to specific proceedings. JIL responded by presenting an affidavit which stated the board member in question was never a board member of LCIA and had no influence on the selection and appointment of arbitrators. According to the court, S&T failed to meet the evidentiary burden necessary to refute the affidavit.

The court then refused to find substantive unconscionability despite a requirement that the arbitration be conducted in Guernsey because both parties were sophisticated commercial entities and the arbitration provision was prominent within the larger investment agreement.

Finally, the court dismissed S&T's procedural unconscionability argument because the company also retained independent counsel unaffiliated with

King & Spalding to review the agreement with JIL. S&T's independent legal counsel reviewed the agreement and informed S&T that the arbitration clause was likely enforceable.

Because S&T failed to establish any of the four elements necessary pursuant to Rule 65, the court denied the company's motion for an emergency temporary restraining order. *S&T Oil Equipment and Machinery, LTD v. Juridica Investments Ltd., No. H-11-0542 (S.D. Tex., March 10, 2011)*.

Precautionary Measures. In November 2007, the Petitioner, Sojitz Corp., ("SJ") a Japanese company, entered into a contract with the Respondent, Prithvi Info Solutions Ltd., ("PIS"), whereby SJ would supply tele-communications equipment for a fee. The contract included a Singapore arbitration clause. SJ delivered the ordered equipment, but claimed it received only \$5.6 million of the full invoice price of approximately \$47.5 million. In August 2009, SJ moved ex parte in New York (NY) Supreme Court for an order of attachment of \$40 million of PIS's assets, alleging that while it intended to commence the arbitration in Singapore, the time it would take to do so would permit PIS potentially to alienate existing assets. The Court granted the order of attachment in the amount of \$40 million, and also allowed the attachment of \$18,480 that was then owed to PIS by one of its NY customers. PIS promptly moved to vacate the order of attachment on the basis that it "did not maintain any offices in NY, was not licensed to do business in NY," had no real assets or bank accounts in the state and "had only three or four customers in NY" who accounted for less than 2% of the company's revenue. The court was persuaded to vacate the attachment of \$40 million, but confirmed the attachment of the \$18,480 from a NY based customer and left SJ free to attach other assets located in NY. The Court rejected PIS's argument that, absent personal jurisdiction over the corporation, the Court had no authority to order any pre-award attachment. After un-successfully moving to stay the order, PIS appealed to the Appellate Division, First Department.

The First Department affirmed the Supreme Court's order of attachment of the \$18,480 of PIS's assets, finding that NY C.P.L.R. Sec. 7502(c) permits "a creditor to . . . attach assets in NY, for security purposes, in anticipation of an award that will be rendered in an arbitration proceeding in a foreign country, where there is no connection to NY by way of subject matter or personal jurisdiction." The Court cited the repeated efforts of the NY Legislature to expand the courts' ability to use orders of attachment in arbitration cases. In 1985, the NY Legislature first amended C.P.L.R. Sec.

7502 to add a section (c) permitting courts to order attachment "in connection with an arbitrable controversy, provided 'that the award to which the applicant may be entitled would otherwise be rendered ineffectual without such provisional relief.'" This amendment overturned an earlier decision by the Court of Appeals that interpreted the previous incarnation of C.P.L.R. Sec. 7502 as not permitting attachment in any arbitration. In 2005, the Legislature amended the C.P.L.R. Sec. 7502(c) yet again, this time explicitly authorizing attachment "in aid of all arbitrations including those involving foreign parties or in which the arbitration is conducted outside of NY." In its current form, C.P.L.R. Sec. 7502(c) states that "The supreme court . . . may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards." In addition to considering NY law on the availability of attachment in arbitration, the First Department looked to the U.S. Supreme Court for guidance on the due process implications of permitting attachment where there are no NY ties. The Court focused on the 1977 decision in *Shaffer v. Heitner*, 433 U.S. 186, in which the Supreme Court found that in rem jurisdiction must be held to "the same standard of constitutional scrutiny that has been applied to in personam jurisdiction since *International Shoe Co. v. Washington*." In *Shaffer* the Supreme Court held that, while "the location of property could be evaluated as a contact for [the] *International Shoe*" inquiry into minimum contacts with a state, the "ultimate question was whether there was jurisdiction over the party against whom the plaintiff asserted liability." Thus, the Court in *Shaffer* found that where property is unrelated to the cause of action, the mere fact that it is located within the state does not establish personal jurisdiction over a defendant in order "to adjudicate the merits of the case."

Where property is unrelated to the case, attachment of that property can not be used to obtain personal jurisdiction over a foreign defendant where jurisdiction would otherwise not exist. The First Department then held "that NY's attachment statute does not run afoul of *Shaffer* when it is used for purposes of security rather than to confer in personam jurisdiction." When combined with the "substantive and procedural safeguards" of C.P.L.R. Sec. 7502(c), the limited use of attachment to secure an anticipated award in a foreign arbitration does not violate due process. Tellingly, the Court observed that the Supreme Court had already permitted

attachment for the purpose of executing foreign judgments in cases where the debtor's only connection to the forum was its ownership of the property. The First Department here found that C.P.L.R. Sec. 7502(c) and due process permit attachment in such situations for the purpose of securing property pre-judgment as well. The Court affirmed the order of attachment of attachment of \$18,480 in PIS's assets.

In permitting attachment of the NY assets of a foreign corporation, purely as security for an anticipated foreign arbitration award, the First Department continued the trend begun by the NY Legislature of ensuring that NY's global economic reach extends to the booming world of international arbitration. *Matter of Sojitz Corp. v. Prithvi Info. Solutions Ltd.*, 12011 WL 814064, (N.Y. App. Div. March 10, 2011)

Arbitration agreement on judicial review. In a variation on the theme of *Hall Street Associates v. Mattel, Inc.*, the US Ninth Circuit Court of Appeals held in a recent case that the Federal Arbitration Act forbids an agreement of the parties to bypass initial judicial review of the award by a federal district court in favor of first instance review in the Court of Appeals.

The parties in *Johnson* made their agreement to arbitrate in the later stages of a prolonged federal lawsuit alleging unfair credit practices by the Wells Fargo Bank. The agreement, so-ordered as a stipulation by the district court in which the case was pending, provided for "binding arbitration with appeal rights" to which the Federal Arbitration Act would apply. When Plaintiff asked the district court to confirm the award, and Wells Fargo cross-moved to vacate the award, the district court interpreted the agreement of the parties to require "rubber stamp" confirmation of the award. While the district court as a formal matter did confirm the award and deny the motion to vacate (so that the matter was properly before the Court of Appeals from a jurisdiction perspective), the district court entered judgment without having considered the merits of the motion to vacate, and thus as a practical matter initial judicial review of the award was lodged in to the Ninth Circuit by the district court's interpretation of the parties' agreement.

The Ninth Circuit panel disagreed with the district court's interpretation of the agreement – as did Wells Fargo, which had asked the district court to hear the merits of its motion to vacate. But the Ninth Circuit did not rest its decision on the premise that the district court misinterpreted the agreement, but

rather on the ground that the structure of judicial review of arbitration awards prescribed by the Federal Arbitration Act may not be overridden by private agreement. The FAA in Section 9 provides, the Court observed, that the district court shall confirm an award unless it is vacated on a ground provided in Section 10 of the Act, and this implies not only that confirmation must be sought initially in the district court but also that the district court must decide on the merits any motion to vacate that is interposed in response to the prevailing party's motion to confirm the award.

The Court did also refer to the possibility – which had been mentioned by the Supreme Court in *Hall Street* – that the parties might agree to some form of arbitration in a federal district court case management order that provides for entry of judgment by the district court in accordance with the arbitrator's decision. But the Court found that this was not the sort of court-annexed arbitration the parties had selected; instead they had expressly subjected their arbitration to the FAA and had not opted for a form of quasi-arbitration more akin to proceedings before a court-appointed special master. *Johnson v. Wells Fargo Home Mortgage, Inc.*, 2011 U.S. App. LEXIS 2908 (9th Cir. Feb. 15, 2011).

4. NOTES

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