

Europe

EDITED BY: VIOLETA BALAN AND JASON LINDBLOOM

CONTRIBUTIONS BY: ELENA SABKOVA, DANY KHAYAT, JOSÉ CAICEDO, DR. MARK C. HILGARD, DR. JAN KRAAYVANGER, TILL FELDMANN, VICTORIA POPOVA, RICK SILBERSTEIN, AND DR. FLORIAN S. JÖRG*

I. Bulgaria

A. THE SAPARD FRAUD AND THE CONSEQUENCES FOR THE BULGARIAN ECONOMY

In February 2008, an investigation revealed a scheme for the misappropriation of funds granted by the European Union's ("EU") Special Accession Program for Agriculture and Rural Development ("SAPARD") program, funding for which started before Bulgaria's 2007 accession. According to the European Anti-Fraud Office ("OLAF"), Germany, Switzerland, and Bulgaria wrongfully obtained €7.5 million from the fund by importing old butcher machinery from Germany, then requesting fraudulently high reimbursements from SAPARD. Both public officials and private businesspeople were involved.

The Bulgarian trial, alleging money laundering, fraud, and participation in organized crime, started in the winter of 2007 but was postponed until September 2009. The Bulgarian courts finally sentenced the defendants to prison in June 2010.¹ The German defendants had been sentenced by German courts two years earlier.

* The 2010 Year-in-Review of the Europe Committee of the ABA Section of International Law was coordinated and edited by Violeta Balan, associate at Mayer Brown LLP, in Washington, D.C. and Jason Lindbloom, legal officer with Foyer International in Luxembourg and Judge Advocate with the United States Air Force Reserve. The contribution on Bulgaria was provided by Elena Sabkova, LL.M, Legal Consultant with the World Bank in Washington, D.C. The contribution on France was provided by Dany Khayat, Partner and José Caicedo, Associate, both with Mayer Brown LLP in Paris, France. The contribution on Germany was provided by Dr. Mark C. Hilgard, Partner, Dr. Jan Kraayvanger, Partner, and Till Feldmann, Rechtsreferendar (legal intern) all with Mayer Brown LLP in Frankfurt, Germany. The contribution on Moldova was provided by Victoria Popova, LL.M, Legal Consultant with the World Bank in Washington, D.C. The contribution on Spain was provided by Rick Silberstein, Partner at Gomez-Acebo & Pombo. The contribution on Switzerland was provided by Dr. Florian S. Jörg, Partner with Bratschi Wiederkehr & Buob, in Zurich, Switzerland.

1. "INFORMATION SECURITY" BNT, *ДЕЛОТО ЗА ИЗТОЧВАНЕ НА ПАРИ ПО ПРОГРАМА САПАРД* [The Case of Siphoning Off SAPARD Money], <http://infocenter.bnt.bg/content/view/full/2856> (last visited Jan. 29, 2011).

Ninety-eight other suspicious projects have been funded by SAPARD since 2007 and are currently under investigation. These suspicions compelled the EU to freeze €140 million in investments in agriculture in 2008 and 2009. Moreover, because of the scandalous fraud schemes in this fund, the Bulgarian Public Fund "Agriculture" is required to return nearly €230 million to the SAPARD fund by the end of 2011.²

One of the main reasons for the prevalence of such a large number of suspicious and fraudulent projects is that Bulgaria lacks a strong legislative framework in the area of EU funding. Currently, all procedures, applications, evaluations, and all components of the process absorbing the EU funds are regulated by decrees of the Council of Ministers.³ Decrees 55 and 121 were specifically designed to serve the area of EU funding and related procedures.⁴

In addition, earlier this year, Tomislav Donchev, the Minister of European Affairs of Bulgaria, announced that new legislation would be drafted to fill the gap in EU funding. Some of the provisions in the new legislation include shorter deadlines for verification of the payment documents and enforcement of penalty mechanisms to ensure accuracy of the new deadlines.⁵ In addition, the Minister recommended removal of the preliminary control in auctions.⁶ Currently, municipalities take preliminary measures to control the EU funding auctions in order to ensure fitness of the participants. However, these procedures can easily be impaired by arbitrary and corrupted actions. Therefore, removal of such preliminary control conducted by the local government would increase the chances of fair and effective auctions.

Furthermore, the proposed EU funding law would need to establish a certification process for consulting services offered to EU funding applicants.⁷ The consultant-applicants would be required to go through a standardized examination to ensure a higher quality of service delivered to the auctioneers. Finally, the proposed legislation will allow consulting services to be accounted towards the operational expenses of program applicants for EU funding.⁸ However, such new legislation has not yet been drafted. In addition, the country's framework related to public procurement is not compliant with the European Directive.

2. *Фонд Земеделие трябва да събере 230 милиона до 2011* [Agriculture Fund Must Collect 230 Million by 2011], 24 HOURS, Oct. 20, 2010, available at <http://www.24chasa.bg/Article.asp?ArticleId=648548>.

3. Lily Granitska, *Подготвя се закон за еврофондовете* [Prepare Legislation for EU Funds], DNEVNIK, May 11, 2010, available at http://www.dnevnik.bg/evropa/evrofinansirane/novini/2010/05/11/898832_podgotvia_se_zakon_za_evrofondovete/.

4. *Опростяват правилата за изпълнение на европроекти с промени в ПМС No. 55* [Simplify the Rules for the Implementation of EU Projects with Changes in Decree No 55], EU CONSULT, <http://www.euconsult.bg/bg/news/pms55-changes.html> (last visited Jan. 29, 2011).

5. Granitska, *supra* note 3.

6. *Id.*

7. *Id.*

8. *Id.*

B. THE EU DIRECTIVE 2007/66/EC ON PUBLIC PROCUREMENT IN EUROPEAN UNION: EMBEDDED IN THE AMENDED BULGARIAN PUBLIC PROCUREMENT ACT

In the summer of 2010, the EU initiated an investigation and sanctions against Bulgaria due to the country's failure to implement EU Directive 2007/66/EC ("Directive") by the end of 2009.⁹ Remedies Directive 2007/66/EC aims at strengthening national review procedures for combating illegal contract awards. It introduces a mandatory standstill period of at least ten days between contract award and actual signature of the contract to allow bidders a reasonable period to challenge the award decision. The Directive also seeks to combat illegal direct awards of public contracts, which is the most serious infringement of EU procurement law. Under the Directive, national courts are able to render void such contracts that have been illegally awarded without transparency and prior competitive tendering.¹⁰ Accordingly, and because of the European Union's measures against Bulgaria and its non-compliant laws in the area of public procurement, the country's legislators amended the Public Procurement Act to meet European requirements.¹¹

The Amended Public Procurement Act includes fundamental changes related to the conduct of public procurement procedures. The maximum term of the contracts for provision of services to the government was extended from four to five years, and a provision was added to the law allowing for contracts related to financing of investment projects of the EU to be as long as ten years.¹² Furthermore, the participation of subcontractors was ensured by mitigation of the requirements for subcontractors and apportionment of the requirements based on the subcontractors' participation in the project.¹³ In addition, the performance bond was reduced from five percent to three percent. Finally, an opportunity for amendment of already-existing procurement contracts was ensured in cases of unforeseen circumstances, such as force majeure.¹⁴

Complete implementation of the EU's Directive 2007/66/EC also required some amendments related to the appeal of public procurement procedures. The amended Public Procurement Act makes appealable only decisions of contracting government authorities, not their acts and failures to act.¹⁵ In addition, the public procurement procedure is suspended if an appeal is filed against the procedure for selection of general contractors. The term for entering a judgment is reduced from two months to one month.¹⁶ Another amendment adds two more grounds for declaring public procurement contracts voidable:

9. Irina Novakova, *България не прилага европейското право за обжалване на обществени поръчки [Bulgaria Does Not Apply European Law to Challenge a Procurement]*, ДНЕВНИК, June 24, 2010, available at http://www.dnevnik.bg/bulgaria/2010/06/24/922407_bulgariia_ne_prilaga_evropeiskoto_pravo_za_objalvane/.

10. Press Release, Europa, Internal Mkt.: Comm'n Acts To Ensure that 12 Member States Implement EU Rules on S'holders' Rights in Listed Companies and Pub. Procurement Redress (June 24, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/815&format=HTML&aged=0&language=EN&guiLanguage=en>.

11. *Amendments to the Public Procurement Act ("the PPA")*, KPMG (July 23, 2010), <http://www.kpmg.com/BG/en/IssuesAndInsights/ArticlesPublications/Newsletters/Tax/Documents/Amendments%20to%20the%20Public%20Procurement%20Act%20.html> (last visited Jan. 29, 2011).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

(i) the conclusion of a contract where an infringement is identified and before the enforcement of all related decisions of the contracting government authority, and (ii) the unlawful conclusion of procurement contract in violation of public procurement procedure.¹⁷ If a contract is declared void, the Public Procurement Act provides for restitution. Moreover, the aggrieved bidder may seek monetary damages under the Bulgarian Administrative Procedure Code.¹⁸ The Bulgarian Commission for the Protection of Competition may also impose a sanction of ten percent of the contract value where a contract was awarded unlawfully.¹⁹ Finally, a new chapter in the Public Procurement Act provides a mechanism to notify the European Commission of serious infringements.²⁰

Unlike the EU funding legislation that is yet to be drafted, the Bulgarian legislators were much more effective in adapting the Bulgarian Public Procurement Act to meet the requirements of the EU laws.

II. France

A. FRENCH EXTENSIVE APPROACH TO THE INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS

On February 12, 2009, the Paris Court of Appeal rendered an important decision concerning the requirements of independence and impartiality of arbitrators in an arbitration seated in France. This decision drew passionate negative reactions from scholars and practitioners²¹ as well as from certain arbitration institutions.²² On November 4, 2010, the French Supreme Court ("*Cour de cassation*") decision was reversed on procedural grounds.

The case stemmed from a request for the annulment of a partial International Chamber of Commerce ("ICC") arbitral award brought by a Greek company J&P Avax SA ("Avax") against an Italian company Société Tecnimont SPA ("Tecnimont"). During the arbitral proceedings, each party appointed an arbitrator who in turn chose the Chairman. In the communication to the ICC in which the Chairman accepted his appointment, he disclosed that the Washington and Milan offices of his law firm had represented Tecnimont's parent

17. *Amendments, supra* note 11.

18. *Id.*

19. *Id.*

20. *Id.*

21. See *La SA J&P Avax SA v. Société Tecnimont SpA*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Feb. 12, 2009, available at <http://www.arbitrage-maritime.org/fr/Misc/Tecnimont.pdf>. The following notes and reviews have been published: Dany Khayat, *Paris Court's Strict Approach to the Independence and Impartiality of Arbitrators*, INT'L ARBITRATION PERSPECTIVES 5 (2009), available at <http://www.mayerbrown.com/publications/article.asp?id=8308&nid=6>; Caroline Verbruggen, *The Arbitrator—As a Neutral Third Party*, YOUNG ICCA BLOG (Jan. 22, 2010), <http://www.youngicca-blog.com/?p=96>; Louis Degos, *La révélation remise en question(s) Retour sur l'arrêt de la Cour d'appel de Paris du 12 février 2009, SA J. & P. Avax SA c/ Société Tecnimont SPA*, GAZETTE DU PALAIS 6 (Dec. 15, 2009), available at [http://www.louis-degos-2010.fr/publications/responsabiliteDesArbitres/La%20r%C3%A9v%C3%A9lation%20remise%20en%20question\(s\).pdf](http://www.louis-degos-2010.fr/publications/responsabiliteDesArbitres/La%20r%C3%A9v%C3%A9lation%20remise%20en%20question(s).pdf).

22. On the website of the Maritime Arbitral Chamber of Paris, for instance, a severe criticism to the Paris Court of Appeal's decision has been posted. The author argues that the case law is demanding a totally exaggerated, unreasonable alarming and devilish transparency requirement. *Indépendance des arbitres et arbitrage spécialisé [Independence of Arbitrators and Arbitration Specialist]*, CHAMBRE ARBITRALE MARITIME DE PARIS, http://www.arbitrage-maritime.org/fr/4_miscellaneous.php?page=revelation (last visited Jan. 29, 2011).

company in a case that was no longer active. He added that neither he nor anyone else in the Paris office acted for Tecnimont. The Secretary-General of the ICC then confirmed these appointments.

During the arbitration, the Chairman made further disclosures that, between 2002 and 2005, his law firm and its Paris office represented an affiliate of Tecnimont and was representing, at the time of the arbitration, other affiliates before the French courts. Avax moved to disqualify and replace the Chairman, but the ICC rejected the challenge. A partial award was subsequently rendered and Avax was held liable for the breach of its agreement with Tecnimont.

Avax brought annulment proceedings in France against the partial award claiming a breach of Article 1502 § 2 of the French Code of Civil Procedure, which provides that the annulment of an arbitral award may be requested if the tribunal was improperly constituted. The Paris Court of Appeal noted that impartiality and independence of an arbitrator constitute “the very essence of the arbitral function.” The arbitrator must reveal any circumstance which may possibly affect his judgment or provoke in the minds of the parties a reasonable doubt as to his qualities of impartiality and independence.²³ Then the court found that the Chairman had not fulfilled his obligation to disclose. Specifically, the Court took into account the fact that Avax had questioned the Chairman’s connections to Tecnimont and had requested additional information from him during the course of the proceedings. Finding that the tribunal had been improperly constituted, the court annulled the partial arbitration award.

Tecnimont filed a motion before the *Cour de cassation* seeking to quash the decision of the Paris Court of Appeal. On November 4, 2010, the court reversed the decision of the Paris Court of Appeal on procedural grounds.²⁴ The court found that the lower court ruled on facts that had not been invoked by Avax and had modified the case before it. The matter was therefore remanded to the Reims Court of Appeal.²⁵

The scope of the *Cour de cassation*’s decision is debated among practitioners. Some practitioners opine that the court only ruled that the Paris Court of Appeal did not correctly address Tecnimont’s arguments about the thirty-day time limit set by the ICC Rules. It was therefore just a question of mere procedural correctness. Moreover, the merits of the Paris Court of Appeal’s decision were not examined by the *Cour de cassation*. Therefore, it is argued, the decision may be understood to mean that the *Cour de cassation* did not disagree with the lower court’s findings that the Chairman lacked independence and that the standard applied should be retained. For other practitioners, the decision of the *Cour de cassation* shows the importance of the issue raised by Tecnimont which was not addressed by the Paris Court of Appeal: whether a failure to bring a timely challenge

23. Such obligation is provided for by Articles 7(2) and 7(3) of the ICC Rules not only at the moment of the appointment, “An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature which may arise during the arbitration.” INT’L CHAMBER OF COMMERCE, RULES OF ARBITRATION 7 (May 2010), available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

24. Société Tecnimont SpA v. J&P Avax SA, Cour de cassation, [Cass] [supreme court for judicial matters] 1e civ., Nov. 1, 2010, Case No. 09-12716 (Fr.), available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=trchJuriJudi&idTexte=JURITEXT000023013868&fastReqId=682827486&fastPos=>.

25. Under French law, when the *Cour de cassation* quashes a decision from a court of appeal, it designates a different court of appeal to decide the appeal. COUR DE CASSATION, ABOUT THE COURT, http://www.courdecassation.fr/about_the_court_9256.html (last visited Jan. 29, 2011).

under the ICC Rules deprive a party of the right to contest the validity of an ICC award on the same grounds.

On the one hand, the *Cour de cassation's* decision may give the impression that there will be no consequences under French law for breaching what the Paris Court of Appeal characterized as a "fundamental" right because the injured party did not submit its challenge in a timely manner. Indeed, one can infer from the decision that, had the lower court addressed Tecnimont's argument, it would have found that the request to set aside the award was inadmissible. On the other hand, as Tecnimont argued, if the ICC rejected the challenge because it was time-barred, it is questionable whether that would have prevented the Paris Court of Appeal from deciding whether or not the Chairman lacked the necessary independence.²⁶

One interpretation of the *Cour de cassation's* decision is that the parties to an ICC arbitration undertook the contractual obligation to file a motion with the ICC within a thirty-day limit after becoming aware of facts which question the independence of an arbitrator. A party that does not respect this obligation must therefore be considered to have waived its right to challenge the independence of the arbitrator later, once the award is reviewed by a court. However, it was certainly difficult for the Paris Court of Appeal to assess whether Avax's challenge was timely or not, given that the ICC did not explain its reasons for rejecting the challenge. In such circumstances, recourse to a court would seem justified, as it would be against the spirit of international arbitration if a ruling with no reasons could eventually bind the parties on a "fundamental" issue.

The decisions in this matter demonstrate the importance of continuous and strict conflict checks by arbitrators throughout the arbitration proceedings. Arbitrators involved in arbitration proceedings with a seat in France must ensure that their independence and impartiality is preserved in the eyes of the parties not only at the inception of the arbitration but until the final award is rendered, by updating, whenever necessary, the disclosure they initially made.

The strict approach of the French courts requires arbitrators to make sure that conflict of interest databases are regularly updated and consulted. Undoubtedly, this adds to the arbitrators' responsibilities and may be challenging to carry out in practice, especially when arbitrators are part of an international law firm. However, far from making arbitration more complex, this important decision has the positive effect of ensuring that arbitrators sitting in international arbitration tribunals in France are, and remain, truly independent and impartial throughout the proceedings.

The criticism initially made to the Paris Court of Appeal's decision disregards current international practice. The disclosure of the links between an arbitrator's law firm and one of the parties is by no means extravagant and should certainly be taken into account to assess the independence and impartiality of an arbitrator in light of the specific circumstances surrounding each case. The International Bar Association, for instance, provides that:

26. In *Mutu v. Chelsea Football Club*, the Swiss Federal Tribunal ruled that the Court of Arbitration for Sport is a private body and that its decision is not binding on the Federal Tribunal later. It therefore concluded that the Federal Tribunal can freely review whether the fact alleged in support of a challenge is a basis for supporting a claim that the panel of the CAS comprising the challenged arbitrator was improperly composed.

if one of the parties is a legal entity which is a member of a group with which the arbitrator's firm has an involvement, such facts or circumstances should be reasonably considered in each individual case. Therefore, this fact alone shall not automatically constitute a source of a conflict of interest or a reason for disclosure.²⁷

It remains, however, to be seen if the Reims Court of Appeal, presided by Mr. Dominique Hascher, who was Secretary-General of the ICC International Court of Arbitration, will maintain the same position. Whatever may be the final solution rendered by French courts, this case has already had an important practical effect. Following the Paris Court of Appeal's decision, the ICC modified the form by which arbitrators accepted their appointment. It is now a declaration of acceptance, availability and independence by which arbitrators, "having made due enquiry," state that they are independent from the parties.

III. Germany

A. STABILIZATION AND REGULATION OF THE FINANCIAL MARKET

On May 10, 2010, the Member States of the EU agreed to create the European Financial Stability Facility ("EFSF"),²⁸ a legal instrument aimed at preserving financial stability in Europe by providing financial assistance to EU Member States in difficulty. To reach these goals the EFSF is construed in the form of a special purpose vehicle that sells bonds and uses the money it raises to make loans up to a maximum of €440 billion to EU Member States in need. The bonds will be backed by guarantees given by the European Commission, the Member States, and the IMF. Germany gave a guarantee in the amount of €123 billion, which can be exceeded by twenty percent under special circumstances.²⁹ A constitutional complaint against the German participation in the EFSF was not successful.³⁰

In June and September, the European Commission temporarily approved, pending a further review, comprehensive supporting measures for the financially stricken banks WestLB (June) and Hypo Real Estate ("HRE") (September).³¹ The banks received finan-

27. IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION 14-15 (May 22, 2004), http://www.voldgiftsforeningen.dk/Files/Filer/Final_Text_of_Guidelines.pdf (last visited Jan. 29, 2011). The Swedish Supreme Court, on November 19, 2007, cited the IBA Guidelines on Conflicts of Interest in International Arbitration when it set aside an award for lack of independence of an arbitrator who was a consultant for and shared offices with a law firm which had a client relationship with the group of companies to which one of the parties belonged. See Christophe Imhoos, Delphine Rooz & Christophe Seraglini, *Briefing Actualites: Int'l Arbitration and Alternative Dispute Resolution*, 2008 INT'L BUS. L. J. 718, 720, available at <http://www.iblj.com/gratuit/22009255-265.pdf>.

28. Council Regulation 9606/10, Establishing a European Financial Stabilization Mechanism, (EU), available at <http://register.consilium.europa.eu/pdf/en/10/st09/st09606.en10.pdf>.

29. Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus [Act on the Granting of Guarantees in Connection with a European Financial Stabilization Mechanism], May 22, 2010 BGBl. I at 627, available at <http://www.gesetze-im-internet.de/bundesrecht/stabmechg/gesamt.pdf>.

30. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 9, 2010, 2 BvR 1099/10, available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20100609_2bvr109910.html.

31. Press Release, Europa, State Aid: Comm'n Prolongs Temp. Approval of Aid to German WestLB and to Austrian Hypo Alpe Adria Group (June 22, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/774&format=HTML&aged=1&language=EN&guiLanguage=en>; Press Release, Europa, State Aid:

cial aid from the German government by being granted the possibility to transfer toxic and non-strategic assets of approximately €200 billion into a winding-up institution (bad bank) at account value and by offering additional state guarantees of up to € 40 billion. Before a final decision on the restructuring plan will be adopted, European Competition Commissioner, Joaquín Almunia, will closely examine the long-term viability of the banks and the adequacy of the measures to limit distortions of competition and to ensure burden sharing.

After the temporary ban of naked short selling of specific bonds and stocks expired in January 2010, a ban that had been imposed by means of an order of the Federal Financial Supervisory Authority (BaFin), the federal legislator issued a statutory and permanent ban of naked short selling and of selling of Credit Default Swaps by implementing Section 30h into the Securities Trading Act (Wertpapierhandelsgesetz–WpHG).³² The ban aims at limiting financial speculation and at decreasing the speed of a potential negative stock market performance.

B. NUCLEAR ENERGY

At the end of 2010, the Bundestag and Bundesrat passed the eleventh modifying act to the Nuclear Energy Act,³³ which was signed and entered into force in December 2010. Due to this modification, the German nuclear power plants will operate on average twelve years longer than decided by the former government. As a result, the act delays Germany's exit from nuclear energy by several years, which has led to severe protests against the act. The government also intends to implement a tax on nuclear fuel. Several members of the Bundestag announced their intention to file complaints against the delayed exit from nuclear energy at the Federal Constitutional Court.

C. LABOR AND EMPLOYMENT

At the beginning of 2010, the Ministry of Labor and Social Affairs³⁴ prolonged the period during which employers can receive short-time worker's money (Kurzzeitarbeitergeld). Employers who applied for the money in 2009 may receive it for up to twenty-four months. Employers who applied in 2010 may receive it for up to eighteen months, instead of twelve months. Short-time worker's money is a financial aid granted by the government in order to allow employers to reduce the amount and costs of production and at the same time to keep all employees employed by having them work short-time, but paying the full wage. The aim of the order is to soften the consequences of the financial

Comm'n Temporarily Authorizes Additional State Support for Hypo Real Estate and Extends Scope of Ongoing Investigation (Sept. 24, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1172&format=HTML&aged=1&language=EN&guiLanguage=en>.

32. Gesetz zur Vorbeugung gegen missbräuchliche Wertpapier- und Derivategeschäfte [WpMiVoG] [Act on Prevention of Abusive Dealings With Bonds and Derivatives], July 21, 2010, BGBl. I at 945, *available at* http://www.bundesfinanzministerium.de/nn_1940/DE/BMF_Startseite/Service/Downloads/Abt_VII/DiskE_Finanzmarktstab__st_C3_A4rkG,templateId=raw,property=publicationFile.pdf.

33. Elfites Gesetz zur Änderung des Atomgesetzes [Eleventh Act to Amend the Atomic Energy Act], Sept. 28, 2010, BTDrucks 17/3051, *available at* <http://dipbt.bundestag.de/dip21/btd/17/030/1703051.pdf>.

34. See Bundesministerium für Arbeit und Soziales, <http://www.bmas.de/portal/16702/startseite.html> (last visited Jan. 29, 2011).

crisis, especially for small and medium sized businesses. The regulation is regulated in the Third Social Affairs Code (“SGB III”) and was valid until December 31, 2010.

In its decision of June 10, 2010,³⁵ the Federal Supreme Court on Employment Matters found that an extraordinary termination with immediate effect is not justified in the case of a minor misconduct of the employee. In the case before the court, the employee had stolen deposit coupons with a total value of €1.30 from the employer. The court held that such minor misconduct cannot reasonably destroy the trust and confidence built over thirty years of employment and therefore found the termination by the employer to be disproportionate and invalid.

D. GAMBLING AND SPORTS BETTING

The European Court of Justice (“ECJ”) found that the German State treaty concerning lotteries in Germany (*Staatsvertrag zum Lotteriewesen in Deutschland*) was not in conformity with European Law and that it infringed on Articles 43 EC and 49 EC.³⁶ The State treaty creates a uniform framework for the organization, operation, and commercial brokering of gambling apart from casinos, and restricts such gambling to a high extent. In contrast to the Federal Constitutional Court, which had held the State treaty to be unconstitutional, yet upheld it for a transitional period,³⁷ the ECJ ruled that the provisions of the State treaty could not even apply during a transitional period. While this judgment fundamentally changes the present legal situation on gambling and betting in Germany, it is not yet clear what consequences it will have in the long run, especially since the legal provisions on gambling and sports betting vary in detail in the different German states.

E. ENGLISH AS THE LANGUAGE OF GERMAN COURTS

A federal initiative suggests that court proceedings in international commercial disputes can be held in English before international chambers for commercial matters. The initiative, which has been widely applauded,³⁸ aims at encouraging foreign parties to engage in court proceedings in Germany. As a test run, international commercial disputes can be held in English before international chambers for commercial matters of four German courts, namely the regional court of Cologne, Bonn, and Aachen, as well as the regional supreme court of Cologne.

35. Bundesarbeitsgericht [BAG] [Federal Supreme Court on Employment Matters], June 10, 2010, 2 AZR 541/09, available at <http://openjur.de/u/56734.html>.

36. Case C-409/06, Winner Wetten GmbH v. Mayor of Bergheim (Sept. 8, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:288:0006:0006:EN:PDF>.

37. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 28, 2006, 1 BvR 1054/01, available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20060328_1bvr105401en.html.

38. Mark C. Hilgard, *Englisch als Gerichtssprache in Deutschland?* [English as the Language of the Courts in Germany?], AMCHAM GERMANY, http://www.amcham.de/fileadmin/user_upload/Policy/Corporate_Law/101111_POP_Englisch_als_Gerichtssprache.pdf (last visited Jan. 29, 2011).

F. COMPLIANCE/DATA PROTECTION

On July 6, 2010, BaFin published a newsletter³⁹ in which it summarizes its present interpretations of the conduct of business rules imposed by the Securities Trading Act and complements them with new regulations. The newsletter with the title “Minimum requirements for the compliance function and additional requirements governing rules of and further behavioral, organization and transparency requirement under sections 31 et seq. of the Securities Trading Act (Wertpapierhandelsgesetz–WpHG) for Investment Services Enterprises”⁴⁰ solidifies the duties imposed by the Securities Trading Act which financial service institutions such as banks must adhere to when rendering financial services to customers. The MaComp is the first uniform set of rules made available by the BaFin to financial service institutions. The requirements of the MaComp are to be implemented by the institutions by January 1, 2011.

In the area of data protection, the government intends to issue an Act on the Protection of Employees’ Data (Beschäftigtendatenschutzgesetz) which aims at protecting employees’ data from their employer. The Act is a reaction to the scandalous spying upon employees by several large German companies and banks, for example, hidden video surveillance of employees. The Act is expected to enter into force some time in 2011.

IV. Moldova

A. MOLDOVAN INVESTOR CLAIMS ILLEGAL EXPROPRIATION BY KAZAKHSTAN

Moldova is the poorest country in Central Eastern Europe,⁴¹ riddled in all aspects by the past communist regime and currently lacking an elected president.⁴² Little known to the Western world, Moldova has been a party to investor-state arbitrations in a few cases.⁴³ However, the U.S. \$1 billion investment arbitration recently filed by a Moldovan investor against Kazakhstan might just put this country on the investor-state arbitration map and shed some light into its economy and the intricacies of the post-Russian communist politics.

39. *Minimum Requirements for the Compliance Function and Additional Requirements Governing Rules of Conduct, Organization and Transparency Pursuant to Sections 31 et seq. of the Securities Trading Act for Investment Service Enterprises*, CIRCULAR 4/2010 (WA), (BaFin), June 7, 2010, available at http://www.bafin.de/cln_152/nr_724268/SharedDocs/Veroeffentlichungen/EN/Service/Circulars/rs_10_06_07_macomp_en.html.

40. *Id.*

41. Ina Dimireva, *Moldova Investment Climate 2009*, EUBUSINESS, Feb. 9, 2010, available at <http://www.eubusiness.com/europe/moldova/invest>.

42. U.S. DEP’T OF STATE, BACKGROUND NOTE: MOLDOVA, <http://www.state.gov/r/pa/ei/bgn/5357.htm#gov> (last visited Jan. 29, 2011); see also AUSTRALIAN GOV’T, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, MOLDOVA COUNTRY BRIEF, http://www.dfat.gov.au/geo/moldova/moldova_brief.html (last visited Jan. 29, 2011).

43. See *Link-Trading Joint Stock Co. v. Moldova* (2002), available at <http://ita.law.uvic.ca/documents/Link-Trading-Moldova.pdf>; see also *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Moldova* (2005), available at <http://ita.law.uvic.ca/documents/Bogdanov-Moldova-22September2005.pdf>; see also *Republic of Moldova’s Legal Proceeding Against Intercomsoft Dismissed*, ENHANCED ONLINE NEWS, Aug. 9, 2010, available at <http://eon.businesswire.com/news/eon/20100809005985/en/Intercomsoft/Ministry-of-Economics/Moldova>.

On September 8, 2010, Ascom filed an investor-treaty arbitration under Article 26 of the Energy Treaty against Kazakhstan before the Arbitration Institute of the Stockholm Chamber of Commerce claiming expropriation by the state of Kazakhstan and demanding U.S. \$1 billion in just compensation.⁴⁴ The arbitration is in its incipient phase: no arbitrators have been chosen and the request for arbitration is not yet available for the public review.⁴⁵ However, the case has been widely publicized by the media,⁴⁶ and the Moldovan investor has given interviews and posted information regarding his claims on the website of Tristan Oil, Ascom's subsidiary.⁴⁷

Ascom has been present in the energy industry in the Caspian for the past fifteen years—first in Turkmenistan and then in Kazakhstan. In 1999, Ascom bought two Kazakh producers, KazPolMunai (“KPM”) and TolyknNefteGas (“TNG”), drilled wells, and made substantial investments in the infrastructure of the Borankol and Tolkyln fields. In 2008, Ascom's oil production increased and the company received bids from the Kazakhstani state company KazMunaiGas (“KMG”).

It is from that period, Ascom claims, that the company began to be subjected to a “systematic campaign of harassment and illegal treatment” by the Kazakhstani state authorities.⁴⁸ It is important to mention that Ascom's owner is Anatoli Stati, believed to be the richest man in Moldova and the rival of the former Moldovan president Vladimir Voronin.⁴⁹ Ascom also claims that the avalanche of the Kazakhstani persecution, which led to the company's expropriation, was triggered by a letter, allegedly sent by former Moldovan President Vladimir Voronin to the Kazakhstani President Nursultan Nazarbayev, in which the former made false and defamatory accusations against Anatoli Stati.⁵⁰

As this case seems to have a complex plot and a lot of political intricacies, it will be interesting to monitor its evolution and to learn its outcome. It is also interesting to note that although Moldova has been a signatory to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (“ICSID Convention”), it has never formally ratified it.⁵¹ However, in a recent official press re-

44. Ascom S.A. (Mold.) v. Kazakhstan, ENERGY CHARTER, <http://www.encharter.org/index.php?id=496&L=0#c1650> (last visited Jan. 29, 2011).

45. *Id.*

46. Press Release, PR Newswire, Ascom Takes Government of Kazakhstan to Stockholm Court of Arbitration Under the International Energy Charter Treaty, <http://www.prnewswire.com/news-releases/ascom-takes-government-of-kazakhstan-to-stockholm-court-of-arbitration-under-the-international-energy-charter-treaty-102416259.html> (last visited Jan. 29, 2011); see also *Tristan Oil's Parent Opens Legal Proceedings Against Kazakhstan*, SILK ROAD INTELLIGENCER, <http://silkroadintelligence.com/2010/09/09/tristan-oils-parent-opens-legal-proceedings-against-kazakhstan/> (last visited Jan. 29, 2011).

47. See *Ascom Urges International Leaders to Address Kazakhstan's "Resource Nationalism" as 40 Heads of State Gather in Astana for the OSCE Summit*, TRISTAN OIL (Nov. 22, 2010), <http://www.tristanoil.com/> (last visited Jan. 29, 2011).

48. Paul Sampson, *Resource Nationalism. Moldovan Tycoon Takes Kazakhstan to Court*, EURASIA INTERNET, Sept. 21, 2010, http://www.eurasia.org.ru/en/index.php?option=com_content&view=article&id=481:2010-09-21-151102&catid=4:events-and-opinions&Itemid=6 (last visited Jan. 29, 2011).

49. *Id.*

50. *Id.*

51. INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION (AS OF DEC. 27, 2010) 3, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> (last visited Jan. 29, 2011).

lease, the Deputy Premier and Minister of Economy of Moldova confirmed that the Government of Moldova finally approved the ratification of the ICSID Convention.⁵² While this new development has no bearing on the Ascom case, it will be interesting to observe whether the ratification of the Convention will lead to an increase in the foreign investment in Moldova and in those made by the Moldovan investors in other countries, on one hand, and whether it will also lead to an increase of investment arbitrations filed under the ICSID Convention, on the other hand.

V. Spain

The year 2010 has seen a slew of legislation related to the world economic and financial crisis and some long awaited changes in basic laws.

A. CORPORATE

Royal Legislative Decree 1/2010 of July 2nd⁵³ regarding companies with share capital combined the two laws governing *Sociedades Anónimas*⁵⁴ and *Sociedades Limitadas*⁵⁵ into one. It has also incorporated certain aspects of the stock market law related directly to companies and derogated certain articles of the Commercial Code of 1885. The new law did not incorporate the law on structural modifications, mergers, spin-offs, and transformations of 2009⁵⁶ and seems to have left out a number of relevant articles of the Stock Market Law regarding certain duties of directors, certain information for the annual report on corporate governance, and additional information for the management report. Still to come, and much needed, is the modification of the Mercantile Registry Regulation.

B. EMPLOYMENT

For years, the OECD has been reporting that the Spanish labor market needs to be modified to provide flexibility and achieve greater competitiveness. It can no longer offer the cheap labor that it was able to offer during the country's run up to EU entry. By the spring of 2010, unemployment had reached twenty percent. Law 35/2010⁵⁷ was passed to address some of the structural concerns about the labor market and contribute to a reduction in unemployment. Three basic routes were taken i) to reduce temporary contracts which weigh heavily on the young and increase indefinite contracts; ii) to reinforce flexibility through measures to temporarily reduce the number of daily work hours to avoid

52. *Moldova to Ratify Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, ALLMOLDOVA, Sept. 8, 2010, <http://www.allmoldova.com/en/moldova-news/1249048273.html> (last visited Jan. 29, 2011).

53. Law 1/2010 (B.O.E. 2010, 161).

54. Law 821/1991 (B.O.E. 1991, 127).

55. Law 2/1995 (B.O.E. 1995, 71).

56. Law 3/2009 (B.O.E. 2009, 82). This law incorporates into Spanish legislation Directive 2005/56/EC, DOL 25 noviembre 2005, núm. 310 regarding cross border mergers and Directive 2007/63/EC, DOL 19 noviembre 2007, núm. 300 regarding the requirements for an independent expert's report in the case of merger or spin-off of companies.

57. Law 35/2010 (B.O.E. 2010, 227).

the need to eliminate jobs during a crisis; and iii) to stimulate the hiring of the young by making training contracts more attractive to both parties and by improving social security discounts for hiring the young through indefinite contracts, among others.

C. FINANCE

The EC approved the Spanish regime for recapitalization of banks (“FROB”) until June 30, 2010. The objective of the regime is to reinforce the solidity and solvency of credit entities in order to re-establish trust in the credit capacity of Spanish entities and stimulate the granting of loans in the “real economy.” The EC found that the regime meets its guidelines for state aid designed to overcome the financial crisis since the measures are limited in time and scope, require compensation at market rates, and include sufficient incentives to reimburse the state interest.⁵⁸

The FROB was just one measure taken. Royal Decree-Law 8/2010⁵⁹ adopts extraordinary measures to reduce the public deficit. These measures include: i) provisions to reduce the salary costs of the public sector by five percent annually; ii) suspensions of the revaluation of public pensions for 2011, excluding minimum pensions and non-contributing ones; iii) elimination for new applicants, of nursing support retroactive payments to support their needs with a requirement that their case be resolved in six months, and that if not they be paid from the date of the application; iv) elimination of the “baby” subsidy of €2,500 per birth as from January 1, 2011; and v) in the area of health care, a review of the price of medicines excluded from the price reference system, adjusting the number of units in medicine packages to the amount normally used during standard treatment. Measures are also taken i) to guarantee that local entities contribute to the fiscal effort; ii) to improve their economic and financial management; and iii) to control more efficiently public spending.

Royal Decree-Law 9/2010⁶⁰ is the legislation that permits Spain to participate in the EU bailout programs for members requiring aid within the framework of the European Mechanism of Financial Stabilization of Member States of the Euro Zone. The State is authorized to guarantee the company called the European Financial Stabilization Facility up to €53.9 million until December 31, 2013.

Royal Decree 628/2010⁶¹ modifies the law regarding deposit guaranties and systems of indemnity for investors. It transposes Directive 2009/14/EC,⁶² which modifies Directive 94/19/EC⁶³ regarding deposit guaranties and periods of payment. Directive 2009/14/EC introduces a series of essential reforms in the European system of deposit guaranties such as: the promotion of cooperation between European Systems, the increase in information provided by banks to customers regarding coverage by national or foreign systems, the increase in the level of coverage (to €100,000), the reduction in the period for the competent authority to declare the incapacity to make the payment and to make the payment

58. See State Aid, N 28/2010–Spain, Recapitalization Measures in Favor of the Banking Sector in Spain, at 5-10 (Jan. 28, 2010), available at http://ec.europa.eu/community_law/state_aids/comp-2010/n028-10-en.pdf.

59. Law 8/2010 (B.O.E. 2010, 126).

60. Law 9/2010 (B.O.E. 2010, 131).

61. Law 628/2010 (B.O.E. 2010, 135).

62. Official Journal L 68, 13.3.2009.

63. Official Journal L 135, 31.5.1994, at 5-14.

through the guaranty system, and lastly, the requirement that guaranty funds carry out stress tests to evaluate their capacity to meet the crisis of an entity. These reforms are supposed to increase confidence in the financial system in the context of the financial crisis without distorting competition in the single market.

D. MONEY LAUNDERING

Under Spanish law, attorneys are gatekeepers in the fight against money laundering. Order EHA/1464/2010⁶⁴ modifies Order ECO/2652/2002⁶⁵ establishing obligations to notify operations related to certain countries to the Executive Service of the Commission for the Prevention of Money Laundering and Currency Infractions (Servicio Ejecutivo de la Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias). It includes the Islamic Republic of Iran.

VI. Switzerland

A. TAX LAW

1. *UBS Treaty*

On March 31, 2010, Switzerland and the United States finalized an amending protocol⁶⁶ to the Agreement on Administrative Assistance that was signed on August 19, 2009⁶⁷ with respect to the data of clients of UBS AG. The original agreement reflected the Federal Council's desire to grant the U.S. federal tax authority (IRS) administrative assistance with regard to roughly 4,550 UBS accounts that were suspected of being associated with the violation of tax law on the part of U.S. citizens. The Swiss Federal Administrative Court issued a judgment on January 21, 2010, holding that the August 2009 agreement, which was designed as a consultation arrangement for the interpretation of the tax treaty between Switzerland and the United States, could neither supplement nor modify the existing treaty. For this reason, administrative assistance in instances of mere tax evasion was not possible.⁶⁸ The Federal Council therefore had to draw up the March amendment and distribute it to Parliament for approval in order to allow administrative assistance and avert looming lawsuits against UBS in the United States. On June 17, 2010, both houses of Parliament approved the treaty. It had, however, been provisionally applied from March 31, 2010.

64. Order EHA/1464/2010 (B.O.E. 2010, 138).

65. Order ECO/2652/2002 (B.O.E. 2002, 260).

66. UBS, US Crossborder-case, Key Developments, http://www.ubsonline.com/1/e/index/crossborder/key_developments.html (last visited Jan. 29, 2011).

67. *Id.*

68. See Jerald D. August, *UBS Update: Swiss Parliament Gives Final Approval to Release 4,450 Bank Deposit Information of US Persons*, FEDERAL TAXATION DEVELOPMENTS BLOG (June 22, 2010), <http://fedtaxdevelopments.foxrothschild.com/2010/06/articles/federal-taxation-developments/ubs-update-swiss-parliament-gives-final-approval-to-release-4450-bank-deposit-information-of-us-persons/>.

2. *Amendments to the Double Taxation Treaty with France*

On November 4, 2010, the Complementary Convention amending the double taxation treaty (“DBA”) between Switzerland and France came into force, following the expiration of the referendum deadline on October 7, 2010 without a referendum being requested.⁶⁹ The provisions of the Complimentary Convention apply to income tax on income from calendar or financial years commencing from or following January 1, 2011.⁷⁰ In addition, following its entry into force, the Complimentary Convention now constitutes the first convention that has passed all the legislative stages, which provides for an expanded administrative assistance clause under Article 26 of the OECD Model Agreement.⁷¹ By the end of November 2010, the revised double taxation treaties with Spain and Luxembourg, which also contain an administrative assistance provision pursuant to the OECD standard, had also entered into force.

3. *Change of VAT Rates*

On January 1, 2011, VAT rates increased. The increase is taking place as part of the bill passed on September 27, 2009 by the people and the cantons for the additional financing of workers’ disability insurance and is restricted to a seven-year period. The standard rate is now 8.0% (previously 7.6%), the reduced rate 2.5% (previously 2.4%), and the special rate for accommodation services 3.8% (previously 3.6%).⁷²

The decisive date for the applicable tax rate is neither the date on which an invoice is presented nor the date of payment but rather the respective date on which the service is provided. If the service is provided partly before and partly following the increase of the tax rate, the part of the service performed in the period following December 31, 2010 is taxable at the new rates.

B. REVISION OF THE FEDERAL TECHNICAL TRADE BARRIERS ACT (THG)

On July 1, 2010, an important amendment to the Federal Law on Technical Trade Barriers to Trade Act⁷³ came into force. As a result, products in Switzerland may now be brought into commerce when they meet the relevant product standards of the EU and, where there is incomplete or no harmonization in the EU, the product standards of a Member State of the EU or the European Economic Area (“EEA”) and are lawfully in commerce in the relevant EU or EEA Member State. In this way, the so-called “Cassis de

69. Press Release, Fed. Dept. of Fin., Änderungen des Doppelbesteuerungsabkommens mit Frankreich sind in Kraft [Changes in the Tax Treaty with France in Force] (Nov. 4, 2010), available at <http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=de&msg-id=36060>.

70. *Id.*

71. Press Release, Fed. Dept. of Fin., Die Schweiz und Frankreich unterzeichnen revidiertes Doppelbesteuerungsabkommen [Switzerland and France Sign Revised Double Taxation Agreement] (Aug. 27, 2009), available at <http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=de&msg-id=28729>.

72. Swiss Fed. Tax Admin., Erhöhung der Mehrwertsteuersätze zugunsten der Invalidenversicherung (IV) per 1. Jan. 2011 [Increasing the Value Added Tax Rates in Favor of the Invalidity Insurance (IV) on Jan. 1, 2011] (Sept. 27, 2009), available at <http://www.estv.admin.ch/mwst/themen/01045/index.html?lang=de>.

73. See U.S. DEP’T OF STATE, BACKGROUND NOTE: SWITZERLAND, <http://www.state.gov/r/pa/ei/bgn/3431.htm> (last visited Jan. 29, 2011).

Dijon Principle” that operates within the EU will be unilaterally introduced in Switzerland. This introduction means that products that meet the relevant requirements of the EU or an EU or EEA Member State can be brought into commerce in Switzerland without additional impediments. Because Switzerland has introduced the “Cassis de Dijon Principle” unilaterally, the Federal Council can now take unilateral countermeasures whenever Swiss products are discriminated against. Should the EU or an EU or EEA Member State impede the entry of Swiss products that conform to the standards of the country of destination, the Federal Council can decree that the “Cassis de Dijon Principle” shall not apply to all or certain of that trade partner’s products. In order to prevent discrimination against Swiss manufacturers that only serve the domestic market, these manufacturers can bring their products into conformity with the European regulations. Exceptions are permitted only for the protection of overwhelming public interests.⁷⁴ Special rules apply for foodstuffs: if these do not meet Swiss standards, entry into commerce will require the approval of the Federal Health Agency.

C. FEDERAL ACT ON CORPORATE IDENTIFICATION NUMBERS (UIDG)

On January 1, 2011, the Federal Act on Corporate Identification Numbers (“UIDG”) of June 18, 2010 entered into force. The UIDG aims to abolish the various specific identification numbers of the respective administrative processes.⁷⁵ In this regard, the aim of the uniform corporate identification number (“UID”) is to provide for the possibility of identifying companies clearly so as to be able to exchange information in administrative and statistical processes simply and securely.⁷⁶ In this context, the concept of a company is to be interpreted broadly. Thus, not only all companies operating in Switzerland *sensu stricto* but also all “customers of the public sector” that exhibit the characteristics of a company or that must be identified for legal, administrative, or statistical purposes, obtain an UID.

The UID is being introduced gradually starting in 2011, and it will be assigned to all companies in Switzerland. In the medium term it will replace all the other corporate identifiers currently used by administrative authorities and after it has been phased in will act as the comprehensive corporate identifier for various administrative processes.⁷⁷ The UID will replace the old six digit VAT number.

74. Anhorung zur Verordnung des Bundesrates upper das Inverkehrbringen von nach ausländischen technischen Vorschriften hergestellten Produkten (Vollzugsverordnung zur THG-Revision), available at <http://www.admin.ch/ch/d/gg/pc/documents/1826/Ergebnis.pdf>.

75. Press Release, Fed. Statistical Office, Unternehmens-Identifikationsnummer (UID) Inbetriebnahme des UID-Registers am 11. Jan. 2011 [Business Identification Number (UID) Commissioning of the UID-register on Jan. 11, 2011], available at <http://www.bfs.admin.ch/bfs/portal/de/index/news/00/09.html>.

76. Unternehmens-Identifikationsnummer-Start zur Einführung der Unternehmens-Identifikationsnummer (UID), <http://www.edi.admin.ch/dokumentation/00331/01824/index.html?lang=de&msg-id=37117> (last visited Jan. 29, 2011).

77. Fed. Statistical Office, UID System, <http://www.bfs.admin.ch/bfs/portal/de/index/news/00/09/03.html> (last visited Jan. 29, 2011).