

## President's Message

The recent decision of the Swiss Federal Tribunal in *Vivendi et al. v| Deutsche Telekom, Elektrim et al.* (Decision of 31 March 2009, 4A\_428/2008) which will be published in a forthcoming issue of the ASA Bulletin, has caught considerable attention. Amongst other reports, a Global Arbitration Review headline read “in a relevant ruling for the times, Switzerland’s Supreme Court has allowed a foreign bankruptcy to justify termination of a Swiss-seated arbitration”. Indeed, the core issue before the arbitrators and the Federal Tribunal was the effect of the bankruptcy of a Polish party on its position in a Swiss arbitration commenced long before the bankruptcy. Is the issue a matter of the Polish party's legal capacity or status (*Parteifähigkeit*) and as such to be governed by the law of the party's jurisdiction or is it a procedural matter to be governed by the *lex arbitri*? The arbitrators and the Federal Tribunal opted for the first alternative.

The ASA Board has taken note of the various comments on the Federal Tribunal’s decision and discussed appropriate reactions. Some consider the decision a blow to international arbitrations seated in Switzerland as it allows Respondents that fall into bankruptcy to take advantage of their local bankruptcy laws to escape an ongoing arbitration. Accordingly, legislative initiatives are being proposed to amend the Swiss arbitration law to curb the impact of foreign local bankruptcy laws on a party’s position in an ongoing Swiss international arbitration. Others consider the Federal Tribunal’s decision to have a minor impact, either because of the uniqueness of the invoked Polish bankruptcy law provision or because they believe the decision is so obviously wrong that the Federal Tribunal will most certainly correct it at the earliest opportunity. With respect to the latter view it may be worth noting that the decision was made by a narrow majority (3:2) and that the Federal Tribunal resolved not to publish it in its bulletin of leading cases, despite the fact that it had never before decided the issue in dispute.

We are interested in hearing the views of the ASA members at large. If you have any comments or suggestions, please write to us.

Zurich, August 2009

DR. MARKUS WIRTH  
ASA PRESIDENT