NYSBA SUMMER 2011 | VOL. 16 | NO. 1

New York International Chapter News

A publication of the International Section
of the New York State Bar Association

Message from the Chair

Andre R. Jaglom

As I sit in New York in early March writing this message, the news is filled with reports of violence and turmoil in Libya and protests in Bahrain following the fall of governments in both Tunisia and Egypt. One result of the uncertainty associated with this turmoil is the rapid increase in oil prices, which threatens the fragile economic recovery.

The recent earthquake in New Zealand has caused billions of dollars in damages less than six months after NYSBA International held our successful Sydney Seasonal Meeting in the region.

And today's *New York Times* reports on the lessons U.S. cities are learning from the implementation of bus rapid transit in places like Bogota, Mexico City, Jakarta, Sao Paolo and Beijing to reduce commuting time, costs and pollution while providing businesses with access to a broader labor pool.

All of these stories highlight the interconnectedness of our world and demonstrate the importance of the connections formed through NYSBA International to shrink the planet further and enable us, as lawyers, to help our clients navigate international regulatory and cultural shoals so that they can thrive in the global economy.

It will be my honor to assume the position of Chair of the International Section on June 1 and attempt to follow in the footsteps of the leaders who have brought the Section to its current position of success since its founding nearly 25 years ago. I am particularly grateful to our current Chair, Carl-Olof Bouveng, who graciously agreed to take office unexpectedly, months earlier than planned.

Inside

Carl-Olof has maintained the momentum of the Section while creating a broader participation of the Section leadership in all aspects of our work, thus providing a strong base of experience for our current Executive Vice-Chair and soon-to-be Chair-Elect Andrew Otis, our current Secretary and soon-to-be Executive Vice Chair, Glenn Fox, as well as for me. I greatly look forward to continuing that approach and to working with Carl-Olof as Immediate Past Chair, Andrew, Glenn and newly elected officers Secretary Neil Quartaro and First-Vice Chair Thomas Pieper, as well as long-time Treasurer Larry Shoenthal. We are all lucky to have the continued guidance of our rock of stability and experience, NYSBA Staff Liaison Linda Castilla for one last year before she moves on to a well-deserved retirement.

Our Section operates largely through two extraordinary sets of groups, our Chapters and our Committees. Our Chapters form a remarkable network of superb lawyers around the globe—a truly incredible resource, as those of us who have sought counsel in far-flung corners of the world know well. The Chapters have presented many remarkable programs in their countries and regions, as well as at our most recent Annual Meeting in New York, on a variety of important legal topics, and have helped bring together international practitioners from their nations and from New York.

Our Committees cover a myriad of substantive areas of the law and have issued valuable reports on legal developments, conducted CLE programs and offered an opportunity for lawyers to meet with and learn from other international lawyers in their substantive areas.

What has happened less than it might, however, is the integration of the work of our Chapters and Committees.

Our Committees could be more effective with the participation of members from each of our Chapters bringing to bear their knowledge of the Committee's substantive legal area as applied in their own country. And our Chapters would benefit from the substantive legal expertise of our Committees when planning local events in an area covered by one or more Committees or when seeking international resources in a particular substantive field. By working together, our Chapters and Committees can, I believe, better foster the three missions of our Section established under the leadership of Immediate Past Chair Michael Galligan: (1) Custodian of New York Law as an International Standard; (2) Guardian of the New York Convention on the Enforcement and Recognition of Arbitral Awards and the international arbitration process; and (3) Monitor of International Law Development in the United Nations System.

It is my hope, during my term as Section Chair, to foster a closer collaboration between our Chapters and our Committees, thereby strengthening both. There will be many opportunities to accomplish this through Section activities such as the Global Law Week in New York May 10-13, 2011, happening just before I take office, at our annual Seasonal Meeting in Panama September 21-24, 2011 and at the many events being planned by Chapters and Committees for the coming year.I very much look forward to working with all of you more closely during my term as Chair to continue our Section's success and expand our ever-growing activities.

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Message from the Past Chair

Prepared on June 1, 2011

Carl-Olof Bouveng

As I sit down to re-write this message, having just handed over the baton to Drew Jaglom, my Chair successor, I would like to take this opportunity to reflect a little bit on my year as Chair. Although I took office somewhat prematurely, I got a running start thanks to the many initiatives and visions that Michael Galligan spearheaded during his year as Chair.

One of the more exciting developments in the past year was the creation of our Chapter in Bahrain, in addition to the recently established Chapters in Algeria and Tunisia. Only a couple of weeks ago we also created a Chapter in Egypt, and will need to develop our ties with Egypt in the near future. Hopefully, we will soon also have a Chapter in Morocco. The Chapters in Algeria and Tunisia, as well as many other Chapters in Africa, were established mostly thanks to the efforts of Calvin Hamilton and, with regard to Bahrain, Mike Pisani. In the past, the Section's activities in Africa and the Middle East have been limited. With the recent uprisings of the people against the regimes in power, our increased activities in the region have become very timely. Our Chapter Chairs in Algeria, Bahrain and Tunisia, being Karim Khoukhi, Aymen Almoayed and Mohamed Zaanouni, have actively participated in our activities during the year and provided us with valuable insight into the background of the current situation. Our thoughts have been, and continue to be, with them through these difficult times in the region. I encourage you to read the contributions by Karim, Aymen, and Mohamed in this issue of the *Chapter News.*

The ultimate results of the uprisings in Algeria, Bahrain, Egypt, Liberia, and Tunisia remain to be seen. Through our Chapters in the region, we are in a better position to support respect for human rights and the rule of law. As more open societies develop, contacts at all levels of civil and commercial life will increase. Consequently, there is also a need for close contacts and good networks among lawyers who specialize in the many fields of private international law that support commercial, family and personal life.

In India we have had an active Chapter for several years. Kaviraj Singh had been leading the Chapter but due to strict New York lobbying rules, Kaviraj had to resign when he became the trade representative of New York State. We have now appointed Sudhir Mishra as the new leader in India to organize and coordinate our activities there. Upon a visit to Delhi and Mumbi in April, I met with Sudhir and several other Indian lawyers who are interested in becoming involved in leadership roles for our India Chapter. I look forward to continuing a broad collaboration with lawyers in India under Sudhir's leadership.

We have also reactivated our Chapters in Denmark, Korea, Luxembourg and Poland by appointing new Chapter Chairs. In addition, we have also appointed a Chapter Chair in Alberta, Canada, as a complement to our current Chapter Chairs in Canada.

Many of our longstanding Chapters are thriving and have recently organized events. In March of this year we held our first Regional European Meeting in London with participation from many of our European Chapters as well as our Tunisian and Algerian Chapters.

To further facilitate and increase the exchange between members in our Chapters and members in New York, we are seeking to activate committees to focus on certain countries or regions. I am therefore also glad that Drew Jaglom during his term intends to foster a closer collaboration between the Chapters abroad and the Committees in New York.

Finally, I would like to mention a couple of very important and exciting projects in New York. First of all, we have the Task Force on New York Law and International Matters, which was appointed by the Association's President Stephen Younger upon the Section's initiative and request and largely through the efforts of Michael Galligan. The Task Force presented its report in April and the report contains a number of important proposals to further the status and knowledge about New York Law in an international framework. It is available at www.nysba.org/InternationalReport. The Section also appointed its own New York Law Study Group, which under the chairmanship of John Hanna is in the process of developing a summary of characteristics of New York law. Both the summary and the report by the Task Force will be valuable tools not only for those practicing in New York but also for us who practice elsewhere.

I look forward to continuing to work with the Section as a past Chair for many years to come.

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A Word from the Editor

Dunniela Kaufman

As we head into summer in North America and I finally pull together this edition of the Section's *Chapter News*, I want to extend a special thank you to all of our contributors for their interesting and insightful contributions, as well as their patience. In that regard, I have to confess that editing this edition of the *Chapter News* took much longer than anticipated. Given the time lag, as you will note, some of our contributions were drafted in February and March. While they have been updated where required, please keep this in mind when reading the more personal contributions, such as the Word from our New Chair, as well as the updates from Algeria, Bahrain and Tunisia. The updates provided from our Chapters in the Middle East and Northern Africa underline the global reach that our Section has and the important role that we can, and do, play in bringing together a global legal community. In that regard, this edition of the *Chapter News* also contains a very special section that was compiled by Chryssa Valletta and David E. Miller. Chryssa and David have coordinated overviews and updates on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") from 33 of our Chapters. We hope to include a Chapter-wide update on the New York Convention on an annual basis. If you have any interest in participating in the next endeavour, please let us know.

It is through initiatives such as this month's special section on the New York Convention that we are able to satisfy the curiosity and broad substantive focus that an international legal practice often encompasses. If you have any ideas for a special section or focus for a future edition of *Chapter News*, please do not hesitate to contact me to discuss. I welcome all suggestions on how we can improve the *Chapter News* to ensure its relevance to our membership. Of course, I also welcome, and look forward to, your contributions.

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Request for Contributions

Contributions to the *New York International Chapter News* are welcomed and greatly appreciated. Please let us know about your recent publications, speeches, future events, firm news, country news, and member news.

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Contributions should be submitted in electronic document format (pdfs are NOT acceptable).

www.nysba.org/IntlChapterNews

Spotlight on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Introduction

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")[1] is a crucial international agreement because it allows parties to participate in international arbitrations without fear that an arbitral award rendered in one country will not be enforced in another. Accordingly, one of the three long-term missions of the New York State Bar Association International Section, as adopted by the Executive Committee of the International Section on September 15, 2009, has been to serve as the guardian of the New York Convention and the international arbitration process. To that end, we compiled this "reporter" on recent statutory and case law developments in application of the New York Convention from submissions we received by soliciting each of the Chapter Chairs for contributors from their country. The Chapter Chairs provided invaluable assistance in locating contributors (and in some cases also served as the contributors). Each of the contributors provided valuable information on the application of the New York Convention in his or her own country.

In this first edition of the reporter, we were able to include submissions from 33 countries. We plan to publish a new edition of the reporter annually, and hope that we will have even more contributors next year. Please contact either of the undersigned directly if you would like to contribute to the next edition. We look forward to hearing from you.

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Endnote

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (New York 1958).

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Country Updates

ALGERIA

Statutory Developments

A. Algerian Law on the Recognition and Enforcement of Foreign Arbitral Awards

Foreign arbitral awards are recognized under Algerian law so long as (a) their existence is duly proved and (b) they do not contravene international public policy. The rules found in the New York Convention concerning the supporting documents required to prove the existence of foreign arbitral awards are incorporated in Articles 1051-1061 of the Algerian Code of Civil and Administrative Procedure (the "Code"). The Code does not provide any specific rules concerning the enforcement of foreign arbitral awards, but simply refers to applicable general principles of law.

A decision refusing to recognize or enforce a foreign arbitral award may be appealed on numerous grounds. In contrast, Article 1056 of the Code provides that decisions recognizing or ordering the enforcement of a foreign arbitral award may be appealed only on certain, limited grounds, namely: (1) if the arbitral tribunal issues an award in the absence of an arbitration agreement or on the basis of a void or expired agreement; (2) if the arbitral tribunal is irregularly organized or if a sole arbitrator is irregularly appointed; (3) if the arbitral tribunal issues an award that falls outside the boundaries of the dispute before it; (4) if the parties are not allowed to effectively present their case; (5) if the arbitral tribunal fails to state its reasons for the award or if the reasons stated are conflicting; and (6) if the award is contrary to international public policy. These grounds for appeal differ from those set forth in the New York Convention. Grounds 5 and 6 are not expressly mentioned in the New York Convention. Conversely, the grounds provided in paragraph (e) of the New York Convention are not specified in the Code. Additionally, some (but not all) of the grounds provided in paragraphs (a) and (c) of the New York Convention are not specifically mentioned in the Code. Any decision concerning the recognition or enforcement of a foreign arbitral award may be appealed to the Supreme Court of Algeria.

Until recently, foreign parties, when awarded favorable arbitral decisions against Algerian parties, generally would not try to enforce the decision in front of Algerian courts, unless they had no other available option. However, the new Algerian arbitration law (discussed below) should provide the incentive necessary for foreign parties to insert international arbitration clauses in contracts with Algerian parties. Furthermore, the current growth of international trade transactions in the Algerian public and private economic sectors will undoubtedly raise the number of foreign arbitral awards requiring enforcement proceedings in Algeria.

B. Legal Reform of Algerian Arbitration Law

Algeria revised its laws concerning international arbitration in 1993 and 2008.[1] The legal reform that passed in 2008 was based upon both updated international con-

ventions and certain foreign countries' recent legislation. The reform also incorporated the latest developments in international case law. Today, Algeria's legislation on this subject is generally considered to be compatible with international standards.

Prior to the 2008 reform, the inclusion of arbitral clauses in public tenders concluded with government-owned entities was a subject of major controversy because, in principle, Algeria's administrative courts had exclusive jurisdiction to hear such disputes. This problem was compounded because, under the 1993 law, government-owned entities could only include arbitration clauses in contracts that affected their "international commercial activities." Thus, foreign parties entering into certain contracts ran the risk that the validity of such clauses might be challenged. The 2008 reform solved this problem by amending the 1993 law such that government-owned entities may include arbitration clauses in contracts concerning international commercial transactions and in public tendering matters.

The new Algerian arbitration law also incorporates the following changes to prior law:

- Economic Definition: international arbitration is defined to encompass any dispute involving the economic interests of at least two states, rather than referring to the parties' residency status;
- Severability: the validity of an arbitration clause is not affected by any judicial determination that the contract in which such clause is found is invalid, illegal, or unenforceable;
- Contractual Instrument: an arbitral clause may be formalized in a written format or by any other means of communication that entails the written proof of its existence (including new technologies);
- Choice of Law: the validity of an arbitration clause is determined according to the law chosen by the parties to govern their dispute or by the law the arbitral tribunal finds appropriate; and
- Default Law: if the parties have not specified the law applicable to the merits of a dispute, the arbitral tribunal may chose to apply any customs or rule of law it deems appropriate, including general principles of law, international trade usages, customs and equity.[2]

Case Law Developments

Although ratified (with reservations) more than 20 years ago,[3] case law concerning the New York Convention is extremely rare in Algeria.

The small number of published cases is attributable to (a) the state's prior monopoly on foreign trade and (b) the fact that most international arbitration is conducted within Europe, rather than in Algeria.

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Endnotes

1. Legislative Decree No. 93-03 of April 25, 1993; Act No. 08-09 of February 25, 2008.
2. Article 107 of the Civil Code.
3. Act No. 88-18 of July 12, 1988 and Decree No. 8-233 of November 5, 1988.

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ARGENTINA

Case Law Developments

The Federal Court of Appeals of Mar del Plata (Province of Buenos Aires, Argentina) recently issued an important decision concerning the direct implementation of the enforcement provisions of the New York Convention.

In re *Far Eastern Shipping Company v. Arhenpez S.A.*,[1] the issue was whether a foreign arbitral award issued in connection with arbitral proceedings seated in the United Kingdom had to undergo *exequatur*[2] prior to enforcement against a debtor domiciled in Argentina.

The foreign arbitral award had been immediately recognized and rendered enforceable under the New York Convention by a lower, federal court. Thus, the lower court had issued an order of attachment and execution over defendant's property. The defendant appealed on the ground that the lower court had not complied with allegedly mandatory *exequatur* proceedings. Furthermore, the defendant argued that it was placed in a defenseless situation against the judicial order of attachment and execution over its property as it was not given any opportunity to raise objections or defenses against the foreign arbitral award being enforced.

The Federal Court of Appeals of Mar del Plata held that the foreign arbitral award was immediately enforceable under the New York Convention, without going through domestic *exequatur* proceedings, as the New York Convention had been signed and ratified by both Argentina and the United Kingdom.

This decision clarifies that, with respect to the recognition and enforcement of foreign arbitral awards in Argentina, if any applicable international or multilateral convention has been signed and ratified by Argentina and

the state in which the arbitration was seated, that international treaty should prevail over any national procedural norms.

Far Eastern Shipping Company v. Arhenpez S.A. is truly a landmark case as there is almost no prior Argentine case law regarding the direct implementation of the enforcement provisions of the New York Convention in Argentina.

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Endnotes

1. *Far Eastern Shipping Company v. Arhenpez S.A.*, Court of Appeals of Mar del Plata, Province of Buenos Aires, Argentina, December 4, 2009.
2. An "*exequatur*" is an official, written statement by the consular officer of another country, authorizing execution of a judgment or award within the jurisdiction in which it is endorsed.

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AUSTRALIA

Statutory Developments

On July 6, 2010 the International Arbitration Amendment Bill 2009 ("the Bill") received Royal Assent. The Bill amends the International Arbitration Act 1974 (Cth) ("the Act"), which in turn gives effect to Australia's obligations under the New York Convention. The Bill adopts most of the provisions of the 2006 revision of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") as well as implementing some "Australian made" provisions. For the purpose of this report, the relevant changes enacted by the Bill are as follows:

A. Concurrent Federal Court Jurisdiction

Sections 8(3) and 35(4) of the Act have been amended to accord the Federal Court concurrent jurisdiction with State and Territory Supreme Courts in the enforcement of foreign arbitral awards under the New York Convention.

B. Removal of Application of State/Territory Arbitration Acts in Recognition/Enforcement of Foreign Awards

Section 8(2) of the Act previously stated that "a foreign award may be enforced in a court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of that State or Territory." Certain jurisprudence in Australia had interpreted this provision as requiring the enforcement of a foreign award to be made under State or Territory arbitration legislation, thereby allowing the court to decline to enforce a foreign award based on grounds included in the State or Territory legislation.

The amended Section 8(2) has removed the application of the laws of the States and Territories in enforcing a foreign award.

C. Expanded Definition of "Agreement in Writing"

Section 3(1) of the Act reflects Article II of the New York Convention, which states that an "agreement in writing" under which the parties have undertaken to submit disputes to arbitration will be recognized as an agreement to arbitrate. Previously, courts in certain jurisdictions had adopted a narrow interpretation of what constitutes an "agreement in writing." This caused concern among State parties to the New York Convention, and led to the incorporation of Article 7 in the 2006 revisions to the Model Law, which seeks to update the definition of what constitutes "writing" in light of our current electronic society.

Although Australian courts had already adopted a liberal approach to the interpretation of the writing requirement (see in particular *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192), the Bill has amended section 3 of the Act to mirror the recent changes to the Model Law. The amendments provide that "for the avoidance of doubt" an agreement will be "in writing" if:

- "its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means;"
- "it is contained in an electronic communication and the information in that communication is accessible so as to be usable for subsequent reference;" or
- "it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other."

Furthermore, a reference in any contract to any document containing an arbitration clause is an arbitration agreement, provided that the reference is such as to make the clause part of the contract (section 3(5)). Under Australian common law, an arbitration clause in a separate document is only incorporated in an agreement if it can be proved that the parties specifically intended to incorporate the arbitration clause. Thus the insertion of subsection 3(5) into the Act will make it easier to incorporate an arbitration clause "by reference."

D. Narrower Grounds for Refusing Enforcement on Public Policy Grounds

The New York Convention allows parties to object to the enforcement of an award if one of the two grounds for refusal identified in Article V(1) is established. These two categories are incorporated into sections 8(5) and 8(7) of the Act.

They were intended by the drafters of the New York Convention to be exhaustive grounds for refusing the enforcement of an arbitral award. However, Australian courts have occasionally failed to treat these grounds as exhaustive. Accordingly, section 3(A) has been inserted into the Act, which states that "[t]he courts may *only* refuse leave to enforce the foreign award in the circumstances mentioned in subsections [8](5) and (7)" (emphasis added). This clarifies that these two grounds are indeed exhaustive.

Subsection 8(7)(A) has been inserted by the Bill to make it clear that enforcement of a foreign award will be contrary to public policy where the making of the award was induced or affected by fraud or corruption or a breach of the rules of natural justice occurred in connection with the making of the award.

Case Law Developments

A. Court Rejects Argument that Competition (Anti-Trust) Law Claims Were Unsuitable for Arbitration on Public Policy Grounds

In *Nicola v Ideal Image Development Corporation Incorporated* [2009] FCA 1177, the Federal Court of Australia granted an application for a stay of proceedings by a foreign party under the Act in relation to those claims which fell within the scope of the arbitration clause. The Court rejected the argument that a breach of competition law (antitrust law) would necessarily render a matter unsuitable for arbitration on public policy grounds. This follows the 2009 decision in *Yang v S & L Consulting* [2009] NSWSC 223, in which the Supreme Court of New South Wales enforced a Chinese arbitral award under the Act, holding that it is not contrary to public policy to enforce an award unless the underlying contract is unenforceable under ordinary contractual principles.

B. Stay of Court Proceedings Granted in Favor of Arbitration

AED Oil Limited & Anor v Puffin FPSO Limited [2010] VSCA 37, illustrates the Australian courts' tendency to grant stays in favor of arbitration under s7(2) of the Act, which implements Australia's obligations under Article II(3) of the New York Convention. In that case, the Victorian Court of Appeal granted a stay of court proceedings so that a dispute could be referred to arbitration. AED Services (incorporated in Singapore) and Puffin (incorporated in Malta) were parties to a charter contract for an oil exploration project. AED Oil (incorporated in Australia) guaranteed AED Services' obligations under the charter contract.

The arbitration agreement under the charter contract contained an exception that permitted a party to seek urgent interlocutory or declaratory relief from a court where, in that party's reasonable opinion, that action was necessary to protect its rights (clause 33.10). Relying on this clause, AED Services sought, and was granted, an injunction restraining Puffin from exercising its power to appoint a receiver to the assets of AED Oil under a charge in favor of Puffin. Puffin brought a cross-claim seeking declarations that AED Services had unreasonably withheld its consent to Puffin filing an income tax return and related statements and that AED Services was liable to indemnify Puffin's tax liabilities.

The Court of Appeal closely analyzed Puffin's evidence about the urgency of its counterclaims and held that Puffin's counterclaims were not relevantly "urgent" and therefore not captured by clause 33.10. In reaching this decision, the Court of Appeal confirmed the current trend of Australian courts of interpreting the grounds upon which a party may resist a stay application under the Act narrowly. The Court also referred approvingly to authorities that support the view that declaratory awards by arbitrators are enforceable.

Other Developments

In Australia domestic arbitration is regulated by State legislation, while international arbitration is governed by federal law. Unlike the laws governing international arbitration, the State Commercial Arbitration Acts have not been based on the Model Law. However, in April 2010 the Standing Committee of Attorneys-General agreed to the wording of a new Commercial Arbitration Bill to be passed by each Australian State and Territory based on the 2006 revisions to the Model Law. The closer alignment between the laws governing international and domestic arbitration in Australia will assist in the development of a more nationally consistent approach to arbitration. This trend should also be assisted by the establishment in February 2010 of specialist arbitration lists in the Supreme Courts of NSW and Victoria and in the Federal Court of Australia.

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AUSTRIA

Case Law Developments

The Austrian Consumer Protection Laws Which Limit the Parties' Ability to Enter Into an Arbitration Agreement Do Not Per Se Form Part of Austrian Public Policy so as to Justify Non-Enforcement of An Arbitral Award Under New York Convention Art. V(2)(B).

An Austrian Supreme Court (OGH) decision dated July 22, 2009, docket No 3Ob144/09m, concerned a Danish company and Austrian company that had entered into

a franchise agreement. The Danish company successfully pursued an arbitration against two Austrian individuals that had guaranteed the contract. When the Danish company sought to enforce the award in Austria against the two Austrian individuals, the individuals challenged enforcement of the award with a range of arguments.

The Court summarily dismissed the majority of these arguments as untimely because the individuals had failed to raise them before the tribunal. However, one claim, whether the individuals' status as "consumers" under Art. 617 of the Austrian Code of Procedure ("ZPO") should prevent enforcement under the public policy exemption of Art. V(2) of the New York Convention, required more analysis.

The basis of the individuals' defense under Art. 617 of the ZPO was that such provision excludes consumer contracts from arbitration unless, *inter alia,* the parties agree on arbitration *after* a dispute has arisen. However, the individuals in this case had agreed to arbitrate prior to the dispute. The Court rejected the individuals' argument because Art. 577 of the ZPO expressly names the provisions of the ZPO that apply to arbitral awards rendered outside of Austria. As ZPO 577 does not mention Art. 617, it follows that Art. 617 does not apply to arbitral awards rendered outside of Austria.

The holding in this case, however, does not mean that defenses based on consumer protection laws will never rise to the level of public policy and, therefore, serve as a basis for denying recognition and enforcement of an arbitral award falling under the New York Convention. The Court left the door open for arguments based on consumer protection laws and will take such arguments into consideration in the future. The Court in this case simply held that arbitration agreements relating to consumer contracts are not *per se* unenforceable when rendered outside of Austria.

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BRAZIL

Statutory Developments

Brazil ratified the New York Convention in 2002, which led to the amendment of the Brazilian Arbitration Act (the "BAA"). As amended, the BAA complies with the New York Convention.

In the last year, there was no significant legal innovation in the laws that regulate arbitration procedures and the acceptance of foreign arbitral awards in Brazil, which is why this report concentrates on decisions of the Brazilian Superior Court of Justice (the "Superior Court"), which is the court responsible for recognizing foreign arbitral awards and allowing their enforcement within Brazil.

Case Law Developments

A. *Ssangyong Corp. v. Eldorado Indústrias Plásticas Ltda.*[1]

In an arbitral award, Eldorado Indústrias Plásticas Ltda. ("Eldorado") was ordered to pay Ssangyong Corporation ("Ssangyong") $2,662,722.24 in damages arising from the breach of five agreements. The arbitration proceedings were held under the auspices of the Commercial Arbitration Chamber. In 2005, Ssangyong sought to have this arbitral award recognized and enforced in Brazil.

Eldorado objected, alleging that the arbitrators had no jurisdiction over the case, as it had not agreed to the arbitration clauses in the agreements, having notified Ssangyong that it had no interest in submitting disputes to arbitration. Eldorado also alleged that there was a lawsuit underway before the Brazilian courts concerning the agreements underlying the dispute, and that recognition of this arbitral award would violate public policy.

Ssangyong replied that the parties had agreed to submit any disputes arising from their commercial transactions to arbitration, that all five agreements contained an arbitration clause, and that all the agreements had been signed by Eldorado's president. Furthermore, Ssangyong pointed out that there was no proof that it had received notice of the alleged proceedings in Brazilian courts.

The Superior Court determined that the arbitral award should not be recognized on the ground that Ssangyong had agreed to the jurisdiction of the Brazilian state courts to decide the matter because it had filed as a creditor in procedures commenced by Eldorado before the arbitral award was granted in its favor.

B. *Kanematsu USA, Inc. v. ATS*—Advanced Telecommunications Systems do Brasil Ltda.[2]

ATS—Advanced Telecommunications Systems do Brasil Ltda. ("ATS") and Kanematsu USA, Inc. ("Kanematsu") entered into a sale and purchase agreement. Kanematsu commenced arbitration proceedings against ATS, alleging that ATS had breached that agreement. The proceedings were conducted under the auspices of the American Arbitration Association (the "AAA"), and the award was favorable to Kanematsu.

Kanematsu, following the rules set forth in both the New York Convention and the BAA, sought enforcement of this arbitral award by the Superior Court against ATS. ATS argued that it had not agreed to have the arbitration conducted by the AAA. ATS presented proof that a hard copy of the contract had not been signed, and that the

agreement was entirely verbal. In response, Kanematsu argued that ATS had voluntarily submitted to arbitration.

The Superior Court found that it could not recognize the arbitral award (thus denying its enforcement in Brazil), on the ground that no signed hard copy of the agreement existed, and that the parties therefore had not agreed to submit any dispute to arbitration or to abide by the terms of any arbitral award.

C. *Atecs Mannesmann GmbH v. Rodrimar S/A Transportes Equipamentos Industriais e Armazéns Gerais*[3]

Rodrimar S/A Transportes Equipamentos Industriais e Armazéns Gerais ("Rodrimar") entered into an agreement with Mannesmann Dematic AG ("Mannesmann") to purchase a crane. Rodrimar defaulted on the agreement and Mannesmann commenced arbitration in Zurich. Mannesmann obtained a favorable arbitral award; Rodrimar was ordered to indemnify Mannesmann for all losses caused by Rodrimar's breach.

Mannesmann ceased to exist after being merged into Atecs Mannesmann GmbH ("Atecs"). Mannesmann had assigned the credit it was entitled to as a consequence of the arbitral award to another company, Gottwald Port Technology GmbH ("Gottwald"), which requested recognition of the arbitral award from the Superior Court. The Court declined to recognize the award on the ground that Gottwald, as an assignee, could not seek recognition thereof. Atecs then sought to have the award recognized. Rodrimar again opposed recognition on the ground that Atecs lacked standing to make that request.

The Superior Court ruled in favor of the recognition of the arbitral award because the party seeking enforcement of the arbitral award was not a company that had simply been assigned a credit by Mannesmann, but was rather a company that had succeeded Mannesmann as a matter of law, thus being subrogated to all of Mannesmann's rights and obligations.

D. *Plexus Cotton Limited v. Ari Giongio*[4]

Ari Giongio, ("Giongio"), an individual, sold 1,100 tons of cotton to Plexus Cotton Limited ("Plexus"). Under the underlying sale contract, Plexus undertook to pay part of the sales price prior to receiving the cotton. Plexus made this initial payment, but Giongio never delivered the cotton. In light of this breach, Plexus commenced arbitration proceedings before the International Cotton Association Limited in the United Kingdom (the "ICAL"), which ruled in favor of Plexus.

Plexus then sought to enforce this foreign arbitral award before the Superior Court. Giongio opposed enforcement on the ground that the arbitral award was invalid because he had been notified of the proceeding by courier, and not by a letter rogatory, as required under the Brazilian Code of Civil Procedure.

The Superior Court held for Plexus on the ground that parties irrevocably subject themselves to the rules of an arbitral body when they agree to arbitration by such body. Here, the ICAL's rules governing arbitration provided that parties may be notified of arbitration proceedings by courier, and thus Giongio's argument was unavailing.

E. *Jess Smith & Sons Cotton LLC v. Orlando Polato and Caetano Polato*[5]

Jess Smith & Sons Cotton LLC ("Jess Smith") commenced an ICAL arbitration proceeding against Orlando Polato and Caetano Polato (the "Polatos"). Jess Smith obtained a favorable arbitral award and subsequently sought to enforce that award in Brazil.

The Polatos maintained that the arbitration had been invalid because they had not had the assistance of counsel when they reviewed the contract and had not understood the arbitration clause. The Polatos also alleged that the arbitral tribunal had interpreted the arbitration clause too broadly. In addition to these arguments, the Polatos also alleged that there was a lawsuit under way in Brazil concerning the same dispute, and that recognition of the ICAL arbitral award would violate public policy and the sovereignty of the nation.

The Superior Court rejected all of the Polatos' arguments and recognized the arbitral award, thereby permitting its enforcement in Brazil, on the grounds that it fulfilled all of the legal requirements of the BAA and of the New York Convention.

F. *Indutech S.p.A. v. Algocentro Armazéns Gerais Ltda.*[6]

The case between Indutech S.p.A. ("Indutech") and Algocentro Armazéns Gerais Ltda. ("Algocentro") began with a cotton supply contract. Algocentro failed to comply with its obligations under the contract, and, in accordance with the arbitration clause, Indutech commenced arbitration proceedings before the Liverpool Cotton Association in the United Kingdom. The parties chose their arbitrators, the arbitration took place, and the arbitral tribunal issued an award holding Algocentro liable to Indutech for $416,323.77.

Indutech, following the procedure set forth in the BAA in accordance with Article III of the New York Convention, requested recognition by the Superior Court of the arbitral award so that Indutech could request enforcement of the award. The request was submitted with the contract that originated the dispute, as well as the arbitral award, and an official translation of it, as required by the New York Convention and the BAA.

Algocentro failed to present a defense, and a public attorney was appointed to defend its interests. The ratification procedures were then stayed pursuant to Algocentro's argument that Algocentro had not signed the

contract. Indutech argued that, as a matter of law, the Superior Court could not reexamine the terms of the arbitral award's decision and that, if there were any issue regarding execution of the contract, there would not have been an arbitral award in its favor in the first place.

Notwithstanding the parties' submissions, the Superior Court found that the arbitral award could not be enforced because the arbitration clause had not been initialed by both parties as required by the BAA.

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Endnotes

1. Superior Court of Justice (STJ), Contested Foreign Sentence No. 826 – KR (2005/0031322-7), decision published on September 19, 2010, reported by Judge Hamilton Carvalhido.
2. STJ, Contested Foreign Sentence No. 885 – EX (2005/0034898-7), decision published on September 10, 2010, reported by Judge Francisco Falcão.
3. STJ, Contested Foreign Sentence No. 3035 – EX (2008/0044435-0), decision published on August 31, 2009, reported by Judge Fernando Gonçalves.
4. STJ, Contested Foreign Sentence No. 4415 – US (2009/0102352-8), decision published on August 19, 2010, reported by Judge Aldir Passarinho, Jr.
5. STJ, Contested Foreign Sentence No. 3661 – EX (2008/0226863-5), decision published on August 06, 2009, reported by Judge Paulo Gallotti.
6. STJ, Contested Foreign Sentence No. 978 – GB (2006/0173771-1), decision published on March 05, 2009, reported by Judge Hamilton Carvalhido.

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CANADA

Case Law Developments

A. *Yugraneft Corp. v. Rexx Management Corp*, 2010 SCC 19, 20 May 2010 (Supreme Court of Canada)

The Supreme Court of Canada held that the New York Convention permits (but does not require) recognition and enforcement of arbitral awards to be subject to local time limits (limitation periods).

Practices respecting time limits to seek recognition and enforcement of foreign arbitral awards vary among Contracting States, including whether there is any time limit, the length of the time limit and the point from which time starts to run. Thus, parties seeking to enforce arbitral awards need to pay attention to these matters in all States in which enforcement might be sought.

In *Yugraneft*, the Court accepted that limitation periods are not included on the list of reasons for which an award may not be recognized and enforced in Article V of the New York Convention. However, it noted that Article III stipulates that recognition and enforcement shall be "in accordance with the rules of procedure of the territory where the award is relied upon." The Court held that local procedural rules include local time limits that apply to applications for the recognition and enforcement of foreign arbitral awards.

The time limit in issue had been imposed by Alberta, one of Canada's provinces. In Canada's federal system, time limits for bringing proceedings are within the jurisdiction of its 10 provinces and three territories. The Court therefore needed to determine how the New York Convention provision regarding "local procedural rules of the territory" applies in a federal Contracting State in which those procedural rules are of a sub-national territory. The Court noted that Article XI of the New York Convention explicitly recognized that some Contracting States will be federal or "non-unitary" and that "jurisdiction over the subject matter of the treaty may lie with a sub-national entity." The Court held that for the purposes of Article III, "the relevant unit is the enforcing jurisdiction within the Contracting State (*i.e.* Alberta)…."

The Court also stated that "an arbitral award is not a judgment or a court order." Significantly, it reconfirmed its holding in 2007 (*Dell Computer Corp. v Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801) that "arbitration is part of no state's judicial system" and "owes its existence to the will of the parties alone."

B. *Wires Jolley LLP v. Jean Estate* 2010 BCSC 391, 25 March 2010 (British Columbia Supreme Court)

This decision addressed the circumstances in which, and terms on which, a proceeding to have a foreign arbitral award recognized and enforced may be adjourned while proceedings to set aside the award are pending in another jurisdiction (here, another province within Canada). (Arbitral awards from each of Canada's 10 provinces and three territories are considered "foreign" awards in the other provinces and territories.)

The losing party applied to the Ontario Superior Court of Justice to set aside the award. The prevailing party applied to the British Columbia Supreme Court (a court of first instance) for recognition and enforcement of the award under British Columbia's *Foreign Arbitral Awards Act* (R.S.B.C. 1996, c. 154) (which codifies the New York Convention) and the *International Commercial Arbitration Act* (R.S.B.C. 1996, c. 233). The losing party opposed the British Columbia application, saying that it should await the outcome of the Ontario set-aside proceedings.

The B.C. Court held that pending foreign set-aside proceedings do not preclude recognition and enforcement in British Columbia. However, the party resisting recognition and enforcement can obtain an adjournment pending the outcome of the set-aside proceedings by showing that the set-aside proceedings raise a "serious issue" and the consideration of irreparable harm and the balance of convenience favors an adjournment. The Court noted that the party seeking enforcement will necessarily be prejudiced by a delay and conversely, there is always potential prejudice to the party seeking to set aside an award if the award is enforced and later set aside.

The Court adjourned the application for recognition and enforcement pending the decision of the Ontario Court. The B.C. Court found that there was a serious issue to be determined in Ontario. It held that there was no exceptional prejudice to the award creditor by an adjournment, because the adjournment was on the condition that the losing party provide security for the award including costs and interest. The Court appeared to accept that if the Ontario Court set aside the award after enforcement was granted in British Columbia, the losing party would be prejudiced by being precluded from seeking a stay of execution in British Columbia as the issue would be *res judicata*.

C. *Min Mar Group Inc. v. Belmont Partners LLC*, 2010 ONSC 1814, 26 March 2010 (Ontario Superior Court of Justice)

The parties settled a dispute arising from share sale agreements. Belmont commenced an arbitration in Virginia to enforce the settlement. The resulting arbitral award required Min Mar to comply with the settlement agreement. The award was recognized by the Ontario Superior Court of Justice. Min Mar asked the Ontario Court to stay enforcement of the award until certain shares had been transferred and to vary the award. The relief was denied.

Min Mar admitted that this motion was brought "in part, if not primarily, to fend off and answer the pending contempt proceedings in Virginia." The Court found that "[t]his motion was brought for an improper purpose of avoiding the consequences [in Virginia contempt proceedings] of Mina Mar's failure to comply with the Award. The court process in Ontario ought not to be used as a 'shield' to proceedings properly taken in another competent jurisdiction." The Court further held that the relief sought amounted to a variation of the award and the Ontario Court does not have jurisdiction to review or vary a foreign award under Ontario's *International Commercial Arbitration Act* (R.S.O. 1990, c. 19) (a Model Law statute). The Court held that the grounds for recourse to the court under Article 34 of the Model Law did not apply and that in any event, such recourse would have to be to a Virginia court. The Court also held that the relief sought had been denied by the arbitrator and was *res judicata*.

D. *Znamensky Selekcionno-Gibridny Center LLC v. Donaldson International Livestock Ltd.*, 2010 ONCA 303, 29 April 2010 (Ontario Court of Appeal)

Znamensky succeeded in two undefended arbitrations in Russia. Znamensky applied to the Ontario Superior Court of Justice for recognition and enforcement of both awards.

Donaldson did not participate in the arbitrations. It claimed that it had been the victim of death threats. It resisted recognition and enforcement of the awards on grounds set out in Article 36(1)(a)(i) and (ii) and 30(1)(b) of the Model Law, which is incorporated in Ontario law by the *International Commercial Arbitration Act* (R.S.O. 1990, c. 19).

Donaldson sought an order that the enforcement application proceed to trial or for leave to call witnesses at the hearing of the application (presumably in both cases on the alleged death threats). The lower court decided that the death threats issue had been dealt with in a prior court decision denying an injunction to prohibit the arbitration from proceeding because of the death threats. That decision was appealed to the Court of Appeal unsuccessfully. The lower court on the recognition and enforcement application held that the doctrine of issue estoppel meant that the death threats issue should not be heard again, because it had been dealt with in the injunction proceedings.

The Court of Appeal overturned the recognition and enforcement decision, holding that issue estoppel had been applied improperly for two reasons. First, whether death threats were made was never decided by the Court of Appeal in its injunction decision, because it had left the death threats issue to be raised at the enforcement proceeding. Since the "undecided issue goes to the heart of the appellant's ability to participate in the arbitration," the matter was remitted to the lower court to decide the factual issue of the death threats and, if proven, presumably the consequences as a defense to the enforcement application. Second, comments in the interlocutory injunction decision did not bind the court hearing the recognition and enforcement application.

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CHILE

Statutory Developments

The New York Convention entered into force in Chile in 1975. However, in 2004 Chile adopted the model law on international commercial arbitration of the United Nations Commission on International Trade Law ("UNCITRAL"), which also covers the recognition and enforcement of the foreign arbitral awards, and the grounds for refusal of such recognition and enforcement. Provisions of the new law reproduce in substance articles III, IV and V of the New York Convention. Therefore, the New York Convention's principles and provisions are valid today in Chile both directly as a binding international treaty and indirectly because they are encompassed in local legislation.

Case Law Developments

A. General Practice in Chile

Enforcement of foreign arbitral awards requires prior approval of the Chilean Supreme Court in an exequatur proceeding, in which it verifies compliance with the New York Convention's requirements for enforcement. In making a decision, the Supreme Court hears the petitioner, the defendant and the Supreme Court's reporter (the "fiscal").

The Chilean Supreme Court has consistently allowed enforcement of decisions that comply with the New York Convention's rules and principles. In turn, it has denied enforcement in cases where enforcement is contrary to local public policy. Below is a brief discussion of recent exemplary decisions.

B. Supreme Court Refuses to Review Award's Findings of Fact or Law

On September 15, 2008, the Chilean Supreme Court granted the exequatur petition made by the petitioner in the case *Gold Nutrition Industria e Comercio v Laboratorio Garden House SA*. The Chilean defendant, Laboratorio Garden House S.A., sought to reopen the finding of its liability for breach of the agreement vis-à-vis the Brazilian claimant. The Supreme Court stated in its decision that the sole purpose of the exequatur proceeding was to verify the compliance with certain minimum requirements concerning public policy, the valid service of process to the party against whom the award is invoked, the proper respect for the limits of jurisdiction and the final character of the decision to be enforced. The Supreme Court added that the procedure did not allow examination of the justice or injustice of the award so it could not review the award's findings of fact or law.

In particular, the defendant argued that its rights of due process, constitutionally protected in Chile, had been violated because the case was heard and decided by an arbitral tribunal appointed by a third entity and not by the parties; the case had been conducted in Portuguese; and it had not been allowed to submit certain expert and documentary evidence. The Chilean Supreme Court rejected each of these allegations, holding that the appointment of arbitrators by a third entity had been ordered by Brazilian courts and therefore the arbitration tribunal had been validly constituted; the fact that the case had been conducted in Portuguese—the language of the country where the arbitration took place—did not imply a violation of due process; and that the rejection of evidence that the defendant claims to have offered is a question that exceeds the scope of the examination of an award under the New York Convention. The Supreme Court reporter's brief went as far as to state that Chilean constitutional laws on due process are only valid in Chile and that considerations that other countries' proceedings do not meet justice and rationality standards or do not contemplate due process principles would represent an undue intromission to their sovereignty.

The defendant also argued that the award of costs had not been sought by the claimant and thus amounted to an excess of jurisdiction. The Supreme Court found that per the rules of the Brazilian Arbitration Center, the arbitrators had the power to decide on the apportionment of the costs of the arbitration and thus dismissed this objection too.

The defendant also claimed that Chilean public policy had been violated by the granting of an award of compound interest by the arbitral panel, because compound interest was forbidden by Chilean laws. The Supreme Court dismissed this allegation on the basis that it went beyond the formal review of the enforcement procedure and should therefore be argued before the local court that would entertain the enforcement of the award after the exequatur petition was granted.

Finally, the defendant argued that the arbitral award did not have a final and permanent character as there were pending actions before Brazilian courts to void the arbitration agreement. The Supreme Court dismissed this allegation on the basis that there were no pending appeals against the arbitral award itself, and so it met the final and permanent character required for enforcement by the New York Convention and local legislation.

C. Service of Process Need Not Comply with Chilean Law

On July 5, 1999, the Chilean Supreme Court approved the exequatur petition in *Sociedad Quote Food Products BV v Sociedad Agroindustrial Sacramento*, which arbitral award had been obtained under the aegis of a local arbitration association in the Netherlands. The Chilean defendant opposed the petition on the grounds that it had not been given proper in person service of process as required by Chilean procedural laws. The Chilean Supreme Court of Justice overruled the defendant's objection and approved the exequatur petition on the basis that service of process

had been made in accordance with the rules of the arbitration association chosen by the parties.

D. Court Refuses to Enforce Award That Decided Matter Subject to a Pending Chilean Judicial Proceeding

By decision dated October 19, 1999 issued in *Transpacific Steamship Limitada v Euroamérica S.A.*, the Chilean Supreme Court refused to recognize an international arbitral award on the basis that the same matter decided in arbitration was subject to a pending judicial proceeding in Chile which had been commenced prior to the filing of the arbitration. The Supreme Court found it would violate Chilean public policy to allow enforcement, because it would contradict the res judicata effect of the Chilean court ruling that had already confirmed its own jurisdiction to hear the case.

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CHINA

Case Law Developments

Whether arbitral awards made in mainland China by foreign arbitral bodies could be recognized and enforced according to the New York Convention had been a disputed issue under Chinese law. However, in April 2009, Ningbo Intermediate People's Court (the "Court") ruled that an arbitral award made in Beijing by the International Court of Arbitration of International Chamber of Commerce ("ICC") according to ICC arbitral rules would be recognized and enforced according to the New York Convention. This decision is reportedly the first time that a Chinese court recognized and enforced an arbitral award of such nature.

The case was filed by the Claimant, DUFERCO S.A. ("DUFERCO S.A."), a Swiss company, against the Respondent, NINGBO ARTS&CRAFTS IMP.&EXP. CO., LTD. (the "NINGBO Company"), a Chinese company, relating to a dispute arising from a goods-importing contract. The arbitration clause in the parties' contract provided for arbitration in Beijing under the ICC.

The ICC accepted the case and designated a sole arbitrator of Singapore nationality who rendered the No. 14006/MS/JB/JEM arbitral award (the "Award") in Beijing in favor of DUFERCO S.A. The Award ruled that the NINGBO Company shall pay $234,568.23 to DUFERCO S.A. DUFERCO S.A. then applied to the Court for recognition and enforcement of the Award.

The Court declared the Award enforceable. It held that China was a contracting State of the New York Convention and must recognize and enforce foreign arbitral awards in compliance with the New York Convention and related domestic laws. Article I of the New York Convention provided that this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of the State other than the State where the recognition and enforcement of such awards are sought. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. The Court opined that the Award may not be treated as a domestic award or a foreign award, but shall be considered an "arbitral award not considered as domestic award" under the New York Convention and ruled that there was a legal basis to recognize and enforce the Award accordingly.

Notwithstanding China's civil law system, this ruling may be cited as a precedent by foreign arbitral parties to ensure the enforcement of the arbitral awards of this kind, and may allow foreign arbitral parties to potentially have more opportunities to explore the broad Chinese arbitration market without fear that awards may not be enforced by the Courts.

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CYPRUS

Statutory Developments

The domestic *lex arbitri* in Cyprus is governed by the Arbitration Law Cap. 4, which was enacted in 1987, and has many similarities to the English Arbitration Act of 1950.

The New York Convention was ratified by means of the enactment of Law No. 84 of 1979 and Law 121(I)/2000.[1] Under Cypriot law, however, the New York Convention is not applied as national law but as an international treaty. As a result, Cypriot courts take foreign decisions into account when interpreting the New York Convention. Upon signing the New York Convention, Cyprus declared that it will only apply the Convention to recognition and enforcement of awards made in the territory of another contracting state. Cyprus also made a reservation declaring that it will only apply the New York Convention to differences arising out of legal relationships, whether contractual or not, which are considered "commercial" under Cypriot law. Cypriot courts will therefore enforce foreign arbitral awards that originate from states that are signatories to the New York Convention while foreign arbitral awards issued by non-signatories can be

enforced by an action based either on the award or on the original cause of action.

Cyprus has also adopted the UNCITRAL Model Law on International Commercial Arbitration by enacting the Cyprus International Commercial Arbitration Law 101 of 1987.

Other Developments

A major development for Cyprus is the establishment of the Cyprus International Arbitration Centre ("CIAC") in May 2010. It is the first of its kind in Cyprus and will operate as a not-for-profit entity. The CIAC will handle domestic and international arbitrations either under Cypriot Arbitration Rules or the UNCITRAL model rules. The CIAC's management committee is headed by retired judge Sotos Demetriou, who is a member of the Permanent Court of Arbitration ("PCA") in The Hague. It is believed that the establishment of the CIAC will strengthen Cyprus's role as a developing arbitration center. It is hoped that the CIAC will attract cases that are usually heard by the PCA, the European Court of Arbitration or the London Court of International Arbitration.

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Endnote

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Ratification) Law of 1979; Foreign Judgments (Identification, Registration and Enforcement Under the Convention) Act of 2000.

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CZECH REPUBLIC

Statutory Developments

The New York Convention was signed by the former Czechoslovakia on October 3, 1958 and an instrument of ratification was deposited on July 10, 1959. The New York Convention entered into force within the Czechoslovak Republic (predecessor of the Czech Republic) on October 10, 1959.[1] Following the division of Czechoslovakia into two separate states on September 30, 1993, the Czech Republic deposited an instrument of succession and the New York Convention became part of the Czech legal order.[2] Czech law recognizes the preemption of national law by international treaties. More specifically, the Act on Arbitration and the Enforcement of Arbitral Awards expressly provides that "[t]his Act shall apply unless otherwise provided by a treaty binding on the Czech Republic and published in the Law Digest."[3]

In order to seek enforcement of an arbitral award in the Czech Republic, it is necessary to file a request for the enforcement thereof with the district court having jurisdiction over the residency of the losing party. The application must be accompanied by the documents specified in Article 4 of the New York Convention. No hearing is conducted.

Case Law Developments

The jurisprudence of Czech courts confirms that the New York Convention is fully enforced by the judiciary. The fact that Czech courts apply the New York Convention is also apparent from older cases. For example, in Case No. Cdo 456/2003 (January 28, 2004), the Supreme Court of the Czech Republic upheld an arbitral award issued by the Chinese Commission for International Trade. Relying on Article V(1) of the New York Convention, the Court confirmed that the party opposing enforcement bears the burden of proving that an arbitral award should not be enforced. The Supreme Court went on to enforce the arbitration proceeding.

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Endnotes

1. Order of the Ministry of Foreign Affairs No.74/1959.
2. Constitutional Law No. 4/1993, Art. 1.
3. Act No. 216/1994 Coll., on Arbitration and on Enforcement of Arbitral Awards, Art. 47.

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EL SALVADOR

Statutory Developments

Per Legislative Decree dated May 19, 1980, published in the Salvadoran Official Gazette Number 9, Tome 267, dated May 27, 1980, El Salvador ratified the New York Convention, without any reservations; hence, in El Salvador, the New York Convention applies to foreign arbitral awards without regard as to whether the arbitral award has been issued in a country that has signed and ratified that treaty.

In El Salvador, a party can only commence the procedure for recognizing a foreign arbitral award before the Salvadoran Supreme Court of Justice (the "SSCJ"). Once the SSCJ has recognized such an award, enforcement thereof can be pursued in the lower courts.

Case Law Developments

To date, only two cases seeking the recognition and enforcement of a foreign arbitral award have been completed in El Salvador.

Recognition Process Reference No. 12-P-2006.

In a resolution dated January 25, 2007, the SSCJ recognized a foreign arbitral award issued in Miami following arbitration proceedings conducted pursuant to the rules of the Inter American Commercial Arbitration Commission.

The Salvadoran company opposed recognition of the foreign arbitral award on the grounds that: (a) the award extended to matters not covered under the arbitral clause agreed to by the parties, specifically the award of damages; (b) litigation was pending because the local company had filed a judicial action in the United States of America seeking to repeal the award; and (iii) the arbitral tribunal had issued the award "*ex aequo et bono*,"[1] rather than in accordance with law.

Following discovery and oral argument, the SSCJ ultimately rejected the Salvadoran company's arguments and recognized the foreign arbitral award. The SSJC's decision is silent as to the legal basis for recognizing the award. Upon such recognition, the First Instance Judge of the city of Santa Tecla, Department of La Libertad, El Salvador, authorized the enforcement of the award in May 2007.[2]

Recognition Process Reference No. 33-P-2007

In a decision dated June 25, 2009, the SSCJ denied recognition to a foreign arbitral award issued in favor of a Mexican company. The award had been issued against a Salvadoran company in an arbitration conducted under the rules of the International Chamber of Commerce ("ICC") in Cancun, Mexico.

The SSCJ based its decision on the fact that the arbitration had been conducted in the absence of the defendant, given that the Salvadoran company never participated in the arbitration (or in the award recognition procedures before the SSCJ), even though it had been duly served with regards to both the arbitration proceeding and the recognition proceeding. In reaching this decision, the SSCJ appears to have ignored the ICC Rules, domestic legislation, and its obligations under the New York Convention, among other treaties.

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Endnotes

1. A decision rendered *ex aequo et bono* is rendered on the basis of equity and conscience, rather than pursuant to statute or case law.
2. Case Reference 7-DVM-2007.

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EUROPEAN UNION

Case Law Developments

Over the last two years, the European Court of Justice ("ECJ") has addressed the New York Convention in *Asturcom Telecomunicaciones v. Cristina Rodríguez Nogueira*,[1] ("Asturcom") and in *Alllianz SpA a Generali Assicurazioni Generali SpA v. West Tankers, Inc*.[2] ("West Tankers").

Asturcom concerned a request for a preliminary ruling from a court in Spain regarding the interpretation of Council Directive 93/13/EEC on unfair terms in consumer contracts. The specific issue was whether a national court hearing an action for enforcement has the power to find sua sponte that an arbitration agreement is void if it contains an unfair term to the detriment of the consumer. The ECJ referring, inter alia, to Article 5(2)(a) of the New York Convention, found that one of the grounds for refusing to enforce an arbitral award is the need to protect a Member State's public policy. Accordingly, *Asturcom* establishes that a final arbitral award cannot be enforced where domestic law allows for a public policy review of final arbitral awards if the national court finds that the arbitration clause is unfair under Directive 93/13. The national court must review the award pursuant to EU law sua sponte, even if national law only provides for discretionary review by the court. *Asturcom* thus provides a higher level of protection for consumers but encourages substantive review by national courts of arbitral awards.

West Tankers involved a dispute between West Tankers, which owned a ship, and an insurer following a collision which occurred in Italy. West Tankers challenged Italian court proceedings in the English Courts on the basis that the Italian courts lacked jurisdiction to adjudicate the insurer's claim because that claim was covered by an arbitration agreement and the parties were obliged under that agreement to arbitrate their dispute in London. The English Courts granted the anti-suit injunction but the insurer appealed to the House of Lords on the ground that the decision was incompatible with Brussels I Regulation No.44/2001, which regulates interactions between courts in the European Union. The question was referred to the ECJ, which held, in line with an earlier opinion by the Advocate General,[3] that anti-suit injunctions in support of agreements to arbitrate are incompatible with the aforementioned EC regulation. Thus, the Italian courts had the jurisdiction to determine whether the parties' dispute should be referred to arbitration.

The ECJ noted that this conclusion is in line with the scheme of the New York Convention, under which (in Article II(3)), if litigation is commenced in breach of an arbitration agreement, a party must apply to the court where

the litigation is taking place in order to stop that litigation, rather than to the court of the seat of the arbitration. The ECJ made no further comment on this point. In his opinion, the Advocate General noted that the parties could guarantee recourse to arbitration by the clear drafting of the arbitration agreement: "If an arbitration clause is clearly formulated and not open to any doubt as to its validity, the national courts have no reason not to refer the parties to the arbitral body appointed in accordance with the New York Convention." It should be noted that West Tankers does not affect anti-suit injunctions which are sought in England for countries outside of the realm of the EC Regulation or Lugano Convention states. As such, anti-suit injunctions continue to be available against proceedings brought in breach of arbitration agreements in the United States.

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Endnotes

1. Case C-40/08 (24 May 2009).
2. Case C-185/07 (10 February 2009).
3. Opinion of Advocate Gen. Kokott, Case-185/07, *Allianz SpA v. West Tankers*, 2009 E.C.R. ___, 2009 WL 4089512, ¶ 74. The Advocate General proposed the following answer: "Council Regulation EC No.44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters precludes a court of a Member State from making an order restraining a person from commencing or continuing proceedings before the courts of another Member State because, in the opinion of the court, such proceedings are in breach of an arbitration agreement."

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FINLAND

Statutory Developments

A. The Finnish Arbitration Act

The new Finnish Arbitration Act (No. 967/1992 with subsequent amendments) (the "Act") that entered into force in 1992 included, for reasons of clarity, provisions on the recognition and enforcement of foreign arbitration awards (Sections 52-55 of the Act). The provisions in the Act are intended to be slightly more favorable to arbitration awards than the New York Convention.[1]

1. Grounds for Non-Recognition of Arbitral Awards

To be recognized, foreign awards must be based on arbitration agreements that comply with the requirements of Finnish law.

According to Section 3 of the Act, the arbitration agreement shall be in writing, usually a document signed by both parties. The writing requirement also encompasses situations where there has been an exchange of letters, telegrams, telexes or other such documents. Arbitration clauses can, as a matter of form, also be contained in general terms and conditions of the contract. However, general principles of contract law apply to the question of when the general terms and conditions have become part of the agreement between the parties and therefore may be enforced.

According to Section 4 of the Act, arbitration clauses in wills, deeds of gift, bills of lading or similar documents, or the bylaws of a corporate entity by which the party against whom the claim is brought is bound, shall have the same effect as an arbitration agreement.

Foreign awards are not recognized to the extent that they are contrary to public policy in Finland. In addition, foreign awards shall not be recognized in Finland against a party that proves that it did not have capacity to enter into the arbitration agreement or was not properly represented when the agreement was entered into. Further, a foreign award shall not be recognized against a party who proves that the arbitration agreement, for some other reason than form, is not valid under the law to which the parties have subjected it, or, if there is no choice of law provision in the arbitration agreement, under the law of the state where the award was made.

The other grounds for refusal to enforce an award track those contained in the New York Convention and are that the party was not given proper notice of the appointment of the arbitrators or the proceedings or was otherwise unable to present its case; the tribunal has exceeded its authority; the composition of the tribunal or the proceedings deviated substantially from the agreement or in the absence of agreement from the law of the state where the arbitration took place; and the award has not yet become binding or it has been declared null and void or set aside or suspended in the jurisdiction in which or, under the law of which, the award was made.

Over the past year, there have not been any statutory developments in Finland that would relate to the New York Convention or to the part of the Act dealing with recognition and enforcement of foreign arbitration awards.

2. Procedure for Enforcement of Arbitral Awards

An application for recognition and enforcement shall be submitted to the court of first instance, the district court. The application shall be accompanied by the original arbitration agreement or clause and by the original award, or certified copies thereof. Documents must be translated into either Finnish or Swedish, unless the court grants an exemption. In practice, the courts have, for example, accepted documents in which solely the arbitra-

tion clause and the decision part of the award are translated into Finnish or Swedish, where the documents were otherwise in English.

The party against whom enforcement is sought shall be given an opportunity to be heard unless there is a particular reason not to do so. Unless witnesses have to be heard, the matter is dealt with by the court in chambers, without an oral hearing.

If the party opposing enforcement shows that proceedings to nullify or set aside the award are pending in the jurisdiction in which the award was made, the court may, if it considers it proper, adjourn its decision on the enforcement of the award. In that case, the court may, upon request, order that the adjournment is subject to provision of security by the opposing party.

If the application is not opposed, the court shall grant the enforcement order and will not *sua sponte* review whether any grounds for refusal of recognition exist, except for reviewing that the award is not contrary to public policy.

The decision of the district court can be appealed to the relevant regional appeal court. Leave to appeal the decision of the regional appeal court can be sought from the Supreme Court on limited grounds. It is impossible to predict the length of a challenge and subsequent possible appeal proceedings. However, a party should be prepared for proceedings stretching over a year or two if the matter is appealed to the regional appeal court.

If the district court has granted enforcement the execution of the judgment may be applied for to the bailiff regardless of appeal. However, execution may be suspended by the appeal court for the duration of the proceedings.

Case Law Developments

Rulings on the enforcement of foreign arbitration awards are rare and there is no established general practice. Courts are, however, in general considered to be favorable to recognition of arbitration awards and the threshold to refuse recognition is generally high.

A. Court Refuses to Retry Issues Determined by Arbitral Panel

While there have been no Supreme Court cases dealing with the enforcement of foreign arbitral awards over the past year, a ruling concerning the application for enforcement of a Swedish award from Helsinki District Court which has not been appealed (case H 10/12492, decision 10/27334 of July 22, 2010) may be noted although it does not have precedential value. In this case, the party that resisted enforcement of the award first objected to the jurisdiction of the court and further argued that the arbitration agreement was not valid because a subsequent agreement allegedly superseded it. In addition, the party that resisted enforcement argued that the arbitration tribunal had exceeded its authority because the party seeking enforcement had allegedly not become a party to the arbitration agreement.

The decision of the district court is short. First, the district court finds that it has jurisdiction and notes that it was irrelevant whether the enforcement debtor had assets in Finland or whether enforcement was pending abroad. Second, the main point on the remaining challenges is that both these challenges had already been dealt with by the arbitration tribunal, which had justified its reasoning. The district court specifically stated that it would not retry the arbitral tribunal's decisions and that the party resisting enforcement had not managed to prove either that the arbitration agreement was not valid or that the arbitration tribunal had exceeded its authority. Hence, the district court ruled that the arbitration award was enforceable in Finland.

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Endnote

1. For an unofficial English translation of the Act, including all amendments made before 1999, see http://www.finlex.fi/fi/laki/kaannokset/1992/en19920967.pdf. (The fully updated Act is available in Finnish and Swedish at http://www.finlex.fi/fi/laki/ajantasa/1992/19920967.)

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GERMANY

Case Law Developments

In 1984, the German Federal Supreme Court, *i.e.*, the highest German court in civil matters, surprised arbitration practitioners by holding that, in Germany, a party may choose between applying to have a foreign arbitral award recognized and declared enforceable under the New York Convention or filing a similar application with respect to an exequatur judgment of a foreign court under which the arbitral award has already been recognized. By creating this option, the Court created a loophole for applicants who wanted to circumvent the recognition requirements of the New York Convention, which differ from the requirements applying to the recognition of foreign exequatur judgments. In exequatur proceedings, the court will not review, for example, whether or not (i) the arbitration agreement was validly concluded, (ii) the matter was arbitrable or (iii) the arbitrators were appointed in accordance with the arbitration agreement (*see* Art. V(1) New York Convention).

The ruling remained in force for more than two decades and was only recently reversed by the Court (Case No. IX ZR 152/06 dated July 2, 2009). In that case, the claimant filed an application seeking recognition of a

judgment by the Superior Court of the State of California. In that judgment, the California court had recognized and declared enforceable an arbitral award rendered in an international arbitration. Abiding by the rule established by the German Federal Supreme Court, both the first and the second instance courts granted the application. Upon the appeal of the defendant, the German Federal Supreme court took the case and expressly rejected the so-called "double exequatur" rule. The Court recognized the loophole created in 1984 and closed it by holding that foreign arbitral awards can only be recognized and declared enforceable pursuant to the New York Convention.

German arbitration practitioners have welcomed this change for two reasons. First, there appeared to be no good reason for the creation of the apparently unique, double exequatur rule. Second, and more importantly, the power to recognize foreign arbitral awards under the New York Convention has been exclusively assigned to the court of appeals, with the result that the local courts and district courts lack such jurisdiction. German practitioners believe that those courts' expertise will grow as a result of the Court's ruling because they will have to rule on many more such applications.

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INDIA

Statutory Developments

The Indian Legislature enacted the Arbitration and Conciliation Act, 1996 (the "A&C Act") to consolidate and amend the laws relating to domestic arbitration, commercial arbitration and enforcement of foreign awards, and to conform those laws with the UNCITRAL Model Law on International Commercial Arbitration in 1985 and the UNCITRAL Conciliation Rules of 1980.

The A&C Act has four parts. Part II gives effect to the provisions of the New York Convention and the enforcement of foreign arbitral awards. This part defines "foreign award" to include an arbitral award resolving disputes between parties arising out of a legal relationship, whether contractual or not, that are considered to be commercial under Indian law and which is made in a country whose awards are recognized by India (and such country reciprocates such enforcement).

A. Conditions for Non-Enforcement

The A&C Act provides that an Indian court may refuse to enforce a foreign award only on certain grounds, which are set forth in Section 48 of the statute. The grounds for refusal of enforcement under Part II of the A&C Act are substantially similar to the grounds under Article V of the New York Convention. However, the A&C Act expands on the ground of non-enforcement of an award as contrary to the public policy of a country, because under the A&C Act, an award shall be deemed to be in conflict with the public policy of India if it was induced or affected by fraud or corruption.

B. Appeal Rights Under the A&C Act

Section 50 of the A&C Act provides that a party may appeal an order refusing to enforce a foreign award under Section 48.

C. Interest After the Date of the Award

The Court enforcing a foreign award has no jurisdiction to award interest after the date of the award. This is probably one of the many lacunae in the A&C Act. *Toepfer International Asia Pvt. Ltd. v. Thapar Ispat Ltd.*, AIR 1999 Bom 417.

Case Law Developments

A. Application of Domestic Arbitration Law to International Arbitration

Bhatia International v. Bulk Trading AIR 2002 SC 1432 was the first of many controversial cases which held that Part I of the A&C Act, which by its terms applies only to domestic arbitrations, may be applicable to international arbitrations. Under Part I of the A&C Act, Indian courts have the jurisdiction to issue interim protection orders in relation to arbitral disputes. Until *Bhatia International,* it was understood that because Part I only dealt with domestic arbitration, Indian courts would not have jurisdiction to issue interim protection orders in relation to international arbitrations, which are governed by Part II of the A&C Act. However, the Supreme Court of India observed that if Part I is not made applicable to international commercial arbitrations then the parties would not be entitled to approach Indian courts for interim relief, even if the parties' properties may be situated in India. The Supreme Court held that such a result was not the intention behind the A&C Act. Instead, the Supreme Court held that the intention was to make Part I applicable to all arbitrations, including international arbitration, unless specifically excluded by the parties by way of an agreement.

This interpretation was further affirmed by the Supreme Court in *Venture Global v. Satyam Computer Services Ltd. and Anr* AIR 2008 SC 1061, wherein the Court dealt with the question of challenge to foreign awards on the merits of disputes under the A&C Act. Following the same interpretation as in *Bhatia International*, the Court held that, unless the parties by agreement have excluded the applicability of Part I, even foreign awards can be challenged, like domestic awards, on the merits under Part I of the A&C Act. Under Part II only the enforcement of an award can be challenged and not the award itself.

B. Public Policy

Under both Part I and Part II of the A&C Act, "public policy" is one of the grounds on which an award can be challenged. Courts have held that the expression "public policy" can include almost anything or everything due to the fact that it is incapable of being defined with one strict formula. In *Central Inland Water Transport Corp. Ltd. v. Brojo Nath Ganguly*, (1986)3 SCC 156, the Supreme Court of India also held that enforcement of foreign awards will be refused on the ground of public policy if such enforcement would be contrary to (i) fundamental policy of Indian Law; (ii) the interests of India; or (iii) justice or morality.

The Indian courts have applied a distinction between the concept of public policy in a matter governed by domestic law and a matter involving conflict of laws and foreign laws. The application of public policy in the field of foreign law is more limited than in domestic law and the Indian courts are slower to invoke public policy in cases involving a foreign element than when a purely domestic legal issue is involved. This principle was recognized by a three-judge bench of the Supreme Court in *Renu Sagar Power Co v. General Electric,* 1994 Supp 1 SCC 644, wherein it was held that public policy must be interpreted in a narrower sense in cases involving a foreign element. It was held that enforcement of an award must invoke something more than a mere violation of the law of India before enforcement could be barred under public policy.

Similarly, the Indian Supreme Court in a subsequent pronouncement in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd*., (2003)5 SCC 705, expanded the meaning of public policy to include patent illegality Although that case involved a domestic award, the court made it clear that such expanded meaning of public policy did not apply to foreign awards.

Recently in *Penn Racquet Sports v. Major International Ltd* (unreported as of the date of this submission) the Delhi High Court rejected a challenge to a foreign award rendered by the International Chamber of Commerce (ICC). The objector had filed its objection on the ground of public policy under Part II and not under Part I of the A&C Act and attempted to apply the definition of public policy as defined under Part I. The objector cited the ruling in *Satyam Computers* to contend that a foreign award can be challenged on its merits in the same way as a domestic award under Part I. The court, however, ruled that because the objector had chosen to style its objections as being under Part II and not under Part I, the principles of Part I could not be applied. The court reaffirmed the principle that under Part II, the definition of public policy is narrower than Part I and held that the award was not against the public policy of India. The Court observed:

> Merely because a monetary award has been made against an Indian entity on account of its commercial dealings, would not make the award either contrary to the interests of India or justice or morality.

Another notable feature of the ruling in *Penn Racquet* was the court's upholding of an ICC arbitration rule whereby a counterclaim could not be entertained by the ICC unless the fee prescribed under the rules was paid by the counterclaimant. The Court held that if the objector's counterclaim was rejected by the ICC for non-payment of fees, that rejection could not be treated as a denial of the principles of natural justice since the objector, having agreed to ICC arbitration, was bound by the ICC's rules and could not be allowed to complain if the rules were applied to it.

C. Limitation Periods

The A&C Act does not prescribe any time limit within which a party must apply for enforcement of a foreign award. However, various High Courts have held that the residuary provision of the Limitation Act would apply, which applies to actions where no specific period of limitation is prescribed. The limitations period is calculated as three years from the date of receipt of award by the Applicant.

D. Procedure for Enforcement of Foreign Awards

While some theorists believe that enforcement of foreign awards are to be made in two separate proceedings, *i.e.,* first the enforcement proceeding and then the execution proceeding, the Honorable Supreme Court in *M/s Fuest Day Lawson Ltd. v. Jindal Exports*, AIR 2001 SC 2293, held that there is no requirement for the party in whose favor a foreign arbitral award was made to move for separate execution proceedings after the enforcement of the award, as separate proceedings would frustrate the entire meaning and the object of the A&C Act.

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ISRAEL

Statutory Developments

When parties to an international agreement have agreed to refer all disputes to arbitration, Israeli courts will almost always honor that agreement.

The general rule is that, if a lawsuit is filed concerning a dispute as to which there is a written arbitration agreement, and if a litigant that is a party to such agreement requests that the court stay the proceedings in the lawsuit, the court is required to issue such a stay. Such a stay only applies as between the parties to the arbitration agreement, and it will only be granted if the party requesting

the stay is prepared to do "all that is required" to conduct the arbitration. Nonetheless, the Israeli court is permitted to deny a motion for a stay if the court finds that a "special reason" that the dispute should not be arbitrated exists.

Case Law Developments

Prior to 2005, there was no published case law discussing whether the open-ended authority of an Israeli court to ignore arbitration agreements on the grounds of a "special reason" is limited to the *domestic* context. More specifically, there had been lower court decisions that, without expressly addressing the New York Convention, allowed multi-party cases to proceed in Israel even though two of the parties had signed an agreement calling for arbitration outside Israel. The reasoning of those decisions was that the presence of an Israeli litigant that was *not* bound to the international arbitration agreement was enough of a "special reason" not to force an Israeli party to arbitrate abroad.

However, in September 2005, the Supreme Court addressed this issue, and it held that, when an international treaty to which Israel is a signatory applies to an arbitration agreement, and when such treaty contains provisions relating to the stay of judicial proceedings, the court's authority to deny a stay on the grounds of a "special reason" must, as a general rule, be exercised *subject to* the provisions of such international treaty.

The Supreme Court went on to observe that Israel is a signatory to the New York Convention, which provides that, when a court of a contracting state is seized of an action in a matter in respect of which the parties have made an agreement to arbitrate, such court shall, at the request of one of the parties, refer the parties to arbitration, unless the agreement "is null and void, inoperative or incapable of being performed." The Supreme Court noted that the New York Convention does not contain any provision analogous to the "special reason" provision of Israeli law; therefore, the Supreme Court held that an Israeli court may not refuse, on the grounds of a "special reason," to stay an action relating to an arbitration governed by the New York Convention.

In October 2009, the Israeli Supreme Court recognized (in a two-to-one decision) a narrow exception to its 2005 holding, in a case involving the adequacy of disclosure concerning drug testing on humans. The Court reasoned that such an issue involved matters of public concern that justified recognizing an exception to the New York Convention.

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ITALY

Case Law Developments

The Corte di Cassazione (the Italian Supreme Court) delivered an important judgment (Cass. Sz. Un. n. 11629/09 "*Cereal Mangimi S.r.l. v.. Louis Dreyfus S.p.A.*") which provides some insight on the scope of application of the New York Convention and on the concept of an "agreement in writing," pursuant to Article 2 of the New York Convention. In its decision, the Court addressed three issues: (1) What is the definition of "Foreign Arbitral Award" in the New York Convention and is the Convention applicable to an award between two parties from the same country; (2) Is an agreement to arbitrate valid when it has been signed by an agent who has the authority to sign a contract but who does not have the specific authority to sign an agreement to arbitrate; and (3) Is an agreement to arbitrate binding when the arbitration clause is not contained in the main contract, but is contained in a different document to which the main contract refers?

Summary of the case: Cereal Mangimi S.r.l. ("Cereal") sued Louis Dreyfus S.p.A. ("Dreyfus"), a supplier of wheat, cereal and cultivated crops before the Court of Bari. Cereal alleged that Dreyfus failed to deliver 20,400 metric tons of French maize as required by a contract signed by the parties' agents. In its reply, Dreyfus claimed that the Italian Court had no jurisdiction because the contract between the parties referred to the conditions stated in a separate document, the Incograin Contract n.12, which requires disputes to be decided by an arbitration proceeding. Dreyfus's argument was rejected by the territorial courts and the case was appealed to the Corte di Cassazione, which upheld the lower courts' decisions but set forth the following principles relating to the New York Convention:

Foreign Arbitral Award: the Court held that an award rendered pursuant to an agreement to arbitrate that sets a foreign arbitral seat for the tribunal is considered a "Foreign Arbitral Award" under the New York Convention (and therefore the New York Convention is applicable to such award), even if the arbitral agreement is signed by two Italian parties and consists of obligations to be performed in Italy.

Power Of Attorney Requirement: Italian courts have traditionally used a "state by state" approach regarding an agent or broker's authority to enter into an arbitration agreement, and have required the agent to have a written power of attorney only when the law applicable to the contract mandated such form. Therefore, Italian courts have held that contracts to which French or English law is applicable will not require a power of attorney in writing. However, in the past, Italian courts have held that contracts that are signed and performed in Italy and to which Italian law is applicable will require a power of attorney in writing, and such power of attorney must not only

authorize the agent to sign a contract, but also explicitly authorize him to sign an agreement to arbitrate.

In this decision, the Court departed from those previous decisions, and held that although a written power of attorney is still required for an agent where the contract is signed and performed in Italy and governed by Italian law, a power of attorney which authorizes an agent to sign a contract implicitly also entitles him to sign an agreement to arbitrate. Therefore, pursuant to this decision, when Italian law is applicable, an agreement to arbitrate signed by an agent is valid even if the power of attorney which entitles the agent to sign the contract does not explicitly authorize the agent to sign an agreement to arbitrate.

"***Per Relationem" Arbitration Clause Comprising an Agreement in Writing***: The Court also addressed the issue of whether the requirement of the agreement being "in writing," as required by the New York Convention, was satisfied when the arbitration clause was not contained in the signed contract, but was contained in another document to which the signed contract referred. The parties' contract did not include an arbitration clause, but referred to conditions in Contract n. 12 Incograin, which included an arbitration clause. The Court in rejecting Dreyfus' claim of lack of jurisdiction, confirmed its traditional view of *per relationem* clauses which distinguishes two scenarios: (1) *Relationem perfectam.* If a contract refers to a different document and specifically mentions the clause in the second document that contains the agreement to arbitrate, the mutual intention of the parties to arbitrate is clear and the agreement to arbitrate is binding. (2) *Relationem imperfectam.* If a contract generally refers to a different document but does not contain any specific reference to the clause in the second document which contains the agreement to arbitrate, the mutual intention of the parties is unclear and the arbitration clause incorporated in the document to which the contract refers will not be applicable.

The above-mentioned case marks a step forward in the interpretation of what an "agreement in writing" is and allows an agent to sign an agreement to arbitrate even if his power of attorney does not specifically authorize him to sign such an agreement, as long as he has the authority to sign the main contract: this seems to signal a less conservative interpretation of Article 2 of the New York Convention in Italy. However, the case also reinforces some of the traditional holdings of the Italian Supreme Court, particularly the traditional distinction between *relationem perfectam* and *relationem imperfectam.*

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KENYA

Statutory Developments

Kenya acceded to the New York Convention on February 10, 1989. The law currently governing arbitration in Kenya is the Arbitration Act ("1995 Arbitration Act"), which has been amended by the Arbitration (Amendment) Act 2009 ("2009 Act") in order to expressly incorporate the New York Convention and other developing practices in arbitration.

The 1995 Arbitration Act had incorporated a majority of the provisions of the New York Convention without referring to the Convention. However, the 2009 Act now introduces section 36 (2) in to the 1995 Arbitration Act which reads, in pertinent part, as follows:

> An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other Convention to which Kenya is signatory and relating to arbitrary awards.

Although the 1995 Arbitration Act previously provided for the enforcement of international arbitral awards, the Act, as amended, explicitly recognizes the New York Convention as part of arbitration law in Kenya.

Case Law Developments

Our search of reported Kenyan High Court and Court of Appeal cases did not yield any decisions in which the New York Convention was considered.

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MALAYSIA

Statutory Developments

Malaysia ratified the New York Convention by way of the 1985 Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act, which gave member states of the New York Convention the right to have foreign arbitral awards recognized and enforced through registration in Malaysia.

In 2005, Malaysia replaced the 1952 Arbitration Act (which was effectively silent on the issue of recognition and enforcement of international arbitral awards) with the Arbitration Act of 2005 (the"New Act"), which contains language that reinforces the essential provisions of

the New York Convention and further enhances arbitration in Malaysia.

Section 10 of the New Act directs Malaysian courts to stay proceedings and to refer any dispute that is the subject of an arbitration agreement to arbitration unless (a) there is an issue as to validity of the arbitration agreement and/or (b) there is no actual dispute between the parties. Section 10 further provides that an award on an arbitrable dispute may be made while the case is still pending before a Malaysian court.

Section 11 and 29 of the New Act are revolutionary for dispute resolution in Malaysia. Those sections enable Malaysian courts to grant interlocutory relief in aid of arbitration, including compelling the production of documents, evidence by affidavit and/or answers to interrogatories. Under these Sections, a Malaysian court may also require the deposit of a sum sufficient to secure a domestic party's costs against a foreign entity, issue interim injunctions and even order a party to preserve its property while an arbitration is pending.

Section 36 of the New Act empowers parties to an arbitration to treat an award by a competent tribunal as final, binding and to be relied upon in any proceedings in any Malaysian court.

Section 38 of the New Act makes clear that any domestic or international arbitral award becomes binding and enforceable within the territorial jurisdiction of Malaysia upon registration of the award as a judgment of the Malaysian courts, unless the subject matter of the dispute or the award itself conflicts with the laws or public policy of Malaysia.

Section 41 of the New Act strikes a balance between efficacy and justice by allowing preliminary issues of law to be referred to courts, but only if such preliminary questions of law are likely to produce substantial savings in cost and/or substantially affect the rights of parties.

Section 42 of the New Act allows parties to refer an award to a Malaysian High Court on a "question of law" arising out of an award but not on "questions of fact." The Malaysian High Court has the authority to confirm, vary or remit the award or parts thereof for reconsideration by the arbitral tribunal.

Case Law Developments

Since 2005, courts have routinely stressed the importance of arbitration as an alternative dispute resolution procedure. Two recent decisions, *Chun Nyam Isham Nyak Ariff v. Malaysian Tech Development Corporation* [2009], 9 CLJ 32, and *Gadang Engineering (M) Sdn Bhd v. Bluwater Developments Berhad* [2010], 6 CLJ 277, demonstrate that the Malaysian High Courts routinely stay proceedings in courts so that matters may proceed to arbitration.

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MAURITIUS

Statutory Developments

The recent enactment of the International Arbitration Act ("IAA") in December 2008 is another major step forward in the development of Mauritius into a favorable venue for arbitration of international commercial disputes.

The IAA contains provisions concerning the selection of an arbitral tribunal, recognition and enforcement of interim measures and the conduct of arbitral proceedings.

The salient points include directing court applications brought under the IAA to a panel of three Supreme Court judges, affording parties an automatic right of appeal to the Privy Council, ensuring that qualified jurists deal with court disputes related to the IAA, assigning all appointment functions, and a number of other administrative duties, to the Permanent Court of Arbitration, establishing a full-time representative from the Mauritius Chamber of Commerce & Industry Arbitration Court (the "Court") in Mauritius, including specific provisions for disputes concerning offshore companies incorporated in Mauritius, expanding the definitions of international arbitration and arbitration agreements to give the IAA a specific focus on investment arbitration, specifically excluding confidentiality provisions to improve transparency, and expressly permitting foreign lawyers to act as both counsel and arbitrators.

The Act is based on the UNCITRAL Model Law on arbitration and Mauritius is currently the only country in the South African region to have enacted such legislation.

The Court has entered into cooperation agreements with arbitration centers in several countries including Australia, France, Germany, India and Kenya.

The Court is also a member of the International Federation of Commercial Arbitration Institutions (IFCAI).

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MEXICO

Statutory Developments

Mexico ratified the New York Convention in 1971.[1] In 1993, as a prelude to joining the North American Free Trade Agreement ("NAFTA"), Mexico adopted the UNCITRAL Model Law on International Commercial Arbitration with minor changes. The use of international commercial arbitration between foreign investors and their Mexican business partners has seen a substantial increase since 1994, when NAFTA entered into force. Arbitration clauses are now standard in international business contracts with Mexican counterparts.

Case Law Developments

In the early to mid-1990s, Mexican courts tended to be hostile to arbitration. In *Operadora de Tintorerías Doña Linda, S.A. de C.V. v. Dry Clean USA Franchise Co.* (1995), for example, a Mexican company sued an American company for breach of contract. In response, the American company asked the court to determine that the dispute should be heard by an arbitral tribunal in accordance with the contract. However, in an abundance of caution, the American company also answered the Mexican company's allegations. The court determined that the submission of a substantive answer, which is not contemplated in Mexican law, constituted a decision to waive the arbitration clause and to submit to the jurisdiction of the Mexican courts.

Mexico's initial judicial hostility towards arbitration has given way to a more ambivalent environment where conflicting precedents in favor of and against arbitration seem to follow each other. For instance, a 2005 decision by the Mexican Federal Courts declared that it was the arbitral tribunal, and not the judge, who had authority to determine the validity of an arbitration clause.[2] This precedent was overturned by a 2006 decision by the First Chamber of the Supreme Court, which found that the judge, not the arbitral tribunal, has that authority.[3]

Fortunately, in the last few years, the Supreme Court seems to be moving toward a more pro-arbitration position. In recent decisions, the Supreme Court has expressly acknowledged that: (1) the parties' intent to arbitrate is determinative and that judicial intervention in arbitration is limited to exceptional situations;[4] (2) parties are obliged to adhere to the terms of their arbitration agreement;[5] and (3) an arbitral tribunal can render an award in equity when the parties agreed to such an award in their arbitration agreement.[6]

Infored v. Radio Centro

Infored v. Radio Centro, which was decided in September 2010, was a major decision in Mexican jurisprudence concerning arbitration. Infored initiated an arbitration proceeding against Radio Centro before the ICC, pursuant to which it sought rescission of an agreement and the payment of damages. The arbitration clause in the relevant agreement provided that the arbitral tribunal had to be comprised of three arbitrators who were "experts in the subject matter." The parties to the arbitration accepted the members of the Tribunal as arbitrators both by appointing them and by signing the terms of reference. In their final award, the arbitrators held that Radio Centro was in breach of the agreement and awarded Infored a multimillion damages award.

Radio Centro sought to have the award nullified by a Mexican judge on the ground that the arbitrators were not recognized experts in telecommunications or radio broadcasting and had not proven their expertise in such subject matter. The judge nullified the award on that basis.

In the Mexican legal system, every judicial decision, including any decision recognizing, enforcing, annulling or vacating an arbitral award, may be submitted for constitutional review through a procedure known as *amparo.* However, there has been considerable debate as to the procedural form that the *amparo* proceeding should take. If the recognition, enforcement or annulment of an award constitutes a summary and independent process, then a "direct" one-step *amparo* proceeding before a collegiate circuit court is appropriate. If, however, such a procedure is treated as an ancillary or incidental process, then an "indirect" two-step *amparo* proceeding would occur; a federal district court would review the decision, and that court's decision would then be subject to review by a collegiate circuit court. In 2007, the Supreme Court resolved the issue in favor of the "indirect," two-stage *amparo* proceeding.[7]

Accordingly, Infored contested the initial Mexican court decision in an indirect *amparo* proceeding. Infored argued that the judge had not considered the arbitration clause in the agreement, or the relevant arbitration rules of the ICC and applicable international treaties. The *amparo* judge declared the decision of the prior judge null and void and ruled that Radio Centro's plea for annulment of the original award was without merit. As this was a two-stage *amparo* proceeding, Radio Centro appealed this decision. On appeal, the collegiate circuit court held that the requisite proceeding was not an "indirect" *amparo* but in fact a "direct" *amparo* for which it constituted the only appropriate forum. Then, instead of analyzing the arguments made in the *amparo* proceeding on appeal, the appellate court proceeded to render a judgment on the facts of the case and denied the *amparo,* thereby confirming the original decision to nullify the award.

In response to this decision, Infored filed an exceptional constitutional complaint before the Supreme Court in which it alleged that the appellate court had misinterpreted certain constitutional concepts and wrongly recharacterized the proceeding at hand as a single-stage *amparo* proceeding. The Supreme Court held for Infored, and

ordered that the case be reexamined in a one-stage *amparo* proceeding. In this reexamination, the federal judge ruled in favor of Infored confirming the validity of the award, based on article 1420 of the Mexican Commerce Code, which provides that if a party does not raises an objection to jurisdiction in an arbitration, it cannot then challenge the award on the basis of lack of jurisdiction. This prompted Radio Centro to commence yet another *amparo* proceeding, arguing that Article 1420 was unconstitutional because it constitutes a waiver of the constitutional guarantee of access to justice before the judiciary, which by its very nature cannot be waived. This *amparo* reached the Supreme Court and was finally decided on September 8, 2010. In its decision, the Supreme Court confirmed the arbitration award, on the basis that Article 1420 of the Commerce Code is constitutional, as it is only through the failure of a party to raise a jurisdictional objection in a timely fashion that such a party would lose the right to challenge an arbitral award.

Infored v. Radio Centro illustrates the ambivalent position of Mexican courts towards arbitration. The case had a happy ending as the arbitration award was confirmed. But it took more than 5 years of litigation in Mexican courts and in the process some positions which do not necessarily help the expeditious enforcement of awards were taken, such as confirming the two-step indirect *amparo* proceeding as applicable to court decisions which recognize, enforce or annul an award. In short, although improvements have been made, the battle for arbitration is still being fought and the arbitration community needs to continue its dialogue with the judiciary in order to achieve a better understanding and cooperation between state courts and arbitration practitioners.

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Endnotes

1. Mexico has also ratified the Inter-American Convention on International Commercial Arbitration and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.
2. Tribunales Colegiados de Circuito; Novena Época; No. de Registro 176581; Tesis Aislada; Materia Civil; Semanario Judicial de la Federación; XXII, Diciembre de 2005, Tesis I.30.C.502C; Página 2650.
3. Primera Sala; Novena Época; No. de Registro 174303; Jurisprudencia; Materia Civil; Semanario Judicial de la Federación; XXIV, Septiembre de 2006, Tesis Ia/J.25/2006; Página 5.
4. Primera Sala; Novena Época; No. de Registro 166510; Tesis Aislada; Materia Civil; Semanario Judicial de la Federación; XXX, Septiembre de 2009, Tesis IaCLXX/2009.
5. Primera Sala; Novena Época; No. de Registro 166507; Tesis Aislada; Materia Civil; Semanario Judicial de la Federación; XXX, Septiembre de 2009, Tesis IaCLXXII/2009.
6. Primera Sala; Novena Época; No. de Registro 166511; Tesis Aislada; Materia Civil, Constitucional; Semanario Judicial de la Federación; XXX, Septiembre de 2009, Tesis IaCLXXI/2009.
7. Primera Sala, Tesis Jurisprudencial 146/2007.

* * *

PORTUGAL

Statutory Developments

A. Finality of Awards

According to Article V(e) of the New York Convention, a court may refuse to recognize or enforce an award that has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made. The Portuguese Law on Voluntary Arbitration ("LAV")[1] distinguishes between appeal and challenge of an arbitral award.

Under Portuguese Procedure Law,[2] the recognition and enforcement of a foreign arbitral award may be refused if the award is not final and binding (*res judicata*), under the law of the country where the award was rendered (this provision includes awards that are subject to appeal). However, the fact that annulment proceedings are pending in the country where the award was rendered is not grounds for refusal of recognition and enforcement. This means that, under Portuguese law, while an appeal inhibits the *res judicata* effect of the appealed decision, annulment proceedings do not.

LAV applies only to arbitrations that take place in Portugal.[3] Thus, if arbitral proceedings take place in a foreign country and apply Portuguese law, Portuguese courts may not decide on the annulment procedures.

B. Arbitrability /International Public Policy Rules

According to article V(2) of the New York Convention, recognition and enforcement of an arbitral award may be refused if, according to the law of the country where such recognition and enforcement are requested, the object of the dispute is not arbitrable or if the recognition and enforcement of the award violates the international public policy of the country where the award is to be recognized or enforced.

1. Arbitrability

In Portugal, LAV[4] limits disputes which can be arbitrated to those relating to disposable rights (that is, rights that are not inalienable). This rule is consistent with the provisions of the Portuguese Civil Code and the Portuguese Civil Procedure Code regarding admission and settlement, which cannot take place in relation to inalienable rights (*as per* articles 353 and 1249 of the Portuguese Civil Code and article 299 of the Portuguese Civil Procedure Code).

Examples of inalienable rights include personal family rights, personality rights and rights to alimony (Decision of the *Tribunal da Relação de Lisboa* of 10-12-2009).[5] Disposable rights are not limited to economic rights. On the one hand, not all economic rights are disposable, and on the other, not all disposable rights have an economic nature.

2. Public Policy

Under Portuguese law, the reference to "public policy" in the New York Convention refers to the international public policy of the country where a party chooses to have the foreign arbitral award recognized and enforced. Article 1096.º/f) of the Portuguese Civil Procedure Code expressly states that the only ground for refusing to review and confirm foreign awards is that the recognition of the award would lead to a result clearly incompatible with the principles of international public policy of the Portuguese State. The offense to public policy may relate to the arbitration agreement (for instance, if it is null and void), to the arbitration (*e.g.* partiality of the arbitrators, violation of the rights of defense), to the award, or even to the enforcement itself. Under Portuguese law, recognition of an award violates public policy where "*its application creates a great injury, unbearable to the deepest ethical-legal sense of the Portuguese system (…).*"[6] For evaluating the condition set out in Article 1096.º/f) of the Portuguese Civil Procedure Code, the court should only look at the award itself and not to the ground on which it lays.[7]

Case Law Developments

A. Enforceability of a Foreign Arbitral Award in Portugal

The Portuguese Supreme Court held in March 2009 that a foreign arbitral award under the New York Convention can be enforced automatically in Portugal without revision or confirmation. The Court noted that under article 48, 2 of the Procedure Code "decisions rendered by an arbitral tribunal are enforceable under the same terms as judicial court decisions." The Court then recognized that Article III of the New York Convention applied and that there could not be substantially more onerous conditions or higher charges to recognize and enforce foreign awards than those applied to the recognition and enforcement of national arbitral awards. (Decision of the Supreme Court of March 19, 2009.)

B. Service of Process

Pursuant to Article V (1)(b) of the New York Convention, the burden of proof falls on the party against which the arbitral award is issued when claiming that it was not properly informed of the selection of the arbitrator or of the arbitration process itself. For the party to be deemed to have been duly informed of the selection of the arbitrator and of the arbitration process itself, it is not necessary for service of the arbitration process to have been made by registered mail with acknowledgment of receipt, and a vernacular translation. Rather, service of process upon the Respondent, as required by al. e) of art. 1096º of the Civil Procedure Code ("CPC"), must be made in accordance with the law of the court of origin. Therefore, it is according to arbitral procedural law, and not according to the Portuguese procedural law, that the question of the validity of the service of the process must be viewed so there is no requirement for registered mail with acknowledgment of receipt as required in litigations under articles 233º, no.2, al. a), 236º and 247º of the CPC. No specific method of service is specified in the New York Convention, hence it must be ascertained if the party against which the award is issued was, or was not, effectively placed in the situation where it could, if it wished to, present its points of views/arguments before the arbitrators.

Under Article V(2)(b) of the New York Convention, the recognition or enforcement of an award can also be rejected if such recognition and enforcement is against public policy, which is called in Portugal the International Public Policy of the State of Portugal, as defined at al. f) of art. 1096º of the CPC. No principle of this public policy requires service by registered mail with acknowledgment of receipt, nor that the demand should be in the native language of the served party. (Decision of the Supreme Court of May 18, 2005.)

C. Court of First Instance as the Competent Court

According to Article III of the New York Convention and according to articles 24, no. 2, 26, no. 2 and 30, no. 2 of Law no. 31/86 of August 29, the court of first instance (whether such court is of general jurisdiction or of specific jurisdiction) and not the "Relação" (which is the court of appeal that is one level above the court of first instance) has jurisdiction over recognition of an international award. (Decision of the *Tribunal da Relação de Coimbra* of January 19, 2010*; see also* Decision of the *Tribunal da Relação de Lisboa* of October 2, 2001; Decision of the *Tribunal da Relação do Porto* of October 26, 2004.)

D. Conflict of Laws

The rules of conventional international law in which the Portuguese State takes part, not only are immediately enforceable in Portugal, but also take a superior role in the hierarchy of norms issued by national statutory bodies, so that, should any conflicts arise between national law and conventional international law in enforcing a foreign arbitration award, the latter will prevail.

E. The Arbitral Tribunal

Under articles 289 and 389, no. 1, al. d) of the CPC, the arbitration process is considered initiated when a party sends a request to the counterparty for the constitution of the tribunal pursuant to art. 11 of Law no 31/86, of 29/08. A certificate of this notification is not required be-

fore the arbitration process is deemed initiated. (Decision of the *Tribunal da Relação do* Évora of 05-06-2008.)

Conclusion

The New York Convention has now been in force in Portugal for 16 years. Jurisprudence shows that the New York Convention is an instrument widely accepted in Portugal with respect to recognition and enforcement of foreign arbitral awards related to several types of commercial disputes, notably those arising in the context of maritime, franchise and distribution agreements as well as contracts for the purchase and sale of merchandise. It also shows that many of the issues dealt with by Portuguese Courts relate to matters of public policy rules, conflict of rules and arbitrability.

Portuguese domestic law is also highly favorable to foreign arbitration and therefore has substantial relevance to recognition or enforcement of a foreign arbitral award in Portugal under the New York Convention.

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Endnotes

1. Arbitration in Portugal is regulated by Law no.31/86, of 29 August 1986, as amended by Decree-Law no.38/2003, of 8 March 2003, also known as the Portuguese Law on Voluntary Arbitration (LAV). Please note that a new arbitration law on voluntary arbitration is currently being debated in Portugal and may come into force soon.
2. Article 1096, b).
3. Article 37, LAV.
4. Article 1.1, LAV.
5. http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/7d0e8e0e55346827802576af00501395?OpenDocument&Highlight=0,arbitra.
6. Decision of *Tribunal da Relação do Porto* of 11-10-2004, proc. 0454490, available at www.dgsi.pt.
7. *See* Decision of *Supremo Tribunal de Justiça*, 03.07.2008, proc. 08B1733, available at www.dgsi.pt.

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RUSSIAN FEDERATION

Statutory Developments

Under Russian law, the Russian Federal Courts are not permitted to reevaluate the factual determinations of an arbitral tribunal. However, those courts may review an arbitral tribunal's legal determinations to ensure that they conform with general principles of Russian law.

Case Law Developments

The following discussion summarizes several decisions issued by Russia's Supreme Arbitrazh Court and the Arbitrazh Courts of Appeal relating to the New York Convention.[1]

***Limited Liability Company "Vertical" v. Limited Liability Company "Delta Vilmar,"* CIS Federal Arbitrazh Court of Appeals, Moscow Circuit, No. KG-A41/7161-10, July 21, 2009.**

The lower court (Arbitrazh Court, Moscow Region) granted Delta Vilmar's application to recognize and enforce an award of the International Commercial Arbitration Court of the Ukraine Chamber of Commerce and Industry. The award, for $2.1 million, included $1 million for default in payment for goods, $1 million in contractual penalties for the delay in payment, interest and arbitration costs. On appeal, Delta Vilmar asserted that the lower court's decision should be vacated, and the matter remanded to the lower court for a new trial, on the grounds that the lower court's decision violated fundamental principles of independence and impartiality, and that the lower court failed to review the circumstances of the case. The Court of Appeals affirmed the lower court's decision and stated that the appellant's arguments "are directed at a reexamination of factual circumstances, which are beyond the competence of an arbitrazh court when reviewing applications for recognition and enforcement of foreign arbitral tribunals." The court did not provide any further details of the underlying case, the arbitral award, the lower court's decision, or the appellant's arguments. Delta Vilmar requested an order requiring Vertical to pay $30,941 in attorney's fees in connection with the court proceedings. The Court of Appeals noted that while Russia's arbitrazh procedure code allows an award of costs and attorney's fees in proceedings to enforce arbitral awards, the application in this case included services that were unrelated to the case. The court granted Delta Vilmar's application for costs and fees but only in the amount of 10,000 rubles (approximately $350).

***Closed Joint Stock Company AKB "Mossrtroyekonombank" v. Closed Joint Stock Company "Kalinka-Stokman,"* Federal Arbitration Court of Moscow District, Case No. 59/2008, October 1 2009; Court of Appeals Decision Case No. Case No. КГ-A40/12274-09-1.**

The court of first instance refused to recognize or enforce an arbitral award issued by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation dated April 14, 2009 on the ground that defendant could not be held liable in the absence of any breach of the underlying lease contract. That court held that the arbitral tribunal's decision violated public policy. The appellate court affirmed.

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Endnote

1. The state "arbitrazh" courts have jurisdiction over most commercial cases and should not be confused with private arbitral tribunals.

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SINGAPORE

Statutory Developments

International Arbitration (Amendment) Act 2009

The International Arbitration Act ("the IAA") (which governs matters concerning *inter alia* the enforcement of foreign arbitral awards) was amended in 2009 to provide that an "arbitration agreement" may be made by electronic communications. This new definition does not apply to Part III of the IAA, which relates to the recognition and enforcement of foreign awards made in New York Convention contracting states, because the New York Convention's definition of "arbitration agreement" has yet to be revised to include explicit reference to electronic communications. However, it is expected that the Singapore Courts will take a pragmatic approach to the requirement for an "agreement in writing" under Article II of the New York Convention and treat the word "writing" as including electronic correspondence.

The IAA was also amended in 2009 to empower the Ministry of Law to designate authenticating authorities to authenticate awards "made in Singapore" for purposes of enforcement in other countries. This should assist the enforcement of Singapore awards in other New York Convention contracting states, as Article IV of the New York Convention requires a party to supply duly authenticated awards and agreements or duly certified copies thereof for the purposes of recognition and enforcement of awards in any New York Convention contracting country.

Case Law Developments

A. An Unsigned Arbitration Agreement Was Held to Be Valid

In *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v. Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2010] SGHC 108, an application to enforce an award from the Danish Arbitration Institute was challenged, *inter alia*, on the basis that a set of contractual terms which were not signed did not constitute an arbitration agreement. The Singapore High Court observed that Article II.1 of the New York Convention required a written agreement but it did not require a signature and accordingly held that the fact that the contractual terms were not signed did not mean that there was no arbitration agreement. The Court held that it should take a pragmatic view of the definitions of "arbitration agreement" within the New York Convention and the IAA in order to give effect to arbitral awards granted outside Singapore under the New York Convention.

B. A Stay of Enforcement Was Denied and Held to Be Rarely Appropriate

An application to stay the enforcement of an award from a Danish arbitral tribunal pending a challenge of the award was dismissed by the Singapore High Court in *Strandore Invest A/S and Others v Soh Kim Wat* [2010] SGHC 174. In dismissing the application for a stay pending appeal, the Court agreed with the observations of Justice Potter in *Far East Shipping Co v AKP Sovkomflot* [1995] 1 Lloyd's Rep 520, in which Justice Potter held that it would rarely, if ever, be appropriate to order a stay of execution of a New York Convention award when the award was enforceable by definition under the New York Convention.

C. An Arbitral Award Was Set Aside Where Tribunal Exceeded Its Powers

An application pursuant to Article 34(2)(a)(iii) of the Model Law to set aside a majority award made by an ICC arbitral tribunal was allowed by the Singapore High Court in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202. A dispute had arisen between the parties concerning certain Variation Orders regarding a construction project and in accordance with the contract (which adopted the standard provisions of the Federation Internationale des Ingenieurs Conseil ("FIDIC") Conditions of Contract for Construction (1st Edition, 1999) with some modifications), the parties referred their dispute to a Dispute Adjudication Board ("DAB"), which rendered several decisions. The applicant submitted a Notice of Dissatisfaction ("NOD") in relation to one specific decision from the DAB requiring it to make payment to the respondent of U.S. $17 million. The respondent filed a request for arbitration with the ICC, seeking an award that, notwithstanding the NOD, the applicant remained obliged to pay the $17 million, and the ICC tribunal eventually made an award in favor of the respondent ordering the applicant to pay the $17 million.

The applicant argued to the Court that the ICC tribunal had acted in excess of its powers by converting the DAB decision into a final award without determining whether the DAB decision was made in accordance with the contract. The Court drew guidance from cases construing Article V(1)(c) of the New York Convention, which was analogous to Article 34(2)(a)(iii) of the UNCITRAL Model Law (the "Model Law") and which provided, *inter alia*, that enforcement of an award may be refused on proof that the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. The Court held that the tribunal had indeed exceeded its powers as it was required under the contract to review the merits of the decision of the DAB before rendering an

award as to whether the respondent was entitled to immediate payment of the U.S. $ 17 million. Accordingly, the award was set aside under Article 34(2)(a)(iii) of the Model Law. Although this case was a rare instance of the Singapore Courts setting aside an international arbitral award, it demonstrates that the Singapore Courts are prepared to exercise their jurisdiction under the Model Law to intervene when such intervention is clearly justified by the circumstances.

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SLOVAK REPUBLIC

Statutory Developments

The New York Convention was signed by the former Czechoslovakia on October 3, 1958 and an instrument of ratification was deposited on July 10, 1959. The New York Convention entered into force within the Czechoslovak Republic (predecessor of the Slovak Republic) on October 10, 1959.[1] After the separation of Czechoslovakia, the Slovak Republic became party to the New York Convention based on the principle of succession as of May 28, 1993.

Slovak Arbitration Act No. 244/2002 Coll. deals with foreign arbitral awards in Articles 46 to 50. Article 53 provides that "[t]his Act shall apply unless otherwise provided by a treaty binding on the Slovak Republic and constituting an integral part of its legal order." A footnote to Article 53 specifically refers to the New York Convention as an integral part of the Slovak legal order.

Case Law Developments

There are no reported cases readily available that cite or refer to the New York Convention. However, certain conference materials published on the Ministry of Justice's website suggest that the New York Convention is applied in the Slovak Republic and that the grounds for denying enforcement are limited to those identified in Article 5 of the New York Convention.[2]

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Endnotes

1. Order of the Ministry of Foreign Affairs No.74/1959.
2. *Podpora aplika nej praxe rozhodcovských súdov v Slovenskej republike* (Collection of conference presentations on the practice of the arbitration courts in the Slovak republic, http://www.justice.gov.sk/dwn/l7/okpbs/okpbs_rk.pdf, dated May 23, 2007.

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SPAIN

Case Law Developments

Reflecting the impetus provided to the institution of arbitration and its acceptance (in particular, regarding international arbitration) in Spain in recent years by a variety of factors including (i) the passage of a UNCITRAL Model Law-based arbitration act (Law 60/2003 of December 23), (ii) the formation and activities of the *Club Español de Arbitraje* (Spanish Arbitration Club), (iii) the increased internationalization of the Spanish economy and (iv) the woeful backlog plaguing the Spanish courts, Spanish courts continue to demonstrate an increasingly benign and favorable attitude towards arbitration in general and to the New York Convention in particular. Three (relatively) recent decisions and one proposed legislative initiative presently pending enactment reflect this generally favorable environment.

In April 2009, the Provincial High Court of Madrid—in a simple ruling establishing territorial jurisdiction in the first instance court in the defendant's registered corporate domicile in an action for recognition and enforcement of a foreign arbitral award where the defendant had changed its physical domicile without affecting such change on the applicable public registry so as to give effective notice to third parties—engaged in a discursive recitation of the merits (and basic requirements) of the New York Convention, stressing its broad international acceptance and critical and successful role in furthering the "free circulation" of international arbitral awards.

Not to be outdone, Spain's other principal appellate court, the Provincial High Court of Barcelona—in a February 2010 ruling denying recognition and enforcement of a foreign arbitral award on the grounds (provided for in the New York Convention) that the award had decided issues not submitted to arbitration—took pains to state that the general point of departure for the Convention is a presumption in favor of recognition and enforcement, which presumption can only be overcome in the limited events and circumstances expressly set out therein.

A third and final ruling, issued by the First Instance Court of Rubí in June 2007 (the appeal of which was dismissed by reason of settlement in April 2009), held that under the New York Convention the pendency of an annulment action in the jurisdiction of the seat of an arbitral award (in this case, France) is not a sufficient reason to deny recognition and enforcement of that award. The Rubí court held that the award was sufficiently "binding" for purposes of Article V of the New York Convention by having been duly and definitively issued by the appropriate arbitral panel under the parties' agreement. The Rubí court did not have occasion to address the more audacious circumstances addressed by the French *Cour de Cassation,* which permitted (in the celebrated *Hilman* decisions of 1994 and 1997) the recognition and enforcement of a foreign arbitral award that had—more than just being

subject of a pending annulment action—actually been annulled.

Nonetheless, the decision reflects a clearly pro-arbitration, pro-New York Convention attitude of the Spanish courts which appears to bring them closer and closer in line with those of the most pro-arbitration/pro-New York Convention jurisdictions, such as France.

Proposed Statutory Developments

A recently proposed and currently pending amendment to Spain's arbitration law will (upon enactment) centralize all recognition and enforcement actions in the Regional High Courts of Justice, with the intent, and surely the effect, of harmonizing and strengthening currently disparate jurisprudence inevitably emanating from the multitude of courts of first instance entrusted with jurisdiction for such matters under the 2003 arbitration law.

In short, insofar as international arbitration in general—and the New York Convention in particular—are concerned, the "beat goes on" in Spain.

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Endnote

1. A portion of the discussion in this note draws on a commentary authored by Mr. Hamilton published in the August 2009 issue of Mealey's International Arbitration Report.

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SWEDEN

Statutory Developments

Sweden ratified the New York Convention in 1972 without any reservations. Sweden has thus agreed to recognize and enforce foreign arbitral awards irrespective of whether the country where the award is rendered has ratified the New York Convention or not.

The provisions of the New York Convention are incorporated into the final chapter of the Swedish Arbitration Act of 1999 ("SAA").[1] Thus, the grounds for refusal of recognition and enforcement set forth in Sections 54 and 55 and Section 58 (2) of the SAA are virtually identical to those enumerated in Articles V and VI of the New York Convention.

One interesting feature of the Swedish procedure is that it is *adversarial*: an application for enforcement cannot be granted unless the opposing party has been afforded an opportunity to submit its opinion upon the application. There is an exception to this rule; if it is clear that the application is ill-founded, then the Svea Court of Appeal ("Court") can reject it without hearing from the other party. In cases where the opposing party has challenged the award or submitted a motion for stay of execution, the Court may postpone its decision and, upon request by the applicant, order the opposing party to provide reasonable security in default of which enforcement might otherwise be ordered.

In general, only the Court hears cases concerning the recognition and enforcement of foreign arbitral awards. However, in view of the overriding responsibility of the Supreme Court for the development of case law, it has been deemed appropriate to allow an appeal to the Supreme Court. The appeal may be taken without first seeking leave to do so. As a general rule, an appeal to the Supreme Court does not stay the lower court's holding. Thus, if the Court grants an application for enforcement of a foreign award, the award may be immediately enforced even though that decision has been appealed to the Supreme Court. However, if the appeal appears *prima facie* to be well-founded, an application for stay of proceedings will be granted.

Case Law Developments

Sweden is generally recognized as an arbitration-friendly country and the practice of the Court during the past few years shows that recognition and enforcement of foreign arbitral awards is seldom denied.

A. The Arbitral Tribunal Determines Its Own Jurisdiction

If a party objects to enforcement of a foreign award due to the alleged non-existence of an arbitration agreement between the parties, it is incumbent on the party requesting enforcement to submit the arbitration agreement or to prove in some other manner that an arbitration agreement was concluded. In *Planavergne v. Bergander*, the Supreme Court addressed the enforcement of an arbitral award rendered in France after arbitral proceedings between a French exporter and a Swedish importer of apples.[2] The Swedish importer argued that, while the contract incorporated the Code of Practices for Fresh Edible Fruit and Vegetables in National and International Trade, which contains an arbitration clause, by reference, it did not expressly require the parties to arbitrate their dispute. In its judgment, dated September 30, 2003, the Supreme Court stated that once the arbitral tribunal had determined that there was such an agreement between the parties, it was incumbent on the party opposing enforcement to show that the arbitral tribunal had made that determination in error. Put somewhat differently, the initial burden of proof as to the existence of an arbitra-

tion agreement is on the applicant, but once the arbitral tribunal finds that there is such an agreement, there is a *presumption* that the arbitral tribunal has reached the right decision.

The same statement of principle was confirmed by the Supreme Court in its recent decision dated March 24, 2009, in *Carbaque International v. Fabryka Wyrobów*.[3] The case concerned enforcement of a Polish award rendered by the Arbitration Court at the Polish Chamber of Commerce in Warsaw against the Swedish company Carbaque International AB. In its award, the arbitral tribunal examined its own jurisdiction. The Court concluded that, based on the materials submitted in the case, the Tribunal's determination that it had jurisdiction must be deemed to be correct.

B. Non-Receipt of the Request for Arbitration Bars Enforcement of a Subsequent, Ex Parte Award

On April 16, 2010, in *Lenmornii OAO v. Arne Larsson & Partner AB*, Ö 13-09, the Supreme Court refused to enforce an award rendered by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation against a Swedish company. [4] The Russian party's request for arbitration had been sent to the Swedish company at the address set forth in the parties' contract. However, after the execution of the contract but before the commencement of the arbitration, the Swedish company had changed its address without informing the Russian counterparty of the change. The request for arbitration was returned to the Russian claimant by the postal service. Thus, the Swedish respondent was actually notified of the arbitral proceedings only after the application for enforcement of the award had been filed with the Svea Court of Appeal. The Russian claimant contended that the Swedish company should nevertheless be deemed to have been properly served, since it deliberately had failed to inform the counterparty of its new address. The Supreme Court found that the term "proper notice" in Article V(1)(b) of the New York Convention does not provide any guidance regarding what constitutes sufficient notice of an arbitration. However, the Court concluded that a party seeking enforcement must show that respondent actually received the initial request for arbitration.

C. The Public Policy Exception Is Narrowly Defined

Swedish law takes a very restrictive approach to the notion of public policy in connection with recognition and enforcement of foreign arbitral awards. There is only one case, *Robert G. v. Johnny L.*, in which the Supreme Court has refused to recognize and enforce a foreign arbitral award on public policy grounds.[5] The circumstances in this case were exceptional because there was reason to believe that the award had been obtained for the purpose of perpetuating a fraud. The debtor, Johnny L., was an undischarged bankrupt that had entered into a security rights transfer agreement with his brother, Robert G., in order to exempt certain property from his bankruptcy estate in Sweden. Based on the transfer agreement, an arbitral award was issued in August 2001, in Ljubljana, Slovenia, with Robert as claimant and Johnny as respondent. There was no explanation in the award as to why a dispute had arisen between the parties or what circumstances had led to arbitration proceedings. The Supreme Court denied recognition on the ground that the parties, presumably in collusion with the arbitrators, intended to deceive the bankruptcy estate by creating a fictitious award. The circumstances in connection with the arbitral award were deemed to be of such a nature that it would be contrary to principles underlying the Swedish legal system to enforce the award.

D. Pending Proceedings Do Not Stay Enforcement

Swedish law adopts a restrictive approach on the issue of postponing enforcement based upon a pending challenge to the arbitral award or effort to have the award set aside. This was recently confirmed by the Supreme Court in *Republic of Latvia v. SwemBalt AB*, which concerned enforcement in Sweden of an award rendered in Denmark in an investment dispute between a Swedish company and the Republic of Latvia.[6] The Swedish company argued that the Republic of Latvia had sequestered a company's property in contravention of the bilateral investment treaty between Sweden and Latvia; the tribunal found that the claim was justified and ordered the Republic of Latvia to pay damages. The Republic of Latvia challenged the award before a Danish court. The same grounds invoked in the challenge proceedings were submitted as reasons to oppose enforcement of the award in Sweden. The Court found it unlikely that the Republic of Latvia would be successful in the challenge proceedings and declared that the award was enforceable in Sweden. The Supreme Court affirmed. Hence, the stay of execution is not automatic, but is based on an evaluation of the prospects of success of the challenge.

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Endnotes

1. Government Bill (Proposition) 1998/99:35, pp. 195-200.
2. NJA 2003 p. 379. (NJA = Nytt Juridiskt Arkiv (Reports of Supreme Court Judgments and Decisions).)
3. NJA 2009 not N 9.
4. NJA 2010 p. 219.
5. NJA 2002 C 45, Supreme Court Decision of October 23, 2002 in case No. Ö2309-02.
6. NJA 2002 C 62.

* * *

SWITZERLAND

Case Law Developments

Until recently, it was not clear under Swiss case law whether the granting of a stay pending the resolution of annulment proceedings in the foreign country of origin of an arbitral award would prevent the recognition and enforcement of that award in Switzerland. In 1984, the Swiss Federal Tribunal ("SFT") ruled that this was so, and that the arbitral award was consequently not binding.[1] In the following years, however, the SFT has modified this rule on a case-by-case basis.

In a decision published in early 2009, the SFT clearly confirmed that a general *ex lege* stay will not prevent the recognition and enforcement of an award in Switzerland according to the New York Convention.[2] Rather, an express court decision granting such a stay is necessary to prevent enforcement of the award until the end of the annulment proceedings in the concerned foreign country.

In July 2010, the SFT reaffirmed the basic principles relating to enforcement of international arbitral awards under the New York Convention when a violation of the Swiss public order is alleged by the appealing party challenging said enforcement.[3] The claimant alleged in that case, *inter alia*, that an arbitral award rendered in the U.S. should not be confirmed or enforced in Switzerland because both the sole arbitrator and the attorney for the respondent had in the past practiced before the same United States Court of Appeals, and the daughter of the arbitrator had worked as a trainee with the same law firm as one of the respondent's attorneys. The SFT denied the claimant's challenge on the ground that a party must challenge an arbitrator as soon as it learns of a reason to do so. In other words, it is unacceptable for a party to keep this argument in reserve, for use only if and when an unfavorable award is issued against it. Therefore, as claimant's attorney in the arbitration proceedings had been informed during the proceedings about all relevant facts concerning prior contacts between the daughter of the arbitrator and the attorney for defendant and had not considered them as a ground for challenging the arbitrator at that time, claimant could no longer use this ground in good faith against recognition and enforcement of the award. In addition, according to the SFT, the fact that the arbitrator and the attorney for defendant had practiced before the same United States court was obviously not a sufficient ground for challenging the impartiality of the arbitrator.

It was not clear until recently whether interim measures (as opposed to interim *awards* related to jurisdiction or to the appointment of the arbitral tribunal) ordered by arbitral tribunals in Switzerland could be immediately challenged before the SFT. In April 2010, however, the SFT clearly excluded the possibility of bringing such immediate challenges.[4] The SFT reasoned that interim measures, including measures ordering the provisional performance of an agreement the termination of which is disputed, are not tantamount to partial awards, even when the arbitral tribunal would designate its order as such. As a result, such interim measures may not be challenged before the SFT. This important and clarifying decision, which also underscores the SFT's policy of not interfering with pending arbitration proceedings, has been very well received by the Swiss legal community.

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Endnotes

1. Decision of the SFT dated March 14, 1984, published in *Arrêts du Tribunal Fédéral* ("ATF") 110 Ib 191.
2. Decision of the SFT No. 4A_403/2008, dated December 9, 2008, published in ATF 135 III 136.
3. Decision of the SFT No. 4A_233/2010, dated July 28, 2010.
4. Decision of the SFT No. 4A_582/2009, dated April 13, 2010, published in ATF 136 III 200.

* * *

TAIWAN

Taiwan is not a signatory party to the New York Convention. Widely accepted and ratified as the New York Convention may be, Taiwan is not able to be a party to that New York Convention due to its special international status. In order to solve all the possible problems that might arise from its peculiar situation, Taiwanese legislators try to follow the principles of the New York Convention to the extent possible. However, although Taiwan's legal provisions are similar to the New York Convention, the recognition and enforcement of foreign arbitral awards in Taiwan still has some unique features.

Under Taiwanese law, an arbitral award can be regarded as a foreign award if: (1) it is made outside of the territory of the Republic of China; or (2) it is made within the territory of the Republic of China, Taiwan, in accordance with foreign law.

The grounds for refusal of recognition or enforcement of a foreign arbitral award are provided in Articles 49 and 50 of Arbitration Act of the Republic of China (hereinafter referred to as the "Arbitration Act"). The Arbitration Act, formally named "the Commercial Arbitration Act of the Republic of China," was revised and came into force on December 24, 1998. The latest amendment to the Arbitration Act was made on December 30, 2009.

As stipulated respectively in Articles 49 and 50 of the Arbitration Act, there exist two different categories of grounds for refusing to recognize and enforce a foreign arbitral award.

A. Article 49 of the Arbitration Act

Article 49 of Arbitration Act provides that:

1. The court shall issue a dismissal with respect to any application submitted by a party for recognition of a foreign arbitral award, if such award contains one of the following elements:
   i. the recognition or enforcement of the award would be contrary to the public policy of the Republic of China, Taiwan; or
   ii. the subject matter of the dispute is not capable of settlement by arbitration under the laws of the Republic of China, Taiwan.
2. The court may issue a dismissal order with respect to an application for recognition of a foreign arbitral award if the court of the country where the arbitral award is made or whose laws govern the arbitral award does not recognize or enforce arbitral awards of the Republic of China.

Under Article 49 of the Arbitration Act, the courts have the power to dismiss an application for recognition of a foreign arbitral award even in absence of any request from the opposite party.

It is noteworthy that the legislators used the word "may," instead of "shall," in Article 49, Para. 2 of the Arbitration Act. This language vests the court with the discretionary power to grant or refuse recognition to a foreign arbitral award, even when the court of the country where the award was made or whose laws govern the award refuses to recognize or enforce arbitral awards made in the Republic of China, Taiwan. The courts have historically exercised this discretion in favor of recognizing foreign awards. In *All American Cotton Co., Ltd. v. Jian-Rong Textile Co., Ltd.*, 75-Tai-Kang-Tze-No.335, dated August 7, 1986, the Supreme Court ruled as follows:

> Article 32 (2) of the Commercial Arbitration Act (the former article of the current Article 49 (2) of Arbitration Act) provides: the court may refuse the enforcement of an arbitral award if the court of the country where the arbitral award is made refuses to recognize or enforce the arbitral awards made in the Republic of China. However, this principle of reciprocity shall not be interpreted as that this Court can recognize a foreign country's arbitral award only after such country where the arbitration took place has recognized the ROC's arbitral awards first. Otherwise, it would not only undermine the spirit of international courtesy but also constitute an impediment to the enhancement of international cooperation in the administration of justice. This view is clearly demonstrated by the Article cited above, which stipulates that the court of our country "may," rather than "shall," refuse the recognition of an arbitral award.

In a recent amendment, Article 49, Para. 2 of the Arbitration Act was modified to serve as a safeguard clause for the purpose of persuading other members of the international community to recognize and enforce Taiwanese arbitral awards. Article 49 (2) of the Arbitration Act (as amended) provides that: "[t]he court may issue a dismissal with respect to an application for recognition of a foreign arbitral award if the country where the arbitral award is made or whose laws govern the arbitral award does not recognize arbitral awards of the Republic of Taiwan."

This safeguard clause allows for the application of the principle of reciprocity, but also enables the courts of Taiwan to determine the enforcement of foreign arbitral awards after taking into consideration all relevant factors as well as the relevant background. This unique provision empowers the Court to recognize foreign awards without being strictly bound by the principle of reciprocity.

By definition, a strict application of the principle of reciprocity means all awards rendered in countries which refuse to recognize Taiwanese arbitral awards in turn will not be recognized by Taiwanese courts, while foreign awards rendered in countries that recognize Taiwanese arbitral awards will be recognized and enforced by Taiwanese courts. However, it is not entirely predictable whether Taiwanese courts will refuse to recognize an arbitral award rendered in countries that have refused to recognize Taiwanese arbitral awards, or in countries that do not have any precedent of recognizing Taiwanese arbitral awards. In other words, Taiwanese courts have the discretion to decide whether or not to recognize and enforce foreign arbitral awards rendered in countries that do not have any precedent recognizing Taiwanese arbitral awards on a case-by-case basis. To date, Taiwanese precedents indicate that arbitral awards made in 10 countries and 1 special administration region, namely the United States, Great Britain, Switzerland, Finland, France, Russia, South Africa, Vietnam, Japan, Korea and Hong Kong, will be recognized by Taiwan.

B. Article 50 of the Arbitration Act

Article 50 of the Arbitration Act is almost identical to Article V of the New York Convention and Article 36 (1) (a) of the UNCITRAL Model Law, and stipulates as follows:

If a party applies to the court for recognition of a foreign arbitral award which concerns any of the following circumstances, the opposite party may request the court

to dismiss the application within twenty days from the date of receipt of the notice of the application:

a. the arbitration agreement is invalid as a result of the incapacity of a party according to the applicable laws;

b. the arbitration agreement is null and void according to the law chosen to govern the said agreement or, in the absence of choice of law, the law of the country where the arbitral award was made;

c. a party is not given proper notice either of the appointment of an arbitrator or of any other matter required in the arbitral proceedings, or any other situations that give rise to lack of due process;

d. the arbitral award is not relevant to the subject matter of the dispute covered by the arbitral agreement or exceeds the scope of the arbitration agreement, unless the offending portion can be severed from and that will not affect the remainder of the arbitral award;

e. the composition of the arbitral tribunal or the arbitration procedure contravenes the arbitration agreement or, in the absence of an arbitration agreement, the law of the place of the arbitration; or

f. the arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.

Article 50 of the Arbitration Act, *reprinted in* 1 CAA ARB. J. 34 (2002).

Thus, under Article 50 of the Arbitration Act, the court is under an obligation to consider whether to dismiss an application if, and only if, the opposite party has so requested based upon various conditions set forth in Article 50.

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* * *

UKRAINE

Statutory Developments

When ratifying the New York Convention, Ukraine made a reservation stating that "with regard to awards made in the territory of non-contracting States, it will apply the Convention only to the extent to which those States grant reciprocal treatment." The same approach towards reciprocity was fixed in several Ukrainian national acts, in particular in the Civil Procedural Code of Ukraine ("Code").

Articles 390-398 of the Code govern the procedure for the recognition and enforcement of foreign court judgments. Notwithstanding the fact that these articles concern foreign court judgments, as opposed to foreign arbitral awards, Article 81 of the Law of Ukraine "On Private International Law" No. 2709-IV, dated June 23, 2005, may be interpreted to mean that the words "foreign court judgments" include foreign arbitral awards and hence that these articles of the Code apply to the recognition and enforcement of foreign arbitral awards as well.[1]

Ukrainian law has not changed much in the last year with regard to the enforcement of foreign arbitral awards. However, there has been one significant change. Law No. 1837-VI, dated January 21, 2010, amended the Code such that, when recognition and enforcement of a foreign arbitration award is sought, reciprocity is presumed unless the contrary is proven. Thus, to avoid recognition and enforcement, the respondent must now demonstrate that courts in the state which is the seat of the arbitration do not recognize and enforce arbitral awards issued by the International Commercial Arbitration Court of Ukraine at the Chamber of Commerce of Ukraine and/or judgments of Ukrainian national courts. The impact of this amendment remains to be seen.

Case Law Developments

A. ICC Arbitration Award Against Companies Based in Ukraine and Cyprus Recognized by District Court (*Hefko Minerals and Metals Shipping AG v. Pivdenna Factoring Company Ltd.*, Case No. 2k-1/09)

A Swiss company applied to the Zavodskyy District Court of Zaporizhzhya for recognition and enforcement of an arbitration award issued by the International Court of Arbitration of the International Chamber of Commerce ("ICC"). The ICC awarded two co-claimants $426,625.36 U.S. dollars in damages, arbitration costs of $3,000 and expenses amounting to 47,617.20 in Swiss Francs against two corporate respondents registered in Ukraine and Cyprus, respectively. The respondents were held to be jointly and severally liable for the above amounts. The court found that the arbitration award could be recognized on the territory of Ukraine and directed that the awarded amounts must be recalculated in Ukrainian currency as required by the Code.

B. Defenses of Non-Arbitrability and Public Policy Rejected by Appellate Court (*StalUkrSnab Ltd. v. Promeksim Ltd.*, Case No. 22ц-2125)

A trial court granted the claimant permission to enforce an arbitration award issued by the International Commercial Arbitration Court at the Russian Federation

Chamber of Commerce and Industry. Respondent appealed this judgment to the Appellate Court of Donetsk Oblast. On appeal, the defendant asked the appellate court to reverse the judgment and reject recognition and enforcement of the award based on Articles 5(2)(a) and 2(b) of the New York Convention. The appellate court held that the appellant's argument concerning arbitrability failed on the grounds that the contract was concluded between two parties, one of which was a foreign entity as required by the Ukrainian Law "On International Commercial Arbitration," and the contract contained a valid arbitration clause. The appellate court also rejected appellant's argument that recognition and enforcement of the award was contrary to the public policy of Ukraine.

C. Foreign Arbitral Award Enforced Against a Ukrainian State-Owned Port (*Evertrade v. State Enterprise Sea Trade Port of Kherson*, Case No. N2-1628/10)

A French company sought enforcement of an arbitral award from the Suvorovskyy District Court of Kherson. The award, which had been issued by a Tribunal of the Arbitration Institute of the Stockholm Chamber of Commerce, concerned the recovery of certain sums owed to the claimant by State Enterprise Sea Trade Port of Kherson (Ukraine). The defendant contested the application, arguing that the award was contrary to the public policy of Ukraine and that the applicant had been liquidated.

The court found that the award complied with both national law and the New York Convention, which was part of national legislation, since it was ratified by Ukraine; had been issued in compliance with the principles of rule of law and the parties' respective rights and obligations; and the award did not violate Ukrainian public policy. The court also held that, since the respondent's liquidation procedure was not yet complete, that process did not prevent enforcement of the award.

D. Award Issued in Favor of Belarusian Potash Company (*CJSC Belaruska Potash Company v. OJSC Sumykhimprom*, Case No. 2-k-4/2010)

This decision by the Zarichnyy District Court of Sumy is noteworthy for two reasons. First, it shows that Ukrainian courts recognize and enforce settlement agreements approved in arbitration awards. Second, the court rejected claimant's request for legal costs on the ground that the Code does not provide for compensation of legal costs incurred in the course of recognition and enforcement of foreign awards. However, the court held that the applicant was free to claim these costs by way of a separate proceeding.

E. Interim Awards May Be Recognized in the Same Manner as Final Awards (*RosUkrEnergo AG v. NJSC Naftogaz of Ukraine*, Case No. 22-22616/10)

In a widely discussed and politically charged matter involving RosUkrEnergo AG and National Stock Company NaftoGaz, the Kyiv Appeal Court held that interim awards of the Tribunal of Arbitration Institute of the Stockholm Chamber of Commerce shall be enforced in the same way as final awards and in accordance with the New York Convention and national legislation of Ukraine.

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Endnote

1. *See also* Resolution of the Plenum of the Supreme Court of Ukraine No. 12, paragraph 10 of adopted on December 24, 1999.

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UNITED KINGDOM

Case Law Developments

English courts have long been supportive of arbitration, both domestic and international. It is rare for an English court to refuse to enforce arbitration awards, and even more rare when the award is a foreign arbitration award covered by the New York Convention. In fact, there have been only three such cases in the 35 years since the New York Convention became part of English law. That statistic means that, on the rare occasion that an English court does refuse to enforce an international arbitration award, it is worth paying close attention to the reasons for that refusal.

The third of the three cases in the past 35 years in which enforcement was refused is the very recent case of *Dallah Real Estate and Tourism Company ("Dallah") v. The Government of Pakistan* [2010] UKSC 46. Aside from being a rarity, *Dallah* is also the first time the highest court in England has refused to enforce a foreign arbitral award.

Dallah, part of a Saudi conglomerate, concluded a Memorandum of Understanding with the Government of Pakistan in 1995 for the provision of housing for pilgrims in Mecca. In January 1996, the Government of Pakistan established a special purpose vehicle, the Awami Hajj Trust ("the Trust"), to perform its part of the bargain, and the Trust signed an agreement with Dallah (which agreement was subject to an arbitration clause). Following a change in political power in Pakistan a few months later, the Trust ceased to exist as a legal entity. As a result, Dallah suffered substantial losses as it had already expended sizable sums of money in acquiring land for the housing project.

Dallah commenced arbitral proceedings against the Government of Pakistan relying on the arbitration clause in its agreement with the Trust. An ICC tribunal (the "Tribunal") sitting in Paris determined that it had jurisdiction over the Government of Pakistan and awarded Dallah damages in excess of U.S. $20 million. Dallah brought its

arbitration award to England and sought to enforce it under the New York Convention.

The Government of Pakistan resisted enforcement under Article V(1)(a) of the New York Convention on the basis that the arbitration agreement did not bind it, and there was no "common intention" between the parties that the Government of Pakistan should be bound (this being the correct test under French law, the law governing the arbitration). Dallah argued that the tribunal had considered this question and decided that it did have jurisdiction and the court should not interfere with that finding.

The Supreme Court considered the weight to be attached to the tribunal's conclusion on these issues and accordingly, on its own jurisdiction. Lord Mance drew an analogy with an entirely different type of court and contest, concluding that *"Dallah starts with advantage of service, it does not also start fifteen or thirty love up."*

That slight advantage was not enough as the Supreme Court refused to allow enforcement. In assessing whether there was a "common intention" that the Government of Pakistan should be bound, the Tribunal had focused primarily on the relationship between the Government of Pakistan and the Trust, but not on whether Dallah had any common intention with the Government of Pakistan (and it is worth noting that the Tribunal itself stated its conclusion was "very close to the line," with two of the three arbitrators expressing hesitation).

The Court also considered the fact that Article V(1) of the New York Convention is apparently permissive, providing that "*recognition or enforcement of the award **may** be refused,"* suggesting that the Court might have discretion to enforce an award even if it concluded that the award had been made by a Tribunal without jurisdiction. The Court rejected this possibility as it would be remarkable if the word "may" enabled enforcement of an award made without jurisdiction.

Dallah reiterates the importance of accurately identifying the entities that should be parties to, and clearly stating the scope of, an arbitration agreement. This should always be a commercial priority when contracting with States or State agencies and groups of companies, where the "true" or best funded party may not always be the signatory to the terms but is no less important in the context of securing an agreement to arbitrate. Particular care should also be taken to secure all necessary consents when contracting with States or State agencies which may be fettered by national laws restricting their ability to refer disputes with private parties to arbitration. Similarly when considering groups of companies, although some tribunals, for example as in the ICC case of *Dow Chemical v Isover St Gobain (ICC Award 4131)*, may consider a group of companies to be one and the same economic entity when determining their jurisdiction, the "group of companies" doctrine is not universally recognized and parties should ensure that all relevant entities should be parties to the arbitration agreement. Failure to do so may leave a party without a respondent or effective remedy.

While *Dallah* is a foreign arbitration award, English law mirrors the New York Convention in its approach to the enforcement of domestic arbitration awards. A recent example of this is *IRB Brasil Resseguros SA v CX Reinsurance Company Ltd* [2010] EWHC 974 (Comm), in which lawyers from our firm successfully defended an award which the respondents had sought to challenge simply because they had lost, rather than on sound legal principles.

Although *Dallah* is a case in which enforcement was refused, it was clearly an unusual case as even the arbitrators expressed some doubt about whether they had jurisdiction. The decision demonstrates that English courts will apply a light touch to reviewing arbitration awards and only intervene if absolutely necessary and in the carefully specified circumstances set out in the New York Convention.

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URUGUAY

Statutory Developments

Uruguay has signed and ratified several treaties involving the recognition and enforcement of foreign arbitral awards in addition to the New York Convention: Montevideo Treaties of 1889 and 1940, Inter American Convention on Extraterritorial Validity of Foreign Judgments and Awards, and the Mercosur Agreements regarding International Commercial Arbitration.

However, the country does not have any special law to regulate international commercial arbitration. That is about to change. At present, the Uruguay parliament has commenced the discussion of a proposed law in that regard, and the law has very good chances of being approved. The proposed law is virtually completely based on the UNCITRAL 1985 Model Law on International Commercial Arbitration. It expressly excludes the amendments introduced in 2006 on the understanding that they imply an important disconnection from the text of the

New York Convention. However, although the proposed law does not include the provisions of the actual UNCITRAL Model Law on International Commercial Arbitration regarding the interpretation of the term "agreement in writing," it does introduce some variation to the original 1985 text by eliminating telexes as a way of evidencing the existence of the agreement while incorporating facsimiles and "other electronic communications," which would include emails.

Case Law Developments

According to articles 541 and 543 of the Code for General Civil Procedure, in Uruguay foreign arbitral awards must go through an exequatur proceeding before the Supreme Court of Justice prior to execution. There is not a significant number of cases in Uruguay. The last two cases were decided in 2008 (case 85) and 2004 (case 41). In the 2008 case referenced, above, the Supreme Court rejected the exequatur because the arbitral clause was contained in a contract which was not signed by the defendant and thus did not comply with the requirement established in Article II, section 1 and 2 and IV of the New York Convention. However, in general the Supreme Court has taken a very broad approach in favor of enforcement of arbitral awards and authorization of their execution in Uruguay (probably a more positive approach than the Supreme Court has taken with foreign judgments).

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VIETNAM

Statutory Developments

A. "Commercial" Activities

When Vietnam acceded to the New York Convention in 1995, it made both of the reservations permitted under Article I(3) of the New York Convention. The Commercial Law of 2005 ("CL") is applicable to the second reservation, which states that Vietnam will apply the New York Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under national law. The CL contains a definition of "commercial activities" as "activities for the purpose of generating profits, including: sale and purchase of goods, provision of services, investment, commercial promotion and other activities for profit." The Ordinance on Commercial Arbitration of 2003 ("OCA") also contains a definition which states that the term "commercial activities" is "the performance of one or many trading acts by business people or organizations, including goods purchase and sale, service provision; distribution; trade representation and agency; consignment; renting and lease; hire purchase; construction; consultancy; technology; licensing; investment; financing; banking; insurance; exploration and exploitation; transport of goods and passengers by air, sea, rail, land, and other commercial acts as prescribed by law." The definitions in both the CL and the OCA appear to be broad and would encompass every commercial activity for profit whatever the nomenclature of the activity is.

B. CPC

In the Vietnamese legal context, the implementation of the New York Convention is subject to the Civil Proceedings Code of 2004 ("CPC"), which governs procedure on the recognition and enforcement of foreign arbitral awards in Vietnam. The CPC provides for the order and procedures for resolution of civil affairs and execution of civil judgments including arbitral awards.

Under the CPC, a petition for the recognition and enforcement of a foreign arbitral award must be filed before the Ministry of Justice of Vietnam ("MOJ"). The MOJ then transfers the filed petition to an appropriate court which will have authority to clarify any unclear matters in the petition. When the court considers the petition, it expressly does not have authority to review the dispute which has been resolved by a foreign arbitral tribunal and it shall only check and verify the foreign arbitral award and any attached document in relation to the CPC and international agreements, such as the New York Convention.

The grounds for non-recognition of foreign arbitral awards in Vietnam generally track those contained in Article V of the New York Convention, with one exception. An award may not be recognized and enforced in Vietnam where it is determined by the Court that such recognition and enforcement would be contrary to the "basic principles of the laws of Vietnam." This is similar to the language in Article V(2)(b) of the New York Convention, albeit Vietnam changed "public policy" under the New York Convention to "basic principles of the laws of Vietnam" in the CPC.

There is no legal guidance as to what constitutes "basic principles of the laws of Vietnam" and this can be broadly interpreted by the courts. As a result, this has been regarded as problematic insofar as recognition and enforcement of foreign arbitral awards are concerned.

Case Law Developments

The New York Convention regime remains largely underdeveloped in Vietnam as there has been a lack of court practice in this regard. One public case, which was widely perceived to be the first of its kind, was decided

on December 18, 2001 by the provincial court of Lam Dong Province. The court ruled in favor of the recognition and enforcement of an arbitral award rendered in Geneva, Switzerland by Kyunggi Silk Co., Ltd., a Korean company, against Visery Company, a Vietnamese company. The amount in dispute was around U.S. $400,000.

The other known case involved the interpretation of the second reservation of Vietnam under the New York Convention restricting recognition and enforcement to commercial awards. In this case, the economic court of Ho Chi Minh City issued a decision on May 23, 2002 recognizing an arbitral award rendered by an arbitral tribunal in Australia for the first time ("Tyco Case"). The dispute arose between Tyco Services Singapore Pte Ltd, a Singaporean company and a subsidiary of a United States company, and Leighton Contractors Co., Ltd., a Vietnamese company, out of a contract signed in 1995 relating to the development of a beach resort hotel.

However, the lower court's decision in the Tyco Case was reversed with finality by the appellate court. In its ruling, the appellate court stated that the dispute did not involve a commercial activity; hence, there was no requirement to enforce the award under the second reservation of Vietnam to the New York Convention. Under the then prevailing commercial laws (not the present CL), commercial activities were limited and narrowly defined, relating mainly to trade in goods. As this was a construction dispute, the appellate court concluded that it was not arbitrable under the laws of Vietnam.

Also, the appellate court in the Tyco Case ruled that the enforcement of the arbitral award would violate the basic principles of Vietnamese law. The violations were in respect of: (i) the lack of a construction permit which invalidated the construction contract; and (ii) the inclusion of a provision in the same contract precluding Tyco Services Singapore Pte Ltd from complying with its tax obligations under the laws of Vietnam.

Challenges and Prospects

Despite having acceded to the New York Convention 15 years ago, there still remains much to be seen as to how Vietnam will be able to implement such convention. The practice of courts in Vietnam has been scant but significant as there is a tendency to review the factual circumstances of every case in light of whether the recognition and enforcement of a foreign arbitral award would be contrary to the "basic principles of the laws of Vietnam." This is contrary to the CPC which provides that courts do not have the authority to review the dispute in such instances of recognition and enforcement. This is also inconsistent with international practice. However, from the perspective of Vietnamese courts, if it appears that a review would be essential to determine whether the recognition and enforcement would contravene the "basic principles of the laws of Vietnam" then such *de novo* review will occur. Such review is dangerous as it actually opens the foreign arbitral award to the additional scrutiny of the courts in Vietnam. Unless this aspect is clarified in another court case in Vietnam, or the CPC and other relevant laws of Vietnam are amended to provide clarity, this Court practice remains an impediment to the effective implementation of the New York Convention in Vietnam.

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Special Updates

Update from Algeria

As most of you have heard, following popular uprisings in some neighbor countries, several civil associations, opposition parties, unions and human rights organizations recently formed the CNCD (National Coordination for Change and Democracy) and since February 12, this organization holds weekly demonstrations in Algiers, with the objective of seeking change.

Indeed, the State is generally perceived as insufficiently modernized because of bureaucratic administration, corruption, absence of effective freedom of speech and lack of political alternative.

In response to these protests, the Government amended various social and economic regulations and, on February 23, 2011, decided to repeal the 19-year-old state of emergency. More recently, the Government initiated a national debate about possible constitutional reform.

In addition to international media coverage of these recent events, one would probably also need to be informed about the political background of the last 30 years or so, in particular violent riots in the 80s and the decade of violence in the 90s.

During that period, the progressive entrance of the country into the new world economy drove the Government to move away from its primary ideological choices. Significantly, the Constitution was amended in order to allow a democratic society (multi-party in politics), cultural diversity (official recognition of the Berber people and their Tamazight language) and movement forward to a more liberal economy.

It is interesting to note that the formation of our (European and U.S.) legal constitutional traditions has developed over centuries of social and political turbulences. Scholars generally admit the proposition that revolutions and reforms gave birth to those modern legal systems.

Therefore, the recent movements require appropriate forum to consider their impact on a legal doctrine level, especially considering that today's events take place in a world much more integrated than it was centuries ago.

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* * *

Update from NYSBA Bahrain (GCC) Chapter

Dear Readers,

Our New York State Bar Association International Section continues to prove, beyond any doubt, absolute commitment to its inherent leadership role throughout the international legal community.

As you may be aware, with tremendous effort and dignity, which included over a year's work behind the scenes commencing in May 2010, both Carl-Olof Bouveng and Michael Galligan were finally able to successfully recommend to Albany the adoption of a detailed program allowing the International Section to register chapters abroad when necessary to abide by local regulations. This new development has, in effect, addressed many barriers that had previously interrupted our growth and the potential of some events abroad.

The Bahrain Chapter was provided with the first such approval and is honored to have been so recognized. I am pleased to report that our colleagues are now en route to finalize the registration and activation process.

The purpose of the Bahrain Chapter was initially to provide a legal forum for all interested local and international transactional lawyers in Bahrain or in neighboring un-served countries. We are hoping that this forum will allow us to accomplish the noble goals of the NYSBA, provide a safe and comfortable venue to network amongst peers, and provide a platform for the natural transfer of knowledge and expertise.

Any keen observer and follower of international developments and legal precedents will no doubt appreciate the timing of this formation. You have all seen the media coverage on the recent turbulence in Egypt, Tunisia, Bahrain and Libya (and other neighboring countries). That said, we regrettably haven't had an opportunity yet to analyze the legal differences between the different events. I am sure you will agree that case study topics are now abundant.

Although the international media may be simplifying developments for general consumption, as legal scholars I have no doubt that you will appreciate the subtle differences, legal arguments and possible constitutional issues relating to:

i. Constitutionality of proposed amendments to the countries' respective constitutions (with or without referendums);

ii. The use of force by riot police, if any;

iii. The introduction of the army to police civil society by force, with or without properly declaring martial law;

iv. The de-centralization of the Rule of Law by implied transfer of powers to local governors;

v. The limitation and practical issues to the principle of force majeure; and

vi. Inherent human rights issues which must be adopted in the new system, whether through a Declaration of Rights, statutes or constitutions.

I hope the upcoming months provide us with the necessary forums and opportunities to consider the massive implications to legal doctrines that have and will result from the revolutions, uprisings and civil debates raging in the Middle East.

I would welcome any of our members to visit the region (physically or electronically), especially at this time, and provide your input. It's not every day that nations rise and decide to address their civil contracts and agreements with one another.

Regards,

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* * *

Background on the Jasmine Revolution in Tunisia

In return for slow but steady economic growth, the majority of Tunisians have accepted restricted political rights, a police state and an elite accused of corruption.

For foreign investors, Tunis has been a safe place to invest and a source of cheap labor; however, this model seems to have failed—or maybe it was always unsustainable over the long term.

The turmoil in Tunisia started with Mr. Mohamed Bouazizi. Mr. Bouazizi became a hero throughout the country when he doused himself in petrol and set himself on fire on December the 17 because officials in his town prevented him from selling vegetables on the streets without permission.

Frustration with lack of freedoms, the excess of the ruling class and anger at police brutality coupled, with a large number of unemployed graduates, seem to have all converged to spark an unstoppable wave of public anger.

Tunisia's uprising began in Sidi Bouzid, a poor town in the interior of the country. This has triggered a much wider series of protests and clashes with the police in Tunisia. The violent response of the authorities—with the police opening fire on demonstrators—appears to have exacerbated the anger and led to the big day of the 14 January when the unrest reached the centre of the capital, principally in the memorable street of Habib Bourguiba.

Despite all his attempts and promises to change, as the world watched, the President finally stepped down on 14 of January, 2011.

He then fled to Saudi Arabia with his family.

What Happens Next? Prime Minister Mohamed Ghannouchi stated that he became the acting President under Article 56 of the Constitution. Many lawyers disagreed with Ghannouchi's interpretation as pursuant to Article 57 of the Constitution, the Constitutional Council should meet and the leader of one of the houses of the Tunisian parliament should become an interim President.

Decision of the Constitutional Council. The post of president is definitely vacant. Under Article 57, Fouad Mebazaa should become the interim President, with the obligation to call for elections within 45 to 60 days and to ask Prime Minister Ghannouchi to form a national unity government.

For Tunisia's new interim national unity government, satisfying the political aspirations of the Tunisian public is a tough job. Further, they need to simultaneously restore the stability which has long been Tunisia's crucial economic asset.

Unforeseen Revolution. Unplanned, emergent, organic to Tunisian society, this revolution is not ruled by mechanical time. Soon enough spontaneity will give way to pre-meditation.

Certainly, a combination of three attributes that make Tunisian society highly distinctive, and different from other Arab countries, set the stage:

- literacy rates over 80%
- emancipation of women
- a demographic transition from high birth and death rates to low birth and death rate, in part due to high literacy and women's rights.

At a Tipping Point. Tunisia's interim President Fouad Mebazaa announced on 3 March 2011 details of new elections promised after the overthrow of the dictator.

Mr. Mebazaa said voting for a council of representatives to rewrite the constitution would be held by 24 July. Until that time, a new interim government would run the country and he would continue in office, even though the

current constitution limits caretaker office-holders to a 60-day term.

A general election has been scheduled for October 23, 2011.

In addition, Fouad Mebazaa addressed the Tunisian people on Feb. 27, 2011 announcing his decision to appoint Mr. Beji Caid Essebsi as Prime Minister following the resignation of Mr. Mohamed Ghannouchi This is exactly what protesters had been demanding. Ghannouchi had served under the country's old dictatorship, and as far as they were concerned, until he went, their revolution was unfinished.

The situation in Tunisia is now calmer, although the situation to the Ras Jedir border zone, where refugees flock by thousands from the Libyan territory, remains tumultuous. For days, Tunisia—which is itself still grappling with the aftermath of a political revolt, has been overwhelmed with refugees, raising alarm among the international aid community.

Reasons for Optimism

- **Economic Prospects**

Although difficult, it is not desperate. Arguably the greater participation of the Tunisian people will enable the government to exact the necessary sacrifices equitably.

The newly acquired freedom will ultimately generate many gains that will offset and surpass the losses sustained during the uprising. As an example, productivity is expected to reach a double-digit increase in the next two to three years. This statistic, by itself, will motivate both domestic and foreign entrepreneurs and companies to invest in free and democratic Tunisia.

- The Jasmine (a Tunisian national flower) Revolution's democratic prospects;

    1) The branches of government have their respective prerogatives;

    2) The independence of the judiciary is also of the utmost importance: It must regain its credibility in the eyes of the population and be the guarantor of the principle that the law is above all;

    3) The embark of the government on a comprehensive decentralization effort both administratively and economically;

    4) Local authorities are invariably more in tune with local populations and are better equipped to deal with their preoccupations and needs; and

    5) Democracy assistance groups and other NGOs will be able to engage in the transitional process and guarantee human rights.

The Question Is: Will There Be a Broader Impact of the Jasmine Revolution on the Whole Region?

Tunisia's Jasmine Revolution was, in many ways, the most unlikely event to spark the current wave of liberalization and democratization that is sweeping through the Arab world; starting from Egypt with the crumble of the long-feared regime of Hosni Mubarak to the "Revolution in Libya," where enraged dissidents and the government are currently embroiled in titanic violence which has led to the freezing of the assets of Libya's leaders, including Kaddafi, and the withdrawal of oil companies from the country.

Timeline: A Chronology of Key Events

17 Dec.: Man sets himself on fire in Sidi Bouzid over lack of jobs, sparking protests.

24 Dec.: Protester shot dead in central Tunisia.

28 Dec.: Protests spread to Tunis.

8-10 Jan.: Dozens of deaths reported in crackdown on protests.

12 Jan.: Interior minister sacked.

13 Jan.: President Ben Ali promises to step down in 2014.

1**4 Jan.:** Mr. Ben Ali dismisses his government after a new mass rally before declaring a state of emergency, then steps down and flees.

15 Jan.: Parliamentary President, Mr. Fouad Mebazaa, sworn in as interim President.

27 Feb.: Prime Minister Ghannouchi resigns, responding to demands by demonstrators calling for a clean break with the past and the appointment of Beji Caid Essebsi as the new Prime Minister.

3 Mar.: The interim President announces that a council of representatives to rewrite the constitution would be held by 24 July and the general elections would be held 23 October, 2011.

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Of International Interest

International Projects, Political Risk and Investment Treaty Shopping

International investment projects are exposed to significant long-term political risk. Host states have the power to unilaterally reassess the terms of private participation in their economies and often do, as is evidenced by a string of expropriations across South America and Asia in recent years.[1] When this occurs, foreign investors are often left with limited recourse. Local courts will likely be unsympathetic and unreliable and contractual arbitration clauses, where available, may be limited in their application and scope. Resort to international investment arbitration under the Convention for the International Centre for the Settlement of Investment Disputes (the "ICSID Convention") or similar international investment arbitration bodies is the best of a bad set of options. Notably, this option is only available where the "home" state of the foreign investor has executed a Bilateral Investment Treaty ("BIT") or Multilateral Investment Treaty ("MIT") with the "host" state that has illegitimately undermined or expropriated the investor's interests. The United States has approximately 40 BITs that are currently in force.[2] Canada, on the other hand, is a party to only 24 BITs currently in force.[3] This can be contrasted with the over 100 BITs and MITs executed by the United Kingdom,[4] including the Energy Charter Treaty (the "ECT").[5]

BITs and MITs establish several key investment protection mechanisms typically unavailable pursuant to national legal regimes or generic contractual dispute resolution clauses.[6] First, they provide foreign investors with a series of protective guarantees, such as guarantees of national and most-favoured nation treatment, fair and equitable treatment under international law, fair compensation in the event of direct or indirect expropriation, as well as guarantees regarding the free repatriation of capital.[7] Secondly, they provide foreign investors with the right to bring claims that such protective guarantees have been breached before impartial arbitration tribunals organized under such institutions as the ICSID and the International Chamber of Commerce or in accordance with the UNCITRAL Arbitration Rules.[8] Where arbitration is pursued before the ICSID, foreign investors will also enjoy access to an enforcement mechanism specifically designed to facilitate the execution of awards rendered against sovereign states.[9] Therefore, where a company is considering undertaking a foreign investment project in a country with which its home country has not executed a BIT or MIT, it would be prudent to consider incorporating a holding company in a third state which has concluded such a treaty with the prospective host state, especially if the target jurisdiction has a history of heightened political risk and interference.

While the practice of "treaty shopping" remains controversial and has yet to be universally adopted by the international legal community,[10] two recent arbitration awards illustrate the circumstances in which investment tribunals may consider accommodating this strategy. In *Mobil v Venezuela*, an ICSID arbitral tribunal upheld its jurisdiction to hear Mobil's claim that Venezuela nationalized two of its exploration and production projects despite Venezuela's claim that the corporation had engaged in illegitimate treaty shopping in pursuing its claim.[11] The arbitration was brought pursuant to a BIT concluded between the Netherlands and Venezuela. However, Mobil only achieved standing to bring its claim under this treaty after inserting a Dutch holding company into its otherwise non-Dutch corporate structure in anticipation of the nationalization and after Venezuela had unilaterally increased the royalty rates and taxes applicable to the oil projects. The Tribunal held that structuring an international investment to maximise available protections was "perfectly legitimate" in respect of potential future disputes but was an "abuse of process" in respect of disputes that had already arisen.[12] It therefore upheld its jurisdiction in regard to the nationalization but denied jurisdiction over claims related to the unilateral royalty and tax hikes.

The decision in *Mobil v Venezuela* parallels that rendered in *Yukos Universal v Russia*.[13] In this case, the Permanent Court of Arbitration at the Hague upheld its jurisdiction to hear a claim brought under the ECT by a holding company organized under the laws of the United Kingdom. This was the case despite the fact that the holding company, Yukos Universal, was a surrogate for, and ultimately controlled by, a series of former Russian oligarchs, including Mikhail Khodorkovsky. Russia argued that a mere holding company established in another signatory to the ECT should not function to provide Russian nationals with a cause of action under a Treaty intended to govern international disputes between investors from one signatory and another signatory state. Stated differently, Russia argued that a holding company should not be allowed to create an international cause of action in what was essentially a domestic dispute. The Tribunal dismissed this objection. It held that, while it was sympathetic to Russia's arguments, the text of the ECT provided no basis for it to consider the nationality of any person or entity other than the investor bringing the claim.[14]

Taken together, the decisions in *Mobil v Venezuela* and *Yukos v Russia* legitimize treaty shopping strategies employed at the front end of an overseas investment project's lifecycle.[15] These decisions also follow earlier affirmations of treaty shopping such as the decision in *Aguas del Tunari v Bolivia*.[16] There it was unapologetically held that "it is not uncommon in practice and—absent a particular limitation—not illegitimate to locate one's operations in a

jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT."[17] These decisions also confirm other earlier decisions in which jurisdiction was denied over claims based on treaty shopping employed well after the state action constituting the basis of the investment claim.[18] The implications of this developing doctrine should not be ignored by companies with overseas interests or aspirations. Importantly, it means that investment protection additional to that provided by a home country's BITs and MITs may be accessible through the careful incorporation of a holding company in a third jurisdiction. This includes access to such treaties as the ECT, the only multilateral investment treaty dedicated specifically to protecting investment in the energy industry and related extractive sectors and covering over forty European and Central Asian states, including the CIS countries. That said, treaty shopping should not be undertaken lightly. Only certain investment treaties will grant standing to holding companies.[19] It is also important to ensure that any "denial of benefits" clause contained in the treaty will not operate to restrict standing to companies with "substantial business activities" in the jurisdiction of the signatory.[20]

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Endnotes

1. Notable examples include recent expropriation programs conducted by Venezuela, Bolivia, Ecuador and Russia. For further discussion of this wave of "resource nationalism" please see, for example, F.R. Buchanan & Syed Tariq Anwar, "Resource Nationalism and the Changing Business Model for Global Oil" (2009) 10 Journal of World Investment and Trade 242.
2. For the full text of these agreements please see http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_ Treaties/index.asp.
3. For the full texts of these agreements please see www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx.
4. For a full list of UK investment treaties please see www.fco.gov.uk/en/publications-and-documents/.
5. For more information in respect of the Energy Charter Treaty please see www.encharter.org/.
6. For an analysis of certain differences between bringing a breach of contract claim and a breach of treaty claim, please see Paul Michael Blyschak, "Arbitrating Overseas Oil and Gas Disputes: Breaches of Contract Versus Breaches of Treaty" (2010) 27 Journal of International Arbitration 579.
7. See August Reinisch (ed.), *Standards of Investment Protection* (Oxford, 2008); Rudolph Dolzer & Christoph Schreuer, *Principles of International investment Law* (Oxford, 2008) at 89 – 194.
8. See Campbell MacLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford, 2007) at 3.01 – 3.39.
9. See Stanimir A. Alexandrov, "Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention" in Christina Binder et al. (eds.), *International Investment Law for the 21st Century* (Oxford, 2009).
10. M. Skinner, C.A. Miles, S. Luttrell, "Access and advantage in investor-state arbitration: The law and practice of treaty shopping" (2010) 3 Journal of World Energy Law and Business 260; Paul Michael Blyschak, "Access and advantage expanded: *Mobil Corporation v Venezuela* and other recent arbitration awards on treaty shopping" (2011) 4 Journal of World Energy Law and Business (forthcoming) [Blyschak, Access and advantage expanded].
11. *Mobil Corporation, Venezuela Holdings BV, Mobil Cerro Negro Holdings, Ltd., Mobil Venezolana de Petroleos Holdings, Inc., Mobil Cerro Negro, Ltd. and Mobil Venezolana de Petroleos, Inc. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27 (decision on Jurisdiction, 10 June 2010).
12. *Id*. at para 206.
13. *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. AA227, In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 26 of the Energy Charter Treaty and the UNCITRAL Arbitration Rules 1976 (Interim Award on Jurisdiction and Admissibility, 30 November 2009).
14. *Id*. at para 413, 434-435.
15. See Blyschak, Access and advantage expanded, *supra* note 10; Paul Michael Blyschak, "*Yukos Universal v Russia*: Shell Companies and Treaty Shopping in International Energy Disputes" (2011) 9 Richmond Journal of Global Law & Business (forthcoming) [Blyschak, *Yukos v Russia*].
16. *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No. ARB/02/3 (Decision on Respondent's Objection to Jurisdiction, 21 October 2005).
17. *Id*. at para 330.
18. See, for example, *Phoenix Action Ltd. v The Czech Republic*, ICSID Case No. ARB/06/5 (Award, 15 April 2009).
19. See Blyschak, *Yukos v Russia*, *supra* note 15.
20. *Id*.

* * *

The Convention on the Use of Electronic Communications in International Contracts: Seeking Clarity and Uniformity in International Electronic Commerce

The increasing volume of international commerce carried out exclusively through electronic communication requires clear, uniform and fair rules designed specifically to address contract formation and enforcement in an electronic context. Such rules exist for non-electronic international commerce and (in some countries) for domestic electronic commerce. To date, however, there is no such regime for international electronic commerce. To address this gap, the United Nations (the "U.N") recently adopted the Convention on the Use of Electronic Communications in International Contracts (CUECIC).[1] The CUECIC will provide greater legal certainty and minimize transaction

costs in the electronic age. This article summarizes its key provisions and current status.

Background

Uniform rules governing contracts for the sale of goods across borders are provided by the Convention on Contracts for the International Sale of Goods (CISG).[2] Courts and arbitrators in the United States, Canada and 74 other countries are bound to apply its rules (absent an opt-out by the contracting parties). The CISG, adopted in 1980, does not directly address contracts formed or performed through electronic communications. While CISG principles and customary law provide guidance for resolving questions of interpretation in an electronic commercial context, their application can be ad hoc, piecemeal and unsatisfactory.[3]

Many countries have domestic law and rules governing contracts in electronic commerce. Thirty-six have adopted legislation suggested by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce.[4] For example, most U.S. states adopted the Uniform Electronic Transactions Act (UETA) or an equivalent, and Canadian provinces have enacted the Uniform Electronic Commerce Act or an equivalent.[5] These laws, however, do not address international contracts.[6]

The resulting gap will be filled by the CUECIC, which will govern international contracts formed or performed through electronic communications.[7] Adopted by the U.N. in 2005, it has not yet entered into force, though it is expected to do so in the coming years. (By its terms, the CUECIC enters into force when three countries have ratified. As of May 2011, eighteen countries had signed and two had ratified. Neither the U.S., Canada, nor any member of the E.U. has signed or ratified.[8])

The CUECIC generally will not alter substantive contract law of any ratifying state. Rather, it will provide uniform rules for the use of electronic communications in the formation or enforcement of contracts, under existing law. When a commercial dispute arises over a contract governed by the CISG, for example, the CISG will remain the primary guidepost for interpretation, except where the CUECIC may address questions particular to electronic communications.[9] That said, given the exponential increase in transactions dependent upon electronic communications, the CUECIC will have substantial effect in international commerce.

It should be noted that the CUECIC is not a sine qua non for enabling trans-border electronic commerce, as customary internet law and advisory opinions relating to the application of the CISG to electronic transactions may provide guidance in its absence. But the CUECIC will provide much greater clarity than such other sources could.[10]

When the CUECIC Applies

The CUECIC will apply when parties in different states use electronic communications for the formation or performance of contracts.[11] Thus if each party is located in a nation that has ratified the CUECIC, obviously its rules apply. If only one is, depending on other circumstances, the CISG may apply, but bereft of rules tailored to electronic transactions. Or choice-of-law rules may deem one party's domestic laws apply. In any event, determining the parties' location is necessary in the first instance.

In the electronic age, the location of a contracting party is fraught with uncertainty. Picture the globetrotting entrepreneur in an airport Wi-Fi lounge working remotely from the office whose server may be in yet another country. Under the CUECIC a party is presumed to be located where the party so "indicates"—without regard to nationality, the location of information systems or hardware, domain name or e-mail address.[12] Where a party indicates more than one place of business, the relevant one is that most closely related to the subject of the contract.[13] To provide a check on potentially fictional indication of location, counterparties may rebut the presumption.[14] To avoid conflict over what regime applies, contracting parties in a state that ratifies the CUECIC should clearly indicate their place of business.

While the CISG is limited to contracts for sales of goods, the CUECIC is more open-ended[15] and may be applied to contracts for services and software licenses.[16]

The CUECIC specifically excludes consumer contracts, regulated financial transactions, negotiable instruments, foreign exchange transactions, and other payment transactions.[17] Two things must be said about the exclusion for consumer contracts. First, although this exclusion for consumer contracts would seem to be a large one, as a practical matter, it is not so. Where a country has a domestic law like the U.S.'s UETA, which upholds the validity of electronic transactions, any choice-of-law analysis designating such a domestic law would apply the same general principles as the CUECIC's to consumer contracts.[18] Second, the imprecise definition of this exclusion provides some leeway for parties in a consumer-type transaction who desire the benefits of CUECIC application to craft their contract outside the scope of the exclusion.[19]

The CUECIC's Provisions

The CUECIC does two things primarily. (1) It affords legal equivalency for electronic communications in international commercial transactions. (2) It provides rules for determining how existing requirements based on traditional notions of contract formation and enforcement are fulfilled in the context of electronic communications.

Most fundamentally, the CUECIC provides for equal treatment for contracts formed through electronic communications vis-à-vis traditional written paper contracts: "A communication or a contract shall not be denied validity or enforcement on the sole ground that it is in the form of an electronic communication."[20] This expression of legal equivalency does not, however, confer absolute legal validity of electronic communications, as they must meet standards of reliability referenced throughout the CUECIC.[21]

Traditional contract form requirements are substantially unchanged by the CUECIC. If, for example, a country's existing law requires a contract to be in writing or signed by the parties, the CUECIC does not change this. What it does do is override any existing law that requires the writing or signature to be fulfilled with paper and ink only or that otherwise excludes electronic formatting or communications. It also specifies how the traditional requirements are met in the electronic context, generally by identifying the purpose of the traditional requirement and specifying how it should be met in the electronic context. It does so using sufficiently general terms so as not to favor one type of technology over another or to become obsolete with technological advances.

Traditional writing requirements exist for the purpose of providing a permanent record evidencing the existence and nature of the parties' intent to bind themselves.[22] The CUECIC provides that writing requirements are met where the information contained in the electronic communication is "accessible so as to be usable for subsequent reference."[23] "Accessible" implies that the information in the form of computer data should be readable and interpretable, and that the software necessary to read the content should be retained; "usable for subsequent reference" relates to both human and computer access.[24]

Traditional signature requirements exist for the purpose of identifying the natural person associated with the document and certifying that person with the content of the document.[25] The CUECIC provides that such requirements are met where a proven reliable method is used to identify a party and to indicate their intention in respect to the information contained in the electronic communication.[26] The drafters felt it unnecessary to identify and elevate technological equivalents to signatures (i.e., "electronic signatures"), especially in light of the variety and pace of technological advances.[27]

Traditional requirements for the retention of original documents exist for the purpose of ensuring and evidencing an unaltered record of the parties' original intent.[28] The CUECIC overrides the requirement in its strict sense—countries cannot require retention of paper adorned by ink in a lawyer's vault—and provides that the requirement is met where there is "a reliable assurance" that the information underlying the communication or contract is unaltered since "it was first generated in its final form" and that the information is capable of being displayed "complete and unaltered" if subsequently required or requested.[29] In this way the CUECIC links the concept of originality to a reliable method of authentication of the integrity of the data.[30]

It should be noted that the foregoing rules are not specific to any particular form of technology. They also illustrate that the CUECIC does not simply give free rein to international traders to click now and worry about the consequences later. Rather, it spells out what parties must do to minimize uncertainty and disputes in e-commerce across borders. For example, taking the example of a retained original, a party wishing to avoid conflict will know what is expected with regard to the "original" of the electronic contract.

As with form requirements, the CUECIC does not alter substantive law on the effect of time and place of dispatch and receipt of communications so much as those events affect formation and compliance with contracts. Rather, it provides default rules as to what constitutes time and place of dispatch and receipt in the electronic context. Time of dispatch of an electronic communication is the time it leaves the originator's information system.[31] Receipt of an electronic communication is the time it is capable of being retrieved by the addressee.[32] While many of the CUECIC's provisions mirror those in domestic laws such as the U.S.'s UETA, here there is a difference. Whereas the UETA pinpoints time of dispatch as the time a communication enters the recipient's information processing system, the CUECIC places it at the time it leaves the sender's system. Arguably, therefore, "if the message gets lost in the electronic ether, it appears that the [CUECIC] places the risk on the recipient and the UETA places the risk on the sender."[33] As for place, dispatch and receipt are presumed to occur at the originator's and addressee's place of business respectively, regardless of where their servers are located.[34]

Websites containing proposals to conclude contracts—e.g., e-retailers—are presumed to constitute invitations to make offers (not offers) unless they explicitly state they intend to be bound in case of an acceptance.[35]

The CUECIC also explicitly allows for contract formation involving so-called "electronic agents"—i.e., software programmed to search the internet for invitations for offers conforming to specified parameters and which may conclude contracts autonomously, sometimes with a real person, more often with other automated software.[36] In this regard, the CUECIC may stake a position closer to U.S. law than that of other countries.[37]

Looking Ahead

The U.S. State Department's Office of the Legal Advisor is presently reviewing the CUECIC to determine how it comports with U.S. laws under principles of cooperative federalism. A member of the U.S. delegation to the UNCITRAL working group that drafted the CUECIC believes it is "fully compatible with both the principles as well as the policies in the American domestic law of electronic commerce" and that American business would benefit from U.S. ratification of the CUECIC.[38]

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Endnotes

1. Convention on the Use of Electronic Communications in International Contracts, full text and UNCITRAL Explanatory Note are available at http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf (hereinafter "CUECIC").
2. http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.
3. See generally Charles H. Martin, "The Electronic Contracts Convention, the CISG and New Sources of E-Commerce Law," 16 Tul. J. Int'l & Comp. L. 467 (2008).
4. http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html.
5. Id. New York's recognition of electronic signatures is State technology Law § 304.
6. The U.S. federal E-sign law applies to international transactions. 15 U.S.C. 7001(a). But because it does not apply in states that have adopted the Uniform Electronic Transactions Act, and that Act does not apply to international transactions, the effect of E-sign is limited.
7. CUECIC, Art. 1, ¶ 1.
8. Status of signatures and ratification may be followed at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html.
9. Francesco G. Mazzotta, "Notes on the United Nations Convention on the Use of Electronic Communications in International Contracts and Its Effects on the United Nations Convention on Contracts for the International Sale of Goods," 33 Rutgers Computer & Tech. L. J. 251, 259-60 (2007).
10. Martin, supra note 3 at 479-80.
11. CUECIC Art. 1.
12. Id., Art. 1, ¶¶ 2-3, Art. 6.
13. Id., Art. 6, ¶¶ 2.
14. Id., Art. 6, ¶ 1.
15. Id., Art. 1.1 (applies to "electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different states").
16. Martin, supra note 3 at 470.
17. CUECIC, Art. 2.
18. Henry D. Gabriel, "United Nations Convention on the Use of Electronic Communications in International Contracts and Compatibility With the American Domestic Law of Electronic Commerce," 7 Loy. Law & Tech. Ann. 1 (2007) at 12-13.
19. The exclusion applies to "contracts for personal, family or household purposes." CUECIC Art. 2(1)(a).
20. Id., Art. 8, ¶ 1.
21. Explanatory Note ¶129.
22. Id., ¶144.
23. CUECIC, Art. 9, ¶ 2.
24. Explanatory Note ¶146.
25. Id., ¶151.
26. CUECIC, Art. 9, ¶ 3.
27. Explanatory Note ¶154-55.
28. Id., ¶167.
29. CUECIC, Art. 9, ¶¶ 4-5.
30. Explanatory Note ¶169.
31. CUECIC, Art. 10, ¶ 1.
32. Id., Art. 10, ¶ 2.
33. Gabriel, supra note 18 at 28.
34. CUECIC, Art. 10, ¶ 4.
35. Id., Art. 11.
36. Id., Art. 12.
37. Martin, supra note 3 at 491-92, fn. 130.
38. Gabriel, supra note 18 at 1.

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UN Commission on Social Development: Poverty Eradication

The 49th session of the United Nations Commission on Social Development was held in New York from 9-18 February. The priority theme for this year was poverty eradication. The Commission examined employment as a pathway out of poverty, social protection mechanisms, micro finance, and various methods of financing for social and sustainable development and achievement of the Millennium Development Goals. The Commission also reviewed other relevant programmes and plans of action relating to special groups including one related to Disabled Persons.

During the session, several parallel events were held. One event, organized and moderated by Denise Scotto on behalf of the International Federation of Women in Legal Careers (FIFCJ) and supported by the International Section of the New York State Bar Association, examined the question: ***"Does Micro Finance Really Help the Poor?"*** The panel brought together experts from a multi disciplinary perspective including three representatives affiliated with micro finance institutions—Fonkoze, FINCA, and Jamii Bora.

Denise provided an overview of the UN's work showing how micro credit evolved into micro finance and further into inclusive financing for development. She set forth questions for panel members to discuss, which included expansion of micro finance institutions them-

selves, formation of new structures and business models, regulation, consumer protection, responsible lending and appropriate domestic law.

One of the panelists, Dr. Wetzel, described that in order to assure success of micro finance programmes servicing women, an inclusive perspective beyond financial education and investment must be in place. By addressing the value of their work in the family and the community, women's sense of self worth is increased and their self esteem and capacity are enhanced. This realization counters the negative messages that they've internalized about themselves. Working in groups, cohesiveness among women is ensured, resulting in bonding so essential to the repayment of loans. Dr. Wetzel showed and explained the use of 3 silk screens that were integral in the training of women involved in micro credit projects in Bangladesh. One of the respondents, Susan Saiyorri, a former client who is now a worker within a micro finance institution in Kenya (Jamii Bora), recounted her personal story confirming the need for integrating and maintaining these services within micro finance institutions.

Maria Vilela, an attorney working within the legal office of FINCA, a premier micro finance institution, described how FINCA offers services and products globally and that FINCA retains control over its country and regional affiliates. She echoed what Denise remarked in her opening, about the growth of micro finance institutions and the desire to expand into more markets and to offer more products and services. Maria discussed how the need for expansion resulted in a need for capital and described the development of new structures for FINCA and other micro finance institutions to achieve this. There was consensus from panel members that these new structures should uphold social returns as the primary outcome as opposed to financial performance and profit as the measure of success in light of the case histories of Banco Compartamos (Mexico) and SKS (India) and the negative consequences of expansion.

Albert Bloomsbury, one of the co-chairs of the International Contract and Commercial Law Committee of the International Section of NYSBA, speaking in his personal capacity, explained a mission of the NYSBA International Section as a custodian of New York law as an international standard regarding cross-border transactions and commercial law. He stated that the Committee decided to study micro financing related to international commercial law issues. In his view, it is important to develop the conditions for establishing stable investment environments and regulatory systems including sound contract and property law as they are the foundations of sound economic relationships and global economic growth. He then discussed some examples of cross-border commercial law issues that the Committee may handle to improve the effectiveness of the international flow of funds that support micro finance.

Heather Balke, Board Member of Fonkoze, USA and financial expert, related that micro finance can and does help the poor as evidenced by the work of Fonkoze in Haiti. She emphasized that it requires long term investment, empowerment or individual capacity training, and industry creativity in designing new micro finance business models which consider a "double bottom line" that includes the social return. CJ Willie, a Board Member of Microfinancing Partners in Africa, also shared positive benefits that micro finance has shown in Africa, describing successful outcomes with partners on the ground, specifically acknowledging Jamii Bora Bank of Kenya. Here again, Susan cautioned against negative consequences of expansion which lead to multiple micro finance institutions lending to an individual resulting in over-indebtedness and a spiral into even more extreme poverty.

In order for micro finance to be a useful tool for poverty alleviation and development, certain safeguards need to be in place. Denise underscored the need for responsible financial actions by the financial industry, the private sector and government. Responsible finance also requires action by consumers or clients of micro finance institutions who should understand the available choices and the consequences of taking action. To ensure responsible lending, Denise provided recommendations for legal reform which ensure that micro finance institutions: are well run; target the poor; keep transaction costs low; maintain low interest rates in order for clients to have reasonable chances of being successful in loan repayment; design appropriate installment cycles; avoid abusive collective practices; assure client privacy; create partnerships with government and the private sector emphasizing people-centered development; deliver diverse products which "do no harm" to clients and abide by the appropriate domestic law.

Another parallel event analyzed country-specific overseas development assistance particularly relating to disabled persons. The Special Rapporteur, Mr. Shuaib Chalklin, moderated. An outcome of the panel stressed the need in all societies, but particularly in developing societies, for greater understanding of "disability" and "disability rights." Another outcome emphasized building partnerships with disability NGOs, human rights NGOs, community based organizations and the private sector.

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WTO Dispute Settlement: United States—Definitive Anti-dumping and Countervailing Duties on Certain Products from China

The Appellate Body of the World Trade Organization ("WTO") reversed an earlier WTO panel decision regarding antidumping and countervailing duties ("AD" and "CVD") applied simultaneously by the United States to four concerned Chinese merchandises and found that the United States acted inconsistently with its obligations under the WTO by imposing AD calculated using a non-market economy ("NME") methodology and CVD on the same products, without having assessed whether double remedies arose from such concurrent duties.

1. Holding

The Appellate Body of the WTO issued its Report on March 11, 2011 on *United States–Definitive Anti-dumping and Countervailing Duties on Certain Product from China*. In so doing, the Appellate Body reversed several aspects of prior panel decisions, especially the decision regarding the so-called "double remedy," i.e., United States applied both AD calculated on a NME basis and CVD on several products exported from China. The Appellate Body found that the United States' imposition of double remedies is inconsistent with Article 19.3 of the Agreement on Subsidies and Countervailing Measures (*"SCM Agreement"*).[1]

2. Facts and Procedural History

When calculating an AD on goods from a NME, the Department of Commerce ('Commerce") uses the information from surrogate countries, *i.e.,* market economy countries considered to be analogous, to obtain normal value.[2] This constructed normal value should not contain the subsidy elements from the NME countries. So the AD margins using a NME calculation methodology has already offset, to various degrees, the benefits of subsidies. Applying a CVD will have a high incidence of double counting the same subsidy. Traditionally, the United States government did not apply CVD to goods from NME countries. Commerce established this policy in CVD investigations on carbon steel wire rod imported to the United States from Czechoslovakia and Poland in 1984. According to Commerce, the concept of subsidies and the misallocation of resources resulting from subsidization had no meaning in an economy that had no market and in which the activity was controlled according to a central plan.[3] In *Georgetown Steel Corp., et al., v. United States* ("*Georgetown Steel*"), the Court of Appeals for the Federal Circuit ("CAFC") affirmed Commerce's discretion not to apply CVD law to NME countries.[4] In late 2006, Commerce changed its earlier policy by initiating the first CVD investigation on merchandise from China.[5] Commerce declared this policy change from *Georgetown Steel* in a memorandum issued by Import Administration on March 29, 2007.[6] Commerce pointed out that China's economy in 2007 was different from Soviet-style economies in 1980s. Notwithstanding both legal and practical challenges in applying CVD on goods from China, which will be discussed in Section 3(1) below, Commerce proceeded to create a new "hybrid," i.e., applying both AD calculated by NME methodology and CVD to merchandise exported from China. After the initiation of a CVD investigation on coated free sheet paper from China, in 2007 four more CVD investigations on products from China were initiated by Commerce: (i) circular welded carbon quality steel pipe, (ii) new pneumatic off-the-road tires ("OTR"), (iii) light-walled rectangular pipe and tube, and (iv) laminated woven sacks.

China brought the above noted four CVD investigations before the WTO. On September 19, 2008, China requested consultation and on December 9, 2008, China requested the establishment of a panel. Before the WTO panel, China argued that the rationale for using an NME methodology to determine normal value in an AD investigation subsumes the rationale for imposing CVD on imported products. By applying both remedies simultaneously, Commerce offset any alleged subsidies twice—once when it calculated an AD margin on the basis of a "surrogate" market-determined cost of production, and again when it calculated a CVD on the basis that the producer obtained its productive resources on non-market-determined terms. On this issue, the United States responded that China failed to establish it's "as such" and "as applied" claims.[7] On October 22, 2010, the panel circulated its report, which decided that with respect to China's "double remedy" claim it agreed with the United States that the measure challenged as China's "as such" claims fell outside its term of reference since China failed to include that measure in its request for consultations. With respect to China's "as applied" claim, the panel found that China had failed to establish the inconsistency of such double remedy with the provisions of the *SCM Agreement*.[8] China appealed to the Appellate Body on certain issues of law and legal interpretations covered in the panel report. On March 11, 2011, the Appellate Body issued its Report, which reversed the panel's findings that Article 19.3 of the *SCM Agreement* does not address the issue of double remedies and that China did not establish that the concurrent imposition of AD calculated on the basis of an NME methodology and CVD is inconsistent with Article 19.3 of the *SCM Agreement*. Thereupon, the United States was found to be acting inconsistently with its obligations under the WTO. At its meeting on March 25, 2011, the Dispute Settlement Body adopted the Appellate Body's Report and the Panel report, as modified by the Appellate Body report.

3. Discussion

(1) Challenges to the United States AD and CVD Laws

In *Georgetown Steel*, Commerce took the position that in a NME the government does not interfere in the market process but supplants it, so subsidies have no meaning outside the context of a market economy. The CAFC confirmed Commerce's position and further interpreted that Congress intended that any selling by NME countries at unreasonably low prices should be dealt with under AD law.[9] Commerce's adoption of CVD to goods exported from an NME has raised both legal and practical challenges. The legal challenge is how to accommodate *Georgetown Steel* with Commerce's policy change. The practical challenge is that Commerce has to develop a methodology to determine CVD on the products exported from NME countries that can pass judicial scrutiny. Commerce dealt with the legal challenge by validating the necessity for policy change and changing the policy directly. However, Commerce has not yet established or made sufficient effort to establish a mature methodology to calculate CVD on NME goods.

Worthy to note, parallel to WTO dispute settlement proceedings, Chinese respondents in AD and CVD investigations of ORT brought a lawsuit before the Court of International Trade ("CIT") in *GPX Int'l Tire Corp, et al. v. United States* (*"GPX"*). Judge Restani of the CIT removed the legal obstacle erected by *Georgetown Steel* by holding "that Commerce is not barred by statutory language from applying the CVD law to imports from the PRC, but that Commerce's…interpretation of the NME AD statute in relation to the CVD statute was unreasonable."[10] In terms of calculation methodology, similar to the findings of the WTO Appellate Body, Judge Restani found flaws of double counting. In *GPX* , the Court ordered Commerce either to forgo CVD or to develop a reasonable calculation methodology. However, "Commerce stubbornly adheres to the position that it does not have discretion to do so."[11] Judge Restani therefore concluded that Commerce's reluctance to develop a reasonable calculation methodology is a "tacit admission, that, at this time, it is too difficult for Commerce to determine, using improved methodologies, and in the absence of new statutory tools, whether and to what degree double counting is occurring. In accordance with the court's remand instructions, the only option remaining for Commerce is not to apply CVD law.…"[12] With respect to the AD and CVD law in the United States, it is not clear yet how the CAFC will determine the role of *Georgetown Steel* in Commerce's policy change and Commerce's CVD calculation methodology. However, with respect to the United States' obligations under the WTO, it is definitely clear that Commerce needs to fix its "hybrid" before driving on.

(2) Further Implications of the WTO Ruling

After the four CVD investigations, there were around 20 more CVD cases. (See the table below.) How Commerce is going to comply with the WTO's ruling, if Commerce decides to do so, may trigger a series of amendments to other CVD determinations. Although the Court in *GPX* has removed the legal obstacle of *Georgetown Steel*, Commerce is under pressure to deal with the practical problem. To avoid double counting, Commerce can decide to apply AD as the only remedy to merchandise from NME countries. Based on the policy direction Commerce takes, such possibility is very slim. Most probably, Commerce will repair the CVD methodology to be reasonable, acceptable under judicial scrutiny and consistent with Article 19.3 of the *SCM Agreement* under the WTO.

4. Conclusion

Commerce applying CVD on China's exports to the U.S. market is a protective policy in reaction to the United States' long-term trade deficit and the increasing pressure from domestic industries that are relatively fragile in the face of increasingly intensified competition in the global market. Meanwhile, China's economic transition also requires Commerce to reconsider its previous position. The WTO and CIT rulings call upon Commerce to set up "parameters" in its CVD policy and practice towards NMEs. Nearly five years has passed since Commerce's first CVD investigation on Chinese goods. It has become more and more imperative for Commerce to develop reasonable and mature calculation methodologies and confine its CVD practice within the judicial and WTO parameters.

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Endnotes

1. Article 19.3 of *SCM Agreement* stipulates that "when a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amount in each case, on a non-discriminatory basis on imports of such product form all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement has been accepted.… "
2. Section 773(c)(1)(B) of the Tariff Act of 1930, as amended.
3. 49 Fed. Reg. 19370, 19374 (May 7, 1984).
4. 801 F.2d 1308 (Fed. Cir. 1986).
5. *Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper from the People's Republic of China, Indonesia and the Republic of Korea*, 71 Fed. Reg. 68546, 68549 (November 27, 2006).
6. Import Administration Memorandum: *Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China – Whether the Analytical Elements of the Georgetown Steel*

Opinion are Applicable to China's Present-Day Economy dated March 29, 2007 (available at http://ia.ita.doc.gov/download/prc-cfsp/CFS%20China.Georgetown%20applicability.pdf.), p.5.

7. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body gives the following interpretation of "as such" and "as applied" claims: (i) "In our view, 'as such' challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than 'as applied' claims." See WT/DS268/AB/R, para. 172; (ii) by "as applied," we refer to the types of claims involving challenges to a Member's application of a general rule to a specific set of facts. Id. para. 6, footnote 22.
8. WT/DS379/R.
9. 801 F.2d 1308 (1986) at 1310.
10. 645 F.Syoo.2d at 1234.
11. CIT Slip Op. 10-84 at 10.
12. Id. at 11.

* * *

Countervailing Duty Investigations on Chinese Products Initiated After January 01, 2000

	Case Number	Product	Initiation	Prelim	Final	Duty Order
1	C-570-906	Coated Free Sheet Paper	27-Nov-06	9-Apr-07	25-Oct-07	
2	C-570-911	Circular Welded Carbon Quality Steel Pipe	5-Jul-07	13-Nov-07	5-Jun-08	22-Jul-08
3	C-570-913	New Pneumatic Off-the-Road Tires	7-Aug-07	17-Dec-07	15-Jul-08	4-Sep-08
4	C-570-915	Light-Walled Rectangular Pipe and Tube	24-Jul-07	30-Nov-07	24-Jun-08	5-Aug-08
5	C-570-917	Laminated Woven Sacks	25-Jul-07	3-Dec-07	24-Jun-08	7-Aug-08
6	C-570-921	Lightweight Thermal Paper	2-Nov-07	14-Mar-08	2-Oct-08	24-Nov-08
7	C-570-923	Raw Flexible Magnets	18-Oct-07	25-Feb-08	10-Jul-08	17-Sep-08
8	C-570-926	Sodium Nitrite	5-Dec-07	11-Apr-08	8-Jul-08	27-Aug-08
9	C-570-931	Circular Welded Austenitic Stainless Pressure Pipe	25-Feb-08	10-Jul-08	28-Jan-09	19-Mar-09
10	C-570-936	Circular Welded Carbon Quality Steel Line Pipe	29-Apr-08	9-Sep-08	24-Nov-08	23-Jan-09
11	C-570-938	Citric Acid and Citrate Salts	13-May-08	19-Sep-08	13-Apr-09	29-May-09
12	C-570-940	Tow Behind Lawn Groomers and Parts Thereof	21-Jul-08	21-Nov-08	19-Jun-09	3-Aug-09
13	C-570-942	Kitchen Appliance Shelving and Racks	26-Aug-08	7-Jan-09	27-Jul-09	14-Sep-09
14	C-570-944	Oil Country Tubular Goods	5-May-09	15-Sep-09	7-Dec-09	20-Jan-10
15	C-570-946	Prestressed Concrete Steel Wire Strand	23-Jun-09	2-Nov-09	21-May-09	7-Jul-09
16	C-570-948	Steel Grating	25-Jun-09	3-Nov-09	8-Jun-10	23-Jul-10
17	C-570-950	Wire Decking	2-Jul-09	9-Nov-09	10-Jun-10	
18	C-570-953	Narrow Woven Ribbons with Woven Selvedge	6-Aug-09	14-Dec-09	19-Jul-10	1-Sep-10
19	C-570-955	Magnesia Carbon Bricks	25-Aug-09	23-Dec-09	2-Aug-10	21-Sep-10
20	C-570-957	Seamless Carbon and Alloy Steel Standard Line	14-Oct-09	1-Mar-10	21-Sep-10	10-Nov-10
21	C-570-959	Coated Paper Suitable for High-Quality Print Graphics	20-Oct-09	9-Mar-10	27-Sep-10	17-Nov-10
22	C-570-961	Steel Fasteners	22-Oct-09			
23	C-570-963	Sodium and Potassium Phosphate Salts	23-Oct-09	8-Mar-10	1-Jun-10	22-Jul-10
24	C-570-966	Drill Pipe	27-Jan-10	11-Jun-10	11-Jan-11	3-Mar-11
25	C-570-968	Aluminum Extrusions	27-Apr-10	7-Sep-10		
26	C-570-971	Multilayered Wood Flooring	18-Nov-10			

Legal and Investment Updates

Family Obligations: The New Frontier of Accommodation Obligations in Canada

Human rights legislation across Canada includes the typical prohibitions on discrimination and harassment that is based on sex, race-based grounds, disability, religion or creed and age as well as sexual orientation and marital status. It also includes a prohibition on discrimination based on an employee's "family status." "Family status" is universally defined in Canada as the status of being in a parent-child relationship. So, it applies to both childcare and eldercare. For many years, family status accommodation slipped under the radar. It was thought to protect against refusals to hire or promote working parents. There were few demands for working hours to accommodate childcare obligations or to deal with an elderly parent's medical appointments. In the last decade, however, family status cases are on the rise. This trend, of obvious concern to Canadian employers, sees employees trying to utilize the protection offered by family status to prevent work from interfering with their family obligations.

The Test to Trigger the Duty to Accommodate an Employee's Family Status

While there had been a few human rights tribunal cases in the 1980s, the case that must be credited with setting off the phenomenon was decided by the British Columbia Court of Appeal in 2004 and is known as *Campbell River*.[1] In this case, the British Columbia Court of Appeal set a standard for the triggering of family status obligations and the consequent duty to accommodate on the part of Canadian employers. The Campbell River test involves three elements. It requires a complainant to demonstrate there has been (1) a change in a term or condition of employment *imposed by the employer*, which resulted in (2) a *serious interference* with (3) a *substantial parental duty or obligation* of the employee. This test required something more than the ordinary conflicts between work and parental obligations to prove a *prima facie* case of discrimination. In *Campbell River*, the test was met because the employee at issue had commitments associated with caring for a child with special needs that interfered with the change in work hours proposed by her employer. Despite the employer's business case that the change in work hours would better serve its customers, it was required to accommodate the employee's need to provide after school care to her child with special needs.[2]

A number of decisions subsequently applied the *Campbell River* test and dismissed employee complaints where there was no suggestion that childcare needs were beyond the ordinary demands faced by employees to balance appropriate childcare and employment obligations. Discrimination claims based on family status fortunately were dismissed where changes in the employment conditions only negatively impacted an employee's ability to attend their children's extracurricular activities or where there was insufficient evidence to establish that reasonable alternatives for providing care for a healthy and normal child were unavailable.

Changes to the Test

Other decisions applied the second and third part of the test: the "serious interference with a substantial parental obligation" standard, but eliminated the first part that limited its application to situations where the employer imposed a change.[3] The rationale for the expansion of the test is that changes often originate within the employee's family, as opposed to just being imposed by the employer. The test, therefore, also would be applied if a diagnosis of a medical condition in a child or parent would interfere with work obligations the employee previously performed without accommodation.

Rejection of the Test

On the other hand, in a series of cases, the Canadian Human Rights Tribunal has rejected the *Campbell River* test entirely.[4] According to the Tribunal, the test is too restrictive and imposes a higher threshold to demonstrate discrimination than is required to prove any other ground of discrimination. According to the Tribunal, the higher threshold of demonstrating a *significant* interference due to a *substantial* obligation forces employees to tolerate some amount of discrimination to an unknown level before being afforded protection under human rights legislation. The result of the Tribunal's rejection of the *Campbell River* test is that complainants have succeeded in establishing a *prima facie* case of family status discrimination in circumstances that involve ordinary parental obligations. For example, in one case, the Tribunal found discrimination where the employer had forced the employee to work part-time, rather than allowing her to work full-time on a modified and more predictable shift schedule that would have enabled her to make childcare arrangements. This particular case did not involve any custody arrangements or the provision of care for a child requiring additional attention due to a disability or other medical reasons.[5]

More practical decisions have been determined by labour arbitrators and provincial human rights tribunals. An example would be where an employee claimed discrimination for being forced to transfer to the afternoon

shift when the employer cancelled the midnight shift due to a lack of demand. The change conflicted with the complainant's child access arrangement and he refused to accept the change. The employer twice delayed the complainant's transfer and then provided additional time off while advising the employee to take the necessary steps to alter his arrangement. While the Human Rights Tribunal of Ontario declined to determine whether or not discrimination had been proven, it found that the employer's efforts were reasonable and satisfied any duty to accommodate that may have existed.[6]

Conclusion

Lack of certainty in the law always is unsettling. Here, Canadian employers face uncertainty as to the extent of their obligation to consider employee's personal family obligations in imposing work requirements. While the *Campbell River* test may very well impose a higher standard to prove discrimination and trigger the duty to accommodate, it is a sensible approach. To require Canadian employers to accommodate every employee's family obligations would trivialize the very protection family status is designed to provide.

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Endnotes

1. Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society, [2004] C.H.R.D. No. 33 [Campbell River].
2. See Gao v. Minco Mining and Minerals Corp, [2010] B.C.H.R.T.D No. 204; Falardeau v. Ferguson Moving (1990) Ltd., [2009] B.C.H.R.T.D. No. 272; Sawchuck v. Hastings Entertainment Inc., [2009] B.C.H.R.T.D. No. 407; and Canadian Staff Union v. Canadian Union of Public Employees (Reynolds Grievance), [2006] N.S.L.A.A. No. 15.
3. See International Brotherhood of Electrical Workers, Local 636 v. Power Stream Inc. (Bender Grievance), [2009] O.L.A.A. No. 447 followed in Alliance Employees Union, Unit 15 v. Customs and Immigration Union (Loranger Grievance), [2011] O.L.A.A. No. 24; Alberta (Solicitor General) v. Alberta Union of Provincial Employees (Jungwirth Grievance), [2010] A.G.A.A. No. 5; and Harry McDonald v. Mid-Huron Roofing, 2009 HRTO 1306.
4. See Johnstone and Canadian Human Rights Commission v. Canada Border Services, 2010 CHRT No. 20; Richards and Canadian Human Rights Commission v Canadian National Railway, [2010] C.H.R.D. No. 24; Seeley and Canadian Human Rights Commission v. Canadian National Railway, [2010] C.H.R.D. No. 23; and Whyte and Canadian Human Rights Commission v. Canadian National Railway, [2010] C.H.R.D. No. 22.
5. Johnstone and Canadian Human Rights Commission v. Canada Border Services, 2010 CHRT No. 20.
6. Saroyan v. Deco Automotive, 2011 HRTO 236.

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FIBRAS, the Mexican REITS

1. Introduction

The Mexican Real Estate Investment Trust[1] or *Fideicomisos de Inversión en Bienes Raíces* ("FIBRAS") represents a vehicle for the public issuance of real estate trust certificates (*certificados bursátiles fiduciarios inmobiliarios*) ("Certificates"). FIBRAS are the Mexican version of the Real Estate Investment Trust, or REIT, that have been operating in the United States for many years. The purpose of the FIBRAS is to allow investors to participate in real estate development with a favorable tax regime along with the transparency and access to information applicable to issuers in the Mexican Stock Exchange.

FIBRAS are the result of an amendment to the Mexican Income Tax Law (the "Income Tax Law") that was passed in 2004, which has triggered a series of additional tax reforms required to make the investment in Certificates issued by FIBRAS both attractive to the market and tax efficient.

The first issuance of Certificates by a FIBRA was successfully placed in the Mexican Stock Exchange in March 2011. The amount of this transaction was approximately U.S. $250 million, representing an important transaction by Mexican standards. Other transactions will surely follow suit.

2. Nature of the FIBRAS

In order to obtain the tax benefits of a "real estate investment trust," the FIBRAS must comply with the following requirements set forth in the Income Tax Law[2]:

(a) The FIBRAS must be established in accordance with Mexican law and the trustee of the FIBRA must be a credit institution resident in Mexico and authorized to act as such;

(b) The main purposes of the FIBRAS must be (i) the acquisition or construction of real estate destined for leasing, (ii) the acquisition of the right to receive income deriving from the leasing of real estate, or (iii) to grant loans for the purposes set forth in (i) and (ii), secured by means of a mortgage on the leased real estate;

(c) At least 70% of the FIBRA's assets must be invested in (i) leased real estate, (ii) the rights to receive income from the leasing of real estate, or (iii) the loans mentioned in (b) above. The remainder must be invested in securities issued by the Mexican Federal Government and registered in the National Registry of Securities or in stock issued by debt investment companies (*sociedades de inversion en instrumentos de deuda*);

(d) The real estate acquired or built by the FIBRAS must be destined for leasing and may not be

sold before the end of a term of 4 years as of its construction or acquisition. The real estate sold before the expiration of such 4 year term shall lose the benefit of considering the transfer of such real estate as a tax free transaction;

(e) The FIBRAS' trustees must issue Certificates and offer same by means of a public offering; and

(f) The FIBRAS must distribute to the holders of the Certificates (the "Certificateholders"), at least once a year, a minimum of 95% of the net profit[3] of the FIBRA for the preceding fiscal year.

3. Tax Benefits Applicable to FIBRAS

If the FIBRA complies with the requirements described in section 2 above, the FIBRA and its Certificateholders are eligible for the following tax benefits:

(a) The entity would be transparent for tax purposes, as the taxable income obtained by FIBRAS is attributed to the Certificateholders, whether Mexican or foreign tax residents;

(b) Mexican securities firms or *Casas de Bolsa* acting as depositaries of the Certificates on behalf of the Certificateholders,[4] are required to withhold a portion of the net profits distributed to the Certificateholders at a rate of 28%, on an annual basis, unless the relevant Certificateholder is not subject to income tax (*e.g.* Mexican and registered foreign pension funds and retirement funds).[5] Mexican tax residents will be able to credit the withholding made by the securities firms against their annual income tax;

(c) Certificateholders who are not tax residents of Mexico are not subject to the Single Rate Business Tax ("IETU"),[6] and the Value-Added Tax ("VAT")[7] for their investments in FIBRAS[8];

(d) Certificateholders who, in their capacity as settlors[9] of a FIBRA, ("Settlors") conveyed real estate to said FIBRA and received Certificates for the total or partial value of such real estate, may defer payment of the income tax and the IETU applicable to such taxable transfer until the Settlors sell their Certificates, or the FIBRA transfers the contributed real estate;

(e) Certificateholders will generally be subject to pay VAT at a rate of 16% if they conveyed construction to a FIBRA. The mere conveyance of land from Settlors to a FIBRA is not subject to VAT;

(f) Foreign tax residents are not subject to income tax, IETU or VAT with respect to the sale of their Certificates, provided such certificates are traded to third parties through the Mexican Stock Exchange (*Bolsa Mexicana de Valores)* or recognized foreign markets;

(g) FIBRAS are not required to make monthly advance payments on account of income tax;

(h) FIBRAS may deduct for income tax purposes the depreciation of their buildings and/or constructions whether conveyed by the Settlors of the FIBRA or otherwise acquired by the FIBRA; and

(i) The transfer of real estate may be subject to a local transfer tax generally at a rate of 2% applied on the value of the real estate conveyed to the FIBRA pursuant to the tax laws of the relevant municipality (*Municipios*) of the States of Mexico, but some amendments have been taking place so that more municipalities are now exempting FIBRAS from this tax.

4. Final Comments

The new tax structure created in 2004 for the FIBRA has resulted in the creation of an interesting vehicle to invest in commercial real estate in Mexico. This vehicle is even more interesting for foreign tax residents as the Mexican Government has created an additional incentive for them by exempting them from paying taxes on the sale of their Certificates if they are sold through a stock exchange.

I expect FIBRAS to be very active in the Mexican market in the following years especially since Mexican governmental pension funds have recently been authorized to invest in FIBRAS, thus channeling the worker's retirement savings to the commercial real estate market. I also expect increasing interest from U.S. REITS to structure their Mexican investments through FIBRAS in order to access the tax benefits deriving therefrom.

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Endnotes

1. For purposes of this article, when we mention FIBRAS we will only be referring to public FIBRAS (*i.e.* FIBRAS issuing certificates through stock exchanges), rather than to private FIBRAS.
2. Articles 223 and 224.
3. Net profits of the FIBRAS are calculated in accordance with specific Mexican tax regulations but in general terms net profits are calculated by subtracting authorized expenses and deductions from the income received by the relevant FIBRA.
4. Under Mexican law, the Certificates are held on behalf of the Certificateholders by these securities firms. Any entity or person that desires to buy Certificates shall execute a Stock Exchange Intermediation Agreement with said securities firms.

5. The Income Tax is a corporate tax that levies multiple items of taxable income coming from Mexico or foreign countries at a rate of 30% calculated on an accrual basis.
6. The IETU levies the sale of property, the lease of property and the provision of services at a rate of 17.5% with limited deductions. The IETU is payable to the extent it exceeds Income Tax and only for the applicable difference.
7. The VAT levies the sale of property, the lease of property and the provision of services at a rate of 16% (or 11% if the taxpayer is located in the Mexican border) on a payment basis.
8. Subject to confirmation with the Mexican tax authorities in some cases.
9. Settlors of the FIBRAS or any other Mexican trust are the parties of the trust that convey the assets (in this case the real estate) to the trustee for the purposes of the trust.

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The Italian Doctrine of "Contratto Di Rete" or "Network Agreement": Interesting Practical Implications

In the Italian economy, small and mid-size companies are very common, and often the most successful.

However, nowadays, in a globalized world, where competition is increasingly fierce, and economic competitors are powerful and resourceful, this typical Italian way of doing business may become unsuccessful. In a few words, all of Italy's small companies (according to Associazione Italiana Politiche Industriali, 99.6% of the Italian companies have less than fifty employees) are under attack.

The Italian Parliament has taken notice of this issue, and recently created a new doctrine to help small and mid-sized companies compete with big international corporations. In fact, Parliament has introduced new rule (article 3, paragraph 4-*ter* of law number 33/2009, that slightly changed with law 122/2010), which aims to help small and mid-sized companies.

The approach that is being encouraged by the Italian legislature is networking and joining forces with one another to create a standard contract known as the "rete d'impresa" (business network).

This is an innovative and interesting solution; however, it is still not successful or widespread in Italy. According to statistics, very few "business network" contracts have been entered into or registered, and for this reason criticisms have been raised from many different directions.

Analysis of the "Network" Contract and Legal Issues

What exactly is the "business network" contract? Article 4-*ter* of rule 33/2009 explains that with this specific contract, small business people and companies can form a specific joint venture to be more competitive and innovative in the market. This particular joint venture, called "rete d'impresa" (business network), requires participating companies to cooperate and work on the basis of a common program in the context of which, each member may develop its own specific area of expertise.

Members of the "rete" or network would also share their commercial know-how and work together on some specific projects and common business areas.

The essence of the "rete" or network is the common aim to increase the competitiveness and business opportunities for all the members.

On the legal side, the "network" contract has been left quite undefined and negotiable. In fact, the Italian law permits the members simply to cooperate in business or to create a legal entity called the "impresa collettiva non societaria" (non-corporate collective business), which is different from other similar entities like companies and "consorzi" (consortia).

When the members create an "impresa collettiva societaria" (or corporate collective business), they can operate in the market through this special corporate entity, which has complete financial autonomy and is established with the assets that the members may contribute to this common entity.

However, if the members of "rete" or network prefer not to create a corporate entity, then they would establish what is known as an "impresa collettiva non societaria" (non-corporate collective business). The law allows members to use different mechanisms to develop a common business and to cooperate.

As a result of the differentiation referred to above, the real innovation prescribed by the Italian law is that the "rete" or network organized as a common entity is recognized, resulting in this being an alternative legal instrument provided to small Italian companies in addition to others like "consorzi" or consortia.

The major question to be answered quickly by Italian lawyers, and the answer to which is not clear from the text of the law, pertains to the possibility of considering these common "entities" as actual legal entities. In this case, if the answer to this question will be affirmative, this kind of "rete" or network could have a proper intangible and invisible essence, like a corporation. In addition, it could enter into a contractual agreement and it could hold ownership rights in assets and goods contributed by members to the "network" entity. It is likely irrelevant that the text of the rule does not specifically define this kind of "rete" or network as a real legal entity, because it has all the necessary requirements to be considered tantamount to a real corporation with complete financial autonomy.

This statement is confirmed by the passage of the Italian rule, which states that inside the "rete," there may exist some specific bodies like the shareholders' meeting and board of statutory auditors. At the end of the day, there are no doubts on the legal status of the "rete" or network.

The "Network" Contract: Practical Issues

The Italian "network" contract is a specific act governed by law, written in the form of an actual certified contract and must contain:

- Personal details of the members (members can be individuals or corporations/companies);
- A specific description of the innovative aims that the "rete" is to pursue and a specific description of the methods that the "rete" intends to develop;
- A specific description of a common program that should enucleate the single rights and duties of the members;
- If the contract establishes a common *patrimonium*, the specific criteria for the valuation of the single assets contributed by the members must be specified;
- Personal details of the individual or corporations that undertake the authority to represent the "rete" or network;
- A specific description of the methods followed for purposes of making decisions and ensuring participation on the part of all of the network's members.

Finally, each member must register the contract in a specific public register called "*Registro delle imprese*" (companies register). The "rete" or network becomes effective when the last member has registered the contract.

Subject to these specific legal requirements, the contents of the contract are open and flexible. Members are free to draft specific clauses to stress certain aspects that they think are particularly important to their "rete" or network.

However, if the members create that kind of "rete" or network with complete financial autonomy, the contract should be very precise to define the specific elements of the "rete" or network, the internal bodies and their single powers.

Conclusions

It is important to stress the innovative impact that this new rule could have on the Italian economic system. In fact, the network contract could be an interesting remedy to encourage the many small Italian companies to join forces, without altering their equity capital. In this manner, this new rule could turn out to be an important instrument to help Italian businesses face market globalisation.

Obviously, it is still too early to make assessments or draw final conclusions. There is still no Italian case law, and the new law has also been criticised for its excessive conciseness.

However, this conciseness could turn out to be a good strong point of the law because it permits businessmen operating in the market to create and enter into the most advantageous and suitable form of "rete" or network contract for a specific and concrete purpose.

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Recent Changes in the Swedish Companies Act (2005:551)

The Swedish legislature has undertaken to simplify Swedish company law in an attempt to facilitate businesses, particularly start-ups and small business. Numerous changes to implement this objective have been passed, the latest of which are briefly described below.

Share Capital Requirements

On April 1, 2010, it became significantly less costly to incorporate private companies limited by shares. The minimum required share capital in such companies has been reduced from SEK 100,000 to SEK 50,000. Even before these changes, incorporation was an expeditious and simple procedure, normally effectuated by acquiring a "shelf company."

Mandatory Audits Abolished

As of November 1, 2010, the mandatory requirement that all companies limited by shares appoint an auditor has been abolished. Companies not reaching certain thresholds, including number of employees, balance sheet total and net turnover, are no longer under a duty to appoint an auditor to conduct audits. The rule aims to reduce the regulatory burden for small-sized enterprises. This change emanates from EU harmonization. Accordingly, such companies may, in their Articles of Association, elect not to appoint auditors.

Shareholders' Rights

On January 1, 2011, numerous new rules relating to shareholders' rights became effective. Some of the more notable rules are outlined below.

Public companies, the shares of which are traded on a regulated marketplace, may benefit from new rules that apply to the convening of shareholders' meetings. Previously such companies had to incur substantial costs for publication of the complete meeting notice in at least one national daily newspaper. Such companies may now, with few exceptions, notify the shareholders by means of a simplified notice. Other public companies may also opt for simplified notification.

The notification must be announced in its entirety only in the Swedish Gazette (*Post- och Inrikes Tidningar)*, as well as made available on the website of the company. In addition, an advertisement containing very brief information about the notification must be published in at least one national daily newspaper. The notification must be made no later than three weeks (normally four weeks for other public companies) before the shareholders' meeting. Contemporaneously relevant documents in relation to the meeting must be made available on the company's website (proposed decisions, etc.).

Further, the notification shall set out the shareholders' rights at the meeting to request information from the company's directors. In addition, each shareholder now has a right, in the event of a vote, to request the company to enter the outcome of the vote in the minutes of the general meeting.

Moreover, in respect of shareholders' rights, all Central Securities Depository companies are affected by the new regulations on proxies to shareholders' meetings, the maximum period of validity of which is extended from one to five years. This will make it much easier for asset managers and other intermediaries who will no longer need to renew the proxy annually.

Future Changes

As exemplified above, the Swedish legislator has already adopted a wide range of regulatory changes in order to facilitate business. Further initiatives are expected to become effective, including, for example, the possibility to incorporate private companies limited by shares on the Internet, less burdensome requirements pertaining to the contents of the Articles of Association, abolishment of share certificates, and abolishment of the requirement that some of the directors must reside in the European Economic Area.

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Freezing Injunctions and Cross-Border Disputes: Perspectives from England and the British Virgin Islands

The Author, Daniel Saoul, a barrister at 4 New Square in London, addressed the NYSBA's London Chapter. He discussed the obtaining of freezing injunctions in England and the BVI in support of litigation or arbitration on foot elsewhere. He has put pen to paper and summarised some of his main points for Newsletter readers. What follows is intended merely to serve as an introduction to the topic, and not as a comprehensive academic paper or practitioner's guide.

Introduction

Litigation, or arbitration, is on foot or about to be commenced. The claimant suspects that the defendant will try to frustrate any Court judgment obtained down the line by dissipating its assets in the interim, other than in the ordinary course of business. What the claimant wants to do is freeze the defendant's assets (or at least a proportion of them that equates to the value of the Claim) to prevent this from happening before trial; a "freezing" injunction.

The availability of injunctions of this kind—which operate *in personam* against defendants, and must be distinguished from proprietary injunctions, which operate *in rem* and relate to specific assets which have allegedly been misappropriated—is a topic that has divided the highest courts of England and Wales and the United States. In England, the House of Lords first approved the granting of such injunctions in principle in 1975, in the now famous *Mareva* case, as well as in one less frequently cited decision that preceded it, *Nippon v Karageorgis*. The test that was set down for the granting of such injunctions was, in short, as follows: (1) the claimant must have a good arguable case against the defendant; (2) there must be a real risk of the defendant dissipating its assets other than in the ordinary course of business, so as to frustrate any judgment that might be obtained against it in due course; and (3) it must be just and convenient, in all the circumstances, to freeze the defendant's assets (or at least a proportion of them).

The powerful and crippling nature of such injunctions has not been lost on the English Courts. The "freezer"—unavailable prior to 1975 in England because it was thought to constitute too invasive an action against a person who had not yet been tried—has been described as a "*nuclear weapon*" by one appellate Judge (Donaldson LJ) with another upping the ante and calling it "*thermo-nuclear*" (Jacob J, as he was then). As many English practitioners well know, acting for a client who has been restrained by a freezing injunction can be like contesting litigation

with one hand tied behind your back. Freezing injunctions are also usually coupled with orders for disclosure of the defendant's assets—and a failure to disclose can, in appropriate cases, be punished by contempt of court proceedings, or in extreme situations, with the entering of judgment without trial. Such is the competitive advantage they can offer, freezing injunctions are heavily sought after—and contested—in England, and significant amounts of money can be spent on obtaining or resisting them. The same is true in the British Virgin Islands, an increasingly active jurisdiction for commercial disputes where the legal system broadly follows English common law (indeed, the ultimate court of appeal for BVI cases is the Privy Council in London).

There are some protections for defendants: an applicant for a freezing injunction (who will usually first be heard without notice and *ex parte*, i.e., without the Defendant being notified or given an opportunity to attend, though a contested hearing will take place subsequently) must give full and frank disclosure of all relevant matters, including all possible defences available to the defendant, and must also give an undertaking in damages, to the effect that, should the injunction prove wrongly granted, and the defendant be exonerated at trial, the claimant will have to compensate the defendant for any losses it might have suffered due to the injunction.

U.S. Supreme Court: No to Freezing Injunctions

Notably, the U.S. Supreme Court declined to follow the English path when, in 1999 in the case of *Grupo Mexicano de Desarrollo v Alliance Bond Fund*, it was invited to rubber stamp the freezing injunction as a legitimate form of procedural relief. In a knife-edge 5-4 majority verdict delivered by Justice Scalia, the Supreme Court emphasised that in England the adoption of *Mareva* injunctions, as they are often called, was "*a dramatic departure from prior practice*." Despite an intervention on behalf of the United States in favour of freezing injunctions, the Supreme Court concluded that "*the requirement that the creditor obtain a prior judgment is a fundamental protection in our debtor-creditor law*" and that, despite the Court's equitable powers it had "*no authority to craft a 'nuclear weapon' of the law*" such as a freezing injunction and "*…the debate concerning this formidable power over debtors should be conducted and resolved where such issues belong in our democracy: in the Congress*." Whilst it is notable that under New York law the local District Court is prepared to grant freezing orders, it will not do so in respect of assets beyond its borders, so their scope is limited.

So where does this leave the international practitioner with a case on foot elsewhere than England or the BVI, such as the United States or perhaps Switzerland (noting that Swiss Courts, amongst others, will not grant relief in respect of assets located beyond local borders), who feels that freezing relief would be hugely beneficial but, for one reason or another cannot get it from the court or tribunal seized of the substantive proceedings?

Since the first freezing injunction was granted in England in 1975, the English Court's jurisdiction to grant freezing orders has been extended to assist in precisely such situations. Although in 1979 the House of Lords held that freezing injunctions could not be awarded by the English Court where there was no substantive action before it that it had jurisdiction to determine by way of final judgment (i.e. no substantive claim before the English Court, no freezing order—the case is *Siskina v Distos Compania Naviera SA*, known as *The Siskina*) the position has since been changed by statute, with the result that, in appropriate cases, the English Court now has a "long-arm" jurisdiction to order worldwide freezing orders, encompassing a defendant's assets across the globe, even where the main claim is proceeding outside of England. So, other than the core criteria mentioned above, what are the additional requirements for obtaining such expansive relief in England? And what is the position in the BVI?

Obtaining Freezing Injunctions in England in Support of Foreign Litigation

The law in this area is complex and, depending on the scenario (e.g., whether the main claim is before a Court in an EU member state or not etc.) can involve brain-teasing (or numbing) interplay between the Senior (formerly Supreme) Courts Act 1981, the Civil Jurisdiction and Judgments Act 1982 (as amended), the Judgments Regulation, the Brussels and Lugano Conventions and the English Civil Procedure Rules. For simplicity, the following assumptions are made here:

- the matter in question is civil/commercial;
- the English High Court is not the natural territorial jurisdiction for the underlying dispute;
- proceedings have been, or will simultaneously be, commenced in the most appropriate overseas forum.

Section 25 of the Civil Jurisdiction and Judgments Act 1982 (the "1982 Act," as amended) gives the English High Court a specific power to grant interim relief in support of foreign courts (removing the previous common law restriction in *The Siskina*). The jurisdiction bestowed by Section 25 of the 1982 Act is intended to be a supportive, ancillary jurisdiction. The point is to ensure that practical justice is achieved through international judicial cooperation; but the risk is that action—and in particular action of purportedly worldwide effect—taken by the English Court might hinder, unduly overlap or be inconsistent with the approach taken by the court seized with the merits. Subsection 25(2) of the 1982 Act provides the English Court with an opportunity to consider this risk. It provides:

> *On an application for any interim relief under subsection (1) the court may refuse to grant that relief if, in the opinion of the court,*

the fact that the court has no jurisdiction apart from this section in relation to the subject matter of the proceedings makes it inexpedient for the court to grant it.

The Expediency Test

The 1982 Act provides no guidance as to which factors might make it expedient, or inexpedient, to grant an order. One must therefore look to the common law for assistance: helpfully, the Court of Appeal has considered this issue on a number of occasions—the key appellate decisions in this area are *Haiti v Duvalier (Mareva Injunction) No.2; Credit Suisse Fides Trust SA v Cuoghi; Refco Inc v Eastern Trading Co and Motorola Credit Corp v Uzan (No.6)*.

The starting point, as stated in *Cuoghi*, is that it is presumed to be expedient to grant the relief if the respondent is resident in England, and inexpedient if he is resident elsewhere. This is clearly a blunt approach, and it has been the subject of subsequent refinements. The most frequently cited case providing more detailed guidance is *Motorola*, in which the Court of Appeal set out the following five considerations which a Court hearing a Section 25 application for a worldwide freezing order should particularly bear in mind:

- whether the making of the order will interfere with the management of the case in the primary court (e.g., whether the order is inconsistent with an order made by the primary court or overlaps with it);
- whether it is in the policy of the primary jurisdiction not itself to make worldwide freezing / disclosure orders;
- whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting, inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets are located;
- whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order; and
- whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce.

Further, in *Motorola* the Court made it clear that the position of each respondent must be considered separately: the fact that it may be expedient to make an order against one co-respondent does not automatically make it expedient to do so against another.

In addition, it is important also to note the requirement, where the primary court is in an EU Member State, for there to be a "real connecting link" between England and the subject matter of the supportive interim relief sought (*Van Uden Maritime BV v Firma Deco-Line*). The precise impact of this criterion on the granting of worldwide freezing orders by the English court is not clear, in particular given the personal nature of that remedy. A cautious interpretation would suggest that, where the "real connecting link" test applies, the English court should not seek to interfere with assets within the jurisdiction of other Member States, or, at least that, for it to potentially to do so by way of a worldwide freeze, the defendant must at least be resident within the English court's jurisdiction. The underlying rationale is that the Court that makes the order should be the one best placed to police it. If neither assets nor defendant are located within the jurisdiction, it will almost always be impossible to show a sufficient connecting link to make a worldwide order. Whilst the "real connecting link" test does not, strictly speaking, apply to cases where the primary court is outside of the EU, it is clear that in those cases if no such link exists there will need to be some other compelling factor to justify ordering worldwide relief (see *Mobil Cerro Negro v Petroleos de Venezuela*), e.g., that there would otherwise be no way of policing an apparent fraud.

Apart from the additional requirement for a real connecting link in intra-EU cases, certain factors will, in general, weigh especially heavily. By way of example, in *Motorola* the claimants, alleging fraud against the defendants, sought a freezing order from the English court in support of substantive proceedings in the Southern District of New York in circumstances where two of the defendants were resident outside the jurisdiction and had no connection with England. The application did not succeed against those defendants. The Court of Appeal concluded that there was no utility in making an order it had no practical means of enforcing. That said, it is interesting to note that the application was sustained against another defendant, a Turkish national resident in Turkey, in respect of assets of his outside of England, because he also held assets in England which could be the subject of contempt (sequestration) proceedings in the event of disobedience.

The influence of the primary court's own injunctive powers—and whether it has elected to exercise them or not—is somewhat more subtle. Whilst the English court's powers will not be limited to those of the court seized with the substantive proceedings (see *Cuoghi*), the question of whether that court has the power to and/or has elected to order an equivalent injunction will nevertheless be relevant. Broadly speaking, the most important guidelines appear to be that:

- where the primary court has the power to make a worldwide freezing order, but has elected not to do so, this will strongly mitigate against the making of

such an order by the English court (*Cuoghi*, *Refco*) though not determinatively so (*Ryan v Friction Dynamics Ltd*, per Neuberger J); and

- where the primary court does not have the power to make the order sought (such as in the case of a claim before the U.S. Federal Court), then the English court should consider whether there is any reason why the primary court might be affronted by an English order. If there is none (and especially if the foreign judge has indicated that he/she would welcome an English order) then the English court should feel comfortable exercising its own powers, assuming that all other relevant criteria are satisfied (*Cuoghi*, *Motorola*). To date, the English court has been robust in intervening in such situations. In *Motorola*, for instance, the fact that the U.S. court was constitutionally prohibited from making a pre-judgment freezing order was interpreted not as a decision not to make that order, but as a situation where it would welcome the assistance of the English courts.

Policing International Fraud

In general, the English court will step in more readily in fraud cases. In such situations, its role in fighting or mitigating the consequences of *prima facie* dishonest behaviour will be emphasised and its worries about comity somewhat lessened. The extreme example of this is *Duvalier*, a fraud case where the substantive proceedings were ongoing in France and where there was no apparent link between the defendant (the former Haitian dictator who had fled Haiti post-revolution) or its assets and England, save that the defendant's solicitors were based in England and were presumed to have access to information relating to the whereabouts of their client's assets. The aforementioned decision in *Motorola* also illustrates the willingness of the English court to extend itself where there is powerful evidence of fraud. Millett LJ in *Cuoghi*, summarised the position thus:

> *In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such cooperation to be sanctioned by international convention. International fraud requires a similar response. It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.*

Injunctions from the English Court in Support of Arbitrations

The English court's power to order interim remedies, including injunctions, in support of arbitrations, is set out in Section 44 of the Arbitration Act 1996 (the "1996 Act"). Section 44 provides that the court will have the same power to order interim injunctions in support of arbitral proceedings as it does in support of legal proceedings (Subsection 44(2)(e)). Notably however:

- the court may only act if or to the extent that the arbitral tribunal has no power, or is unable effectively to act equivalently (subsection 44(5); e.g. before the tribunal has been constituted);
- where freezing injunctions are concerned, the court's power can only be exercised on an application on notice, and with the permission of the tribunal, or by written agreement of the parties, unless the case is one of urgency (subsections 44(3) and (4)); and
- section 44 can be contracted out of (subsection 44(1); compare with section 25 of the 1982 Act, the effect of which as to substantive jurisdiction is not completely clear).

Subsection 2(3) of the 1996 Act provides that the powers under Section 44 apply in relation to all arbitrations, i.e. regardless of where the seat of the arbitration is. However, by analogy with subsection 25(2) of the 1982 Act, subsection 2(3) of the 1996 Act provides that *"…the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland…makes it inappropriate to do so."*

As to the matters going to the appropriateness or otherwise of ordering extra-territorial injunctions in support of foreign-seated arbitrations, the leading authority is the judgment of Walker J in *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA*. Clearly, the court will first have to consider (where an application for a freezing injunction is concerned) whether the threshold tests of a good arguable case and a real risk of dissipation are met. Beyond this, however, in *Mobil* it was argued by the Claimant (seeking a worldwide freezing order in support of a New York arbitration, in a non-fraud case) that issues of comity largely fell away, since in the context of an arbitration there was little risk of "criss-crossing" orders from various national courts, and equally little risk of treading on the tribunal's toes, since, in the instant case that tribunal had not yet been constituted.

On the facts, Walker J concluded that there was insufficient evidence of a risk of unjustified dissipation of assets by the defendant to warrant an injunction in any case. However, for completeness he went on to consider

the extent to which it would, or would not be, right to order such an injunction pursuant to the power conferred on the court by section 37(1) of the Supreme Court Act 1981 (as it then was) and section 44(3) of the 1996 Act, as tempered by section 2(3), on the assumption that the defendant had no assets within the English court's jurisdiction. His conclusion was clear: matters of comity remain important. In the absence of fraud, a link between England and the defendant or its assets was necessary if it was to be just and convenient (under the 1981 Act) or appropriate (under the 1996 Act) to grant a worldwide freezing injunction. In this particular case, given that the seat of the arbitration was New York, and that there was no other connection between the defendant and England, the appropriate step was for the claimant to seek to injunct the defendant in Venezuela, i.e., its home jurisdiction and where the majority of its assets were located.

In practice, the English court's approach to the granting of worldwide freezing injunctions in support of foreign arbitration is equivalent to that adopted in relation to foreign litigation—indeed in *Mobil* Walker J considered the jurisprudence relating to overseas litigation at length, and the language he used in reaching his decision closely mirrored that found there. Put simply, whether a party is seeking a worldwide freezing order from the English court in support of foreign litigation or arbitration, it will almost certainly need to show that the defendant is resident within the jurisdiction, or has significant assets within the jurisdiction which an English order can be enforced against, unless (in non-EU cases) a good arguable case of fraud can be established —and even then the English court will need to be persuaded that it is right for it to make a worldwide, and not purely domestic, order in circumstances where a foreign court or tribunal has been seized of the substantive proceedings.

The Position in the British Virgin Islands

Orthodoxy

As a broad generalisation, the BVI High Court follows English common law where matters of private international law are concerned. This means that, with regard to injunctive relief in support of foreign proceedings, the position is (at least in theory) different in the BVI from that in England.

Indeed, whilst, as explained, the English court's jurisdiction to order interim relief in support of foreign litigation and arbitration is provided for by statute, namely the 1982 Act and the 1996 Act respectively, the BVI has no equivalent legislation, and so the Courts there fall back onto the case law.

Until recently, it was assumed that this meant that the BVI High Court was limited by what appeared to be the broad principle arising out of Lord Diplock's judgment in *The Siskina*, namely that in the absence of substantive proceedings in the jurisdiction, the court had no power to order free-standing injunctions against parties being sued elsewhere, even if such injunctions would, on their face, assist the foreign court or tribunal in question.

This restriction failed to give due recognition to the fact that there will be situations where securing a BVI freezing injunction as part of a strategy of international litigation will be highly desirable and/or necessary—for instance where shares in a BVI company are an asset which one wants to secure, or where a BVI company is somehow implicated in the main claim and a local order will be more easily enforceable against it. This was a point made by Lord Nicholls, in the Hong Kong context, in his judgment in the Privy Council decision of *Mercedes Benz AG v Leiduck.*

Consequently, BVI practitioners have litigated creatively to circumvent the restriction in *The Siskina*. Essentially, two approaches have been adopted by claimants/applicants:

- formulating and issuing a BVI-specific claim against the target defendant, relying on a different cause of action from that being prosecuted in the primary court, and applying for a freezing injunction in support of that fresh claim. This is the cleanest approach, and is most likely to be available where the target defendant is domiciled in the BVI and is not a party to the main action, but can be implicated in the events giving rise to that claim, e.g. on the basis of an alleged economic tort (conspiracy, inducing a breach of contract, etc.) or accessory liability for an equitable wrong (dishonest assistance in a breach of trust or knowing receipt); or
- issuing proceedings in the BVI which duplicate the claim on foot overseas, and applying for a freezing injunction by piggy-backing on these repetitious proceedings (which proceedings the claimant would then typically volunteer to stay, pending resolution of the primary claim).

Whilst the second of these two approaches might, *prima facie*, appear to be an abuse of process, it is a method that has been used with some success by local practitioners who have found the BVI High Court willing to act, in particular in fraud cases, in the interests of justice and to plug a gap in the international judicial process, notwithstanding the transparency of the procedural device used. But this approach has not yet been tested at appellate level.

Recent Developments

Against this background, it is perhaps unsurprising that efforts were being made by BVI legal practitioners to bring the position into line with that in England, and to regularise what has, for some time, been viewed as a

local legal anomaly detrimental to the reputation of the BVI's judicial system as one that is protective of legitimate international commercial activity. In a bill carrying the working title of the BVI Administration of Justice (Miscellaneous Provisions) Act, 2009, local lawyers were proposing statutory wording to the effect that "*the Court shall have the power to grant interim relief under this section in relation to proceedings commenced or to be commenced in another jurisdiction whether or not the subject matter of the proceedings is justiciable before the Court*."

However, a more recent development has superseded the private members' bill. In *Black Swan Investment I.S.A v Harvest View Ltd* and others, the Honourable Mr Justice Bannister QC, the Judge of the BVI Commercial Court (which hears business disputes valued at over U.S. $500,000) was required to consider precisely whether the BVI High Court had jurisdiction to freeze the assets of BVI registered companies implicated in substantive proceedings on foot overseas (in that case in South Africa).

In short, his Lordship distinguished *The Siskina* on the basis that it did not expressly deal with the situation where the respondents to the proposed freezing injunction were within the jurisdiction, and that the question remained open for determination. The Judge relied on the judgment of Lord Nicholls in *Mercedes Benz AG* and of the House of Lords in a case called *Channel Tunnel v Balfour Beatty Ltd* in support of this proposition. Relying on these opinions to fill what he perceived as a lacuna in the authorities, Bannister J concluded that there were sound policy reasons why a party to a dispute taking place overseas (because that was the appropriate forum) seeking a money judgment there against someone with assets in the BVI should be able to have resort to those assets—and to protect them by way of a freeze in the interim, where the usual criteria were otherwise met. Notably, this decision and its reasoning is, broadly, on all fours with that of the Jersey Court of Appeal in *Solvalub Ltd v Match Investments Ltd*, save that in that case the Court felt that following Lord Nicholls in *Mercedes-Benz* (as it did) necessarily meant not following *The Siskina*, the two decisions being irreconcilable.

The judgment in *Black Swan* was understood to be under appeal to the Eastern Caribbean Court of Appeal, and might well have gone up from there to the Privy Council for ultimate determination, but indications are now that the matter has settled before Bannister J's verdict was tested at appellate level. That said, doubtless other cases on the issue will come through sooner or later given how fertile a source of high-value commercial litigation the BVI has become.

Indeed, whilst Bannister J's decision is to be welcomed for the same reasons as the private member's bill it usurped, refinement of it by the appellate courts would be useful: in particular, the Judge approved *dicta* to the effect that no substantive cause of action was required against the respondents to the injunction, which does not chime with the existing core principles for freezes. It might be more felicitous to say that no substantive cause of action against the respondents need be articulated so long as they are sufficiently associated with a cause of action being litigated elsewhere—as in the *Black Swan* case, where the respondent companies were said to be under the ownership or control of the main defendant in the South African litigation (a private individual) and to be the legal owners of valuable assets which should properly be attributed to that wrongdoer. This is the kind of issue that is specific to multi-party cross-border litigation and which would benefit from an express extension to traditional principles. Recognition of this would be a positive step in helping to clarify the ambit of the newly established injunctive power of the BVI High Court, and to bring it more closely into line with the position enshrined by statute in England.

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Chapter News

Brazil

On March 15th, the Brazil Chapter of the New York State Bar Association ("NYSBA") organized the seminar "International Arbitration in Brazil and in the US." The seminar was hosted by Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados and had in the discussion panel the then-president of the NYSBA, Stephen Younger. President Younger led the discussion with José Emilio Nunes Pinto, a highly renowned practitioner and arbitrator, and Eduardo Damião Gonçalves, an arbitration practitioner and partner of the hosting firm.

The panelists (from left to right): Mr. Nunes Pinto, Mr. Gonçalves and President Younger

After the introductory remarks about the Brazil Chapter activities given by its chair, Isabel Franco, President Younger addressed issues relating to international arbitration from the U.S. perspective while Mr. Nunes Pinto gave his thoughts on how international arbitration has been developing in Brazil. After the presentations, there was a Q&A session moderated by Mr. Gonçalves with active interaction from the audience, comprised of more than 50 Brazilian lawyers that practice in the international arena.

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Introductory remarks by Isabel Franco

The members of the Brazil Chapter with the panelists (from left to right) Helen Naves, Rafael Villac, Mr. Nunes Pinto, Mr. Gonçalves, Isabel Franco, President Younger, José Ricardo Martins, Eugenio Deliberato and Carlos Mauricio Mirandola

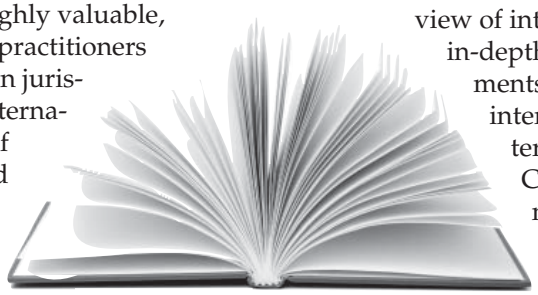
Book Reviews

Franklin, David, ed., *International Commercial Debt Collection*

Franklin, David and Harms, Steven A., ed., *International Commercial Secured Transactions*

Both published by Thomson Reuters

These two new books provide highly valuable, timely and practical guides for busy practitioners whose files sometimes involve foreign jurisdictions. Mr. Franklin, chair of the International Creditors' Rights Committee of the NYSBA, using his uniquely broad range of contacts in the legal profession around the world, which he has built up over several decades of practice, has compiled two digests of the laws of a broad range of jurisdictions from every continent and all parts of the world.



International Commercial Debt Collection is 838 pages long and covers fifty countries, including all the jurisdictions of greatest interest such as the United States, Canada, the People's Republic of China, Brazil, India, and Western Europe. To guide the reader through this, there is a carefully-thought-out and detailed table of contents. Coverage of Canada is broken down into sections for each of the major regions—British Columbia, the Prairies, Ontario, Quebec, and the Maritimes. For the United States, there are separate sections for New York, California, Illinois, Florida, Texas, Georgia and the District of Columbia. Each is written by a practitioner in the relevant jurisdiction and his or her contact information is listed in case you need further assistance.

All of the discussions of the various jurisdictions are based on a shared template so that each discussion is organized in the same way, which helps readers find the treatment of a particular issue quickly, and aids in comparing multiple jurisdictions on a particular aspect of their laws. The discussions cover such practical topics as pre-litigation collection procedures (e.g., government record searches available to reveal assets of the debtor), prerequisites for the local courts to take jurisdiction, the effect of forum selection clauses and choice of law clauses, basic requirements for filing suit, limitation periods, overview of the litigation process from commencement of the action to trial, means of enforcement of the judgment, and the enforceability of foreign judgments and arbitral awards.

In addition, there are seventeen essays on topics related to international debt collection, such as an overview of international commercial arbitration, an in-depth treatment of the enforcement of judgments in the European Union, discussions of international debt collection and trusts, international debt collection and the Vienna Convention on Contracts for the International Sale of Goods, and dispute boards. These essays are written by various experts and would, by themselves, constitute a valuable book.

International Commercial Secured Transactions has a similar format and concept: discussions of the law for each of about three dozen countries share a common template, and are written by local practitioners. The treatment of Canada is broken down by region; a similar breakdown is not provided for the United States because each of the fifty states has adopted the Uniform Commercial Code. The template is practical, starting with an overview of how secured transactions work in that country, followed by a description of international letters of credit, the statute law, the types of personal property that can be secured, the leasing of goods, the priority rules for competing liens, and the recovery and repossession of collateral. Again, a detailed table of contents quickly pinpoints for you the very place to find the answer to your question. As with the first book, this one also includes several essays on related topics, such as credit insurance and the securitization of court judgments.

In conclusion, I heartily recommend these two books to any practitioner who needs a quick overview of the law of other countries.

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Member News

International boutique law firm, **Bench Cooper Singh LLP**, opened its doors in July 2010, uniting its unique international experience and languages to serve the global legal community.

NYSBA member **Lisa Bench Nieuwveld** heads the international dispute resolution and international commercial transaction groups. Lisa has just returned to the United States after spending 6 years in The Netherlands working with medium and large law firms abroad. Lisa has worked extensively on international arbitrations, both commercial and investor-state disputes as well as on international transactional deals. Lisa speaks Dutch, Spanish and basic French. Lisa will be joined by partners Courtney Cooper, who will head the firm's International trade group, and Jaspreet Singh, who will head the Immigration and Appellate group. The firm will practice in the areas of International Arbitration and Litigation, Immigration, Appellate Litigation, International Trade and Corporate Services.

Bench Cooper Singh LLP is located at 244 Fifth Ave., Ste. J256, New York, New York 10001. Phone: 646.807.4646.

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* * *

Dr. Hong Tang, a well-known practicing lawyer and scholar focusing on international law and policy and a member of the NYSBA International Section, is currently offering limited *pro bono* services relating to the U.S. "Trade Adjustment Assistance" (TAA) Program to U.S. workers, firms, communities, and farmers that are negatively affected by globalization and international trade. Requests for the aforementioned limited *pro bono* services are welcomed. Members who are also interested in providing TAA-related *pro bono* services are encouraged to contact and coordinate with Dr. Tang. Dr. Tang can be reached at tang@lawyer.com.

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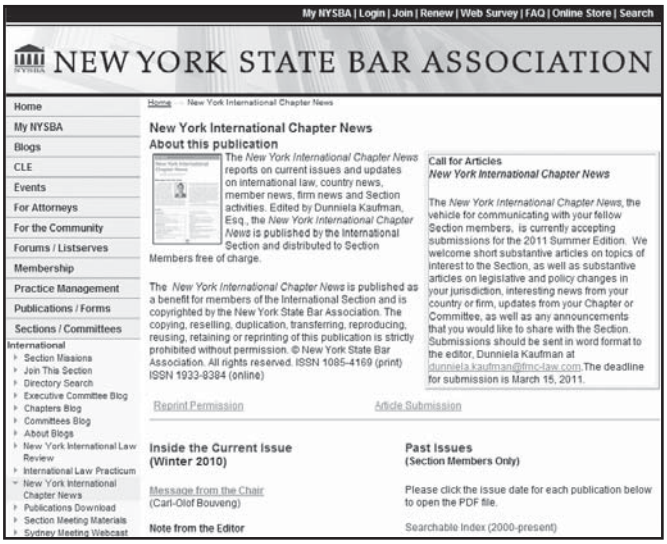

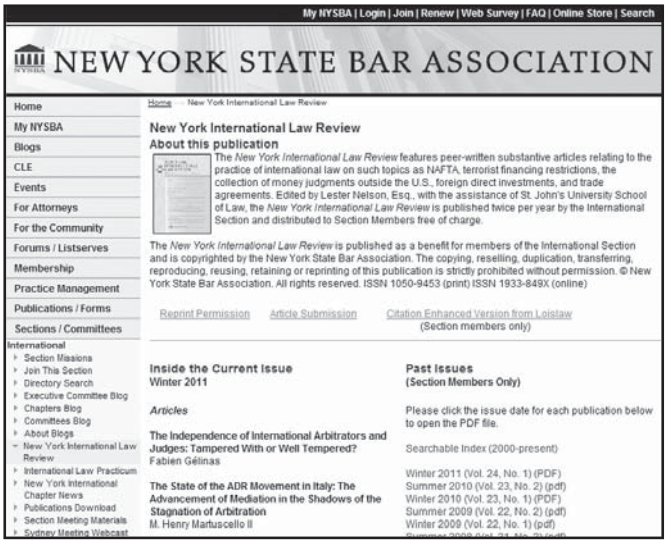

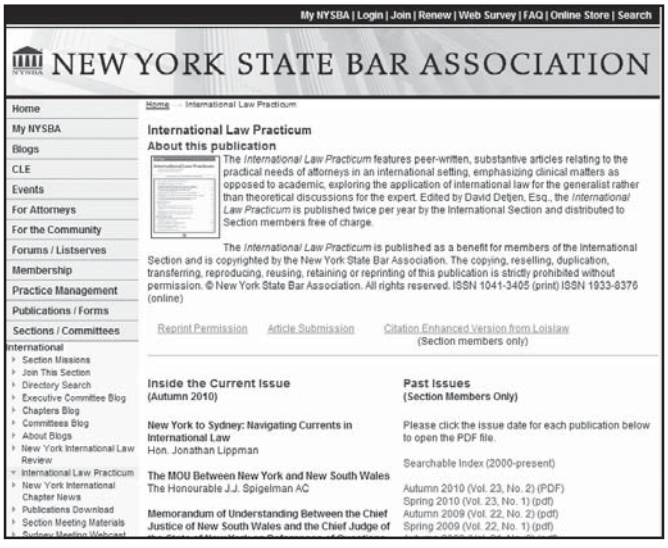

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Panama City, Panama
September 20-24, 2011

Plan now to join your friends and colleagues for the 2011 Seasonal Meeting of the International Section in Panama. The meeting will be held September 20-24, 2011. The theme of the meeting is "Latin America as an Engine for Economic Recovery and Growth."

The meeting will feature experts in their fields of law from all over the world. Don't miss this opportunity to participate.

Panama is small country, yet it has a great variety of attractions—exotic tropical rainforests, beautiful mountain refuges, Caribbean-style beaches, a thousand islands, seven living Indian cultures, a Miami-style sophisticated capital city, scads of Spanish colonial historical sites, golf, diving, sportfishing, not to mention that 8th wonder of the world and engineering marvel, the Panama Canal. It is hard to think of any other destination in the world that has such a variety of attractions so close by and so easy to get to. Panama is one of the safest countries in Latin American for tourists.

As part of Central America, Panama is just a short plane ride away. There are direct flights from New York and Newark.

Panama has the most accessible exotic nature in the world. Its position as a narrow land bridge connecting two continents endows it with some of the world's most pristine and bio-diverse rainforests in national parks covering 5 million acres.

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ISSN 1085-4169 (print) ISSN 1933-8384 (online)