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WELCOME

A Happy New Year to all our members. We hope you will enjoy this first YIAG e-newsletter of 2011, which captures our events and activities for the latter half of 2010. As always, and foremost, we wish to welcome the new YIAG members who have joined our membership since August.

2010 was a busy year overall, the period from September to December being no exception. In September, YIAG held its third 'Tylney-style', topics-based, symposium of the year at the Grove in Hertfordshire (following London in March and Rio de Janeiro in May). This was followed by an inaugural ITA CCB roundtable event in Bogota in October, an event co-hosted by YIAG with YAF and ICDR Y&A, and a very lively roundtable discussion in Kiev, Ukraine in November. Following the success of last year's event, YIAG hosted its second London Christmas social gathering at the White Swan on Fetter Lane in December, followed swiftly by yet another inaugural event, the Mauritius Discussion Group, which YIAG again co-organised - this time with Young ICCA and YAF. YIAG activities in the next few months to kick off 2011 include our first annual symposium of 2011 in Seoul, Korea in March followed by the (newly revived) YIAG symposium at Tylney Hall in May. Finally, we are pleased to formalise the announcement in this Newsletter of the winners of the Gillis Wetter Prize for 2010.

With all good wishes for a successful and prosperous 2011.
Amir, Andy, Kate and Marie



on whether CRW was entitled to immediate repayment by PGN of the sum set out in the DAB Decision should first be referred to the DAB. The Court's judgment also did not deal with the Terms of Reference or the relevant procedural orders in the arbitration, which might well have confirmed the Tribunal's mandate, or the hearing transcripts, which might indicate the issues which the Tribunal thought it was supposed to resolve.

Although the unbroken record in the Singapore Courts of successfully resisting setting aside applications of international arbitral awards ceased with *AJT* and *Perusahaan*, it seems clear that both decisions turned on very specific factual matrices. *AJT* and *Perusahaan* are unlikely to be representative of the Courts' approach to the setting aside of international arbitral awards under the IAA and Model Law. Hence, the setting aside of international arbitral awards is likely to remain a near-Herculean task.

SWITZERLAND



Catherine A. Kunz, Lalive

The New York Convention: A recent Confirmation of Switzerland's Pro-enforcement Approach

1. Introduction

In a recent decision,¹⁸ the Swiss Federal Supreme Court dismissed an application to refuse the recognition and enforcement of a foreign arbitral award based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC"). This decision, although largely in line with previous case law, is worth mentioning given the few decisions recently rendered in Switzerland in relation to the NYC and the clarification it brings as regards its interpretation. It confirms Switzerland's pro-recognition and pro-enforcement approach in the implementation of the NYC.

In this case, the Swiss Federal Supreme Court had to decide on the recognition and enforcement in Switzerland of an award of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic, with a seat in Prague. The dispute opposed a Czech supplier to a Swiss buyer in connection with an iron steel plate supply agreement. The supplier was successful and sought to enforce its award in Switzerland.

2. Right to Renew the Petition for Recognition and Enforcement (Article IV(1) NYC)

The first question was whether the close of the proceedings following the withdrawal of a prior petition for the recognition and enforcement of the arbitral award, which had not been documented in accordance with the requirements set forth in Article IV(1) NYC, had a *res judicata* effect and precluded the Claimant from renewing its petition.

The Court held that the wording of Article IV(1) NYC did not contain any indication that would exclude a renewal of the petition and underlined that the spirit of the NYC aimed precisely at facilitating the recognition and enforcement of foreign awards. The Court recalled that the possibility to complete the documents supplied in the course of the proceedings or to file a new petition with the required documents was widely recognised by scholarly writers, and further stated that under Swiss procedural law a decision to close proceedings usually has a *res judicata* effect, except where the withdrawal of the claim occurs at the beginning of the proceedings or is made in order to file a more complete claim. The Court held that this exception was to be applied to the case at hand. Interestingly, however, the Court left open the question of whether principles of civil procedure regarding the *res judicata* effect of court decisions would apply in recognition and enforcement proceedings of arbitral awards.

¹⁸ Decision of the Federal Supreme Court 4A_124/2010, 4 October 2010.

3. Compliance with the Requirements Regarding the Authentication of the Award (Article IV(1)(a) NYC)

The Court next examined the validity of a certified copy of the award with only the signature of the Chairman authenticated on the original. The Court underlined that the *rationale* of the authentication set out in Article IV(1)(a) NYC was to provide confirmation of the authenticity of the signature(s) of the arbitrators, but that it was not a mandatory requirement when the authenticity of the award was not disputed by the opposing party. The Court added that the formal requirements set forth in the NYC were not to be applied strictly given that the NYC precisely seeks to facilitate the recognition and enforcement procedure. This is largely in line with previous case law.

4. Public Policy (Article V(2)(b) NYC)

As the award did not take into account a settlement agreement entered into by the parties prior to the arbitral proceedings, the Appellant claimed its recognition and enforcement would be contrary to Swiss public policy. The Court rejected this claim and recalled that the public policy threshold set out in Article V(2)(b) NYC requires that the recognition or enforcement would contravene the Swiss concept of justice to “*an intolerable degree*” and that the public policy reservation must be applied more restrictively in cases of recognition and enforcement of awards (so-called “attenuated public policy” or “*ordre public atténué*”) than in situations where foreign law is applied directly.

5. Jurisdiction of the Arbitral Tribunal (Article V(1)(b) and (d) NYC)

The Appellant further claimed that the arbitral tribunal did not have jurisdiction as it was not the arbitral tribunal referred to in the arbitration agreement but instead its successor institution. The Court recalled that the main intention of the parties when opting for arbitration is to exclude the jurisdiction of State courts; when choosing institutional arbitration the parties express their intention to rely on the support of a trustworthy institution and fair rules of arbitration. As the successor institution presented the same guarantees as the institution referred to in the arbitration agreement, the Court considered that the intention of the parties had been respected. The Court also held that the obligation to provide significant security for costs as a prerequisite for jurisdictional objections and set-off pleas, which were not foreseen by the original institution’s arbitration rules, did not *per se* aggravate a party’s position or deprive a party of its procedural rights.

6. Composition of the Arbitral Tribunal (Article V(1) (d) NYC)

Addressing the Appellant’s claim as to the improper composition of the arbitral tribunal, the Court recalled its constant case law, pursuant to which the principle of good faith commands that objections of a formal nature be raised already during the proceedings in question. Failure to do so preclude a party from relying on the grounds set out in Article V NYC. However, the Court added that if the improper composition is raised by a party during the proceedings but disregarded by the arbitral tribunal, Article V(1) (d) NYC does not require the party concerned to have initiated setting aside proceedings against the final award.

GILLIS WETTER MEMORIAL PRIZE 2010

Most of you would have seen the announcement of the winner of the Gillis Wetter Prize on the LCIA website - full details please go to www.lcia.org/Membership/YIAG/The_Gillis_Wetter_Memorial_Prize.aspx.

Congratulations to the GWP 2010 winner, **Hussein Haeri** (London), the first and second runners-up, **Yulia Andreeva** (New York) and **Michele Potestà** (Geneva), respectively, for their excellent submissions and our thanks go to the 37 remaining YIAG members who entered extremely thoughtful and well-written submissions into the competition.