

The Bulletin in Brief

This issue contains three articles. First, *Timothy Nelson* discusses the crucial heritage of the Permanent Court of Arbitration's 1910 decision in the *Orinoco Steamship* case, long before the adoption of the 1965 ICSID Convention, with respect to the **annulment of arbitral awards for *excès de pouvoir***, corruption, serious procedural misconduct and failure to state reasons. *Alexander Markus* and *Sandrine Giroud* then propose a **Swiss perspective on the impact of the ECJ *West Tankers* decision**, in particular on the Lugano regime. Finally, *Thomas Legler* considers the impact on the **arbitrability of intellectual property disputes** of the recently enacted Swiss law establishing a Federal Patent Court, with "exclusive jurisdiction" in patent matters.

As usual, you will find abstracts of the case law published in the Introduction to the **Case Law** Section (p. 263), including the following:

- A decision from the Supreme Court of 6 January 2010 confirming that the manner in which arbitrators **interpret a contract** is not governed by the principle of *pacta sunt servanda*, and cannot give rise to a violation of **public policy**; nor can the Supreme Court verify whether the arbitrators **applied correctly the law** which they found to be applicable, or whether their **determination of the applicable law** was correct;
- The decision 4A_464/2009 of 15 February 2010, in which in particular the Court ruled, in keeping with its restrictive case law, that the terms of the arbitration clause were not specific enough to amount to a valid **waiver agreement under Art. 192 PIL Act**; and in which the Court clarified that **inconsistency of reasons** ("*incohérence intrinsèque des considérants*") does not reach the breach of **public policy** threshold;
- The decision 4A_160/2009 of 25 August 2009, which addresses the issue of the **lifting of the corporate veil** and **waiver** of a party's right to rely on the arbitration agreement where it has **prevented the arbitration** by the liquidation of its alter ego (signatory to the agreement); the case is being critically reviewed by *Laurence Burger* in her note on "*la théorie des faits de double pertinence (doppelrelevante Tatsachen)*" in international arbitration; and
- The highly publicized case of *Thales v Frontier AG* (the **sale of French frigates to Taiwan** case), decision 4A_596/2008 of 6 October 2009, in which, following an application for

revision/review of the award, the Supreme Court annulled a 1996 ICC arbitral award, on the **basis of a crime** (procedural fraud) established as against a key protagonist in the case, which it found had affected the outcome of the arbitration; the matter was remanded to the arbitrators.

This section also includes four case commentaries. *Christopher Koch* analyses a late 2008 Supreme Court decision¹ in a note on “Judicial activism and the limits of institutional **arbitration in multiparty disputes**”. *Tina Wüstemann* and *Manuel Arroyo* provide some critical insight into the decision from the Zurich High Court on the validity under Swiss law of an arbitration clause providing on “**FIFA shall be the sole arbiter**”. The note by *Sandra Adeline* deals with the increasing reference to **the concept of “estoppel”** by the French Cour de cassation (France) by reference to *Société Merial c. Société Klocke Verpackungs – Service GMBH*. *Bernd Ulrich Graf* and *Arthur Appleton* explain the ECJ decision *Asturcom*, which confirms that **EU law on unfair terms** is a matter of **public policy**.

The Arbitration News & Notes section contains a summary of the key features of the **new Irish Arbitration Act 2010** by *Klaus Reichert*. Finally, we have included our usual reports on the activities of ASA.

If you have critical remarks or suggestions as to how the Bulletin could be further improved, or wish to provide materials for possible publication, please do not hesitate to contact us.

For the Editorial Board

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REMINDER: CALL FOR MATERIALS - TESTIMONY EVIDENCE

The next piece on Arbitration Practice and Procedure to be published in 2010 will deal with testimony evidence. We would welcome unpublished decisions (recorded in procedural orders, letters or awards) on the topic. (For more information, see ASA Bull. 1/2010, p. 6 or contact Domitille Baizeau at dbaizeau@lalive.ch).

¹ Federal Court Decision 4A_376/2008 of December 5, 2008 in ASA Bull. 4/2009, p. 745. An English translation of the decision, which was published in Italian, can be found at page 762 of the same issue.