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## Intensive International Arbitration Training Program

with particular focus on India

LOCATION: Chennai, Tamil Nadu, India

Consisting of sessions on four consecutive

**Saturday's** (January 5, 12, 19 and 26, 2013)

AIA will conduct the training in association with the Nani Palkhivala Arbitration Center, India.

To register and for more information visit [www.nparbitration.in](http://www.nparbitration.in)

## Arbitration in Latin American: Panama as Place of Arbitration by Missuly Clark

Ever since the "Calvo Doctrine" emerged, many countries developed a certain perspective about arbitration in Latin American countries. This doctrine holds that jurisdiction in international commercial disputes lies within the country in which the investment is located. As a result, this caused reluctance towards arbitration across Latin America since the nineteenth century; however, this is not the case anymore.

Latin America's economy has changed in the past years, prompting countries to pursue foreign direct investment as a new path of economic development. As a result, Latin American countries developed new measures and regulations for the protection of foreign investment. They have enacted changes in their policies to promote the development of international arbitration in Latin America as a way to promote foreign investment. In fact, since 1995, several Latin American countries have ratified or acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the Inter-American Convention on International Commercial Arbitration ("Panama Convention").

In July 1999, the Government of the Republic of Panama approved and enacted Decree Law No. 5, by which a new system of arbitration, mediation and conciliation rules was established. This Decree Law derogated the existing provisions of the Civil Procedure Code related to arbitration, and it recognized the validity of international commercial arbitration.

In recent years, Panama have adopted and ratified various international conventions requiring the enforcement of arbitral awards, such as the Panama Convention in 1975 and the New York Convention in 1984. This provides concrete evidence of the changing attitudes and acceptance of international arbitration in Panama.

The Chamber of Commerce and Industry of Panama took the initiative to promote arbitration as a modern means of solving disputes between parties. It established a Center for Dispute Resolution known as Centro de Conciliación y Arbitraje de la Cámara de Comercio e Industrias de Panamá in 1994, which adopted a set of procedural rules.

By way of summary, Panama is consolidating as a proper forum for international arbitration. It has been moving forward in the process of updating its legislation in mediation, conciliation and arbitration. International arbitration is growing basically due to the increase in international business and economy growth, related to banking, securities and construction, and the awareness of the numerous benefits of arbitration as an ADR method.

## Accreditation of EMTPJ by NMI.

The Dutch Mediation Institute (NMI) accredited (as in previous years) the European Mediation Training for Practitioners of Justice (3-15 September, 2012) for 40 Permanent Education (PE) points in category 2. As from this year, NMI also accredited several parts of the full training:

- EMTPJ – Practical training, 7 – 14 September 2012, 41 PE points, category 2.
- Intervention in specific situations of cross border mediation, Phillip Howell-Richardson, 4 September 2012, 9h-18h30, 8 PE points, category 2.
- The function of party-experts and party counsel in civil and commercial mediation, Willem Meuwissen, 12 September 2012, 9h-13h, 4 PE points, category 2.

For more information: <http://www.nmi-mediation.nl/> or <http://www.emtpj.eu>

## Book review: Costs and Quality of Online Dispute Resolution: A Handbook for Measuring the Costs and Quality of ODR



The book titled “*Costs and Quality of Online Dispute Resolution*” was published in 2012 to present the results of a project named EMCOD under the auspices of the Directorate General Justice of the European Commission with Grant JLS/2008/CFP/CJ/08-1 AG. Written by a notable team of experts and academics, this book gives the reader an overview of the position of ODR in the European Union and outlines the results of EMCOD, illustrated below.

It is evident that the Internet is rapidly changing our lives and with them the way we deal with disputes, which is why ODR has been raising in popularity since its inception. The question remains however, whether or not the current ODR procedures achieve the objective of *reasonable justice within reasonable delays at a reasonable cost*. This is what EMCOD and this book are all about: to deliver a method to ODR providers and policy makers in Europe to assess the costs and quality of the ODR procedures they (wish to) deliver.

Like the Internet, ODR is a recent concept, the term first being coined in 2001. In its first chapter, the book introduces the reader into the short history of ODR since its inception and the debates that surrounded (and continue to surround) its emergence, most notably the proper place of ODR in relation to other ADR systems. A summary is given of recent relevant literature.

In Chapter 2, an attempt is given to define the concept of ODR and to categorize the different varieties of ODR. The authors describe ODR as ‘an array of dispute resolution techniques which are outside the courts and utilise information and communication technologies, and the Internet in particular’. The authors conclude that like traditional ADR, ODR has great advantages over litigation in terms of accessibility, speed and cost efficiency. Interestingly, the authors seem to conclude that ODR shows many advantages in this area, even over traditional ADR. In Chapter 3, dealing with cross-border implications of ODR, the authors seem to reach the same conclusion.

Chapters 4 and 5 deal with the implications and development of ODR at EU level. In Chapter 4, an analysis is given of the recent EU proposal for regulation on ODR. Furthermore, a chronological summary is given of the recent EU legislation on ODR, ADR and electronic commerce. Besides the normative developments, the results are portrayed of empirical research over ADR schemes in EU member-states.

The last four chapters deal the actual method that EMCOD delivered to organise ODR s that an optimal balance between fairness and efficiency is stricken. In Chapters 7, 8 and 9, the authors outline the real results of EMCOD: a method of cost and benefit assessment for ODR procedures. Chapter 7 is about the types of cost that can be incurred in an ODR procedure. The author distinguishes between three types of cost: monetary costs, opportunity costs and ‘intangible costs’, i.e. costs like loss of time and stress. These concepts are then translated into measurable concepts. Chapters 8 and 9 take a similar approach to the ‘quality of the procedure’. These steps are taken to finally arrive at the tangible result of EMCOD: three questionnaires that enable the provider of ODR services to assess the costs and quality of his/her own ODR procedure.

Further information about this book is available at <http://www.maklu.be/MakluEnGarant/BookDetails.aspx?ID=9789046604731>. Copies of the book can be ordered from the aforementioned website.

## Cross-Border Mediation by the EMTPJ Mediator

by Dmytro Galagan

On 21 May 2008, the Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (the Mediation Directive) was adopted. One may say that it was the Mediation Directive that assisted mediation to become considered as a profession, and a mediator – as a service provider that can earn living by mediating disputes.

### Application of the Services Directive to Mediation

The Mediation Directive, however, does not address a situation when a mediator established in one Member State is willing to provide mediation services in another Member States. This issue is dealt with in other pieces of the EU legislation, in particular, in the TFEU and the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (the Services Directive).

The Services Directive, recital 64, emphasizes the necessity to abolish any restrictions on the freedom of establishment and the free movement of services that exist in national law of Member States and are incompatible with Arts. 49 and 56 TFEU (ex Arts. 43 and 49 EC), in order to establish a genuine internal market for services. Should the Services Directive be applicable to mediation services, mediators established in any of the Member States can benefit from the freedom of establishment (if the provider is established in the Member State where it provides its services) and freedom to provide services (if, due to the temporary nature of the activities concerned, the provider is not established in the Member



State where the service is provided).

However, according to Art. 17(6) of the Services Directive, its provisions on freedom to provide services are not applicable to matters covered by Title II of the Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (the Professional Qualifications Directive), as well as requirements in the Member State where the service is provided which reserve an activity to a particular profession.

Under Art. 3(1)(a) of the Professional Qualifications Directive, a regulated profession is a professional activity "access to which, the pursuit of which [...] is subject, [...] by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications". Even though Art. 4(2) of the Mediation Directive requires that Member States shall encourage the training of mediators, currently some Member States treat mediation as a regulated profession (requiring vocational education of specified duration, passing of professional examination, registration with a governmental authority or a professional association), whereas other Member States do not have formal requirements for persons willing to practice mediation.

With respect to the regulated professions, pursuant to recital 31 of the Services Directive, it only deals with questions other than those relating to professional qualifications, for example professional liability insurance, commercial communications, multidisciplinary activities and administrative simplification.

Cases are known where the ECJ analyzed in light of the Services Directive certain rules applicable to regulated professions, in Case C-119/09 the ECJ held that Art. 24(1) of the Services Directive must be interpreted as precluding national legislation, which totally prohibits the members of a regulated profession, such as the profession of qualified accountant, from engaging in canvassing.

Thus, mediation services are regulated by the Mediation Directive (matters of ensuring the quality of mediation; confidentiality of mediation), the Professional Qualifications Directive (regarding the recognition of professional qualifications of mediators if they are deemed to be a regulated profession), and the Services Directive (free movement of mediation services, if a mediator is deemed to be not a regulated profession; issues of professional liability insurance, commercial communications, etc.).

#### Application of the Services Directive to Third Country Nationals

In the Member States, which allow third country nationals to be registered as mediators and provide mediation services within a Member State, a question may arise whether such persons benefit from the provisions of the Services Directive on free movement of services and freedom of establishment.

According to Art. 2(1) of the Services Directive, it applies to services supplied by providers established in a Member State. The concept of "provider" covers any natural person who is a national of a Member State and is engaged a service activity in a Member State in exercise either of the freedom of establishment or of the free movement of services (Recital 36 of the Services Directive).

Thus, though a third country national may successfully practice mediation in one or several Member States where national laws allow it, he/she may not rely on the Services Directive to benefit from the freedom of establishment and free movement of services, which remains the domain of natural persons who are nationals of Member States.

#### Application of the Services Directive to Notaries

Article 2(2)(l) of the Services Directive excludes from its scope "services provided by notaries and bailiffs, who are appointed by an official act of government", however, this provision does not give a clear cut answer to the question whether mediation services provided by notaries are also excluded.

Previously, in Joined Cases C-372/09 and C-373/09, the ECJ held that the activities of court experts in the field of translation did not constitute activities which are connected with the exercise of official authority for the purposes of Art. 45 EC (now Art. 51 TFEU), since the translations carried out by an expert were merely ancillary steps and left the free exercise of judicial power intact, so that such translation services could not be regarded as activities connected with the exercise of official authority.

Similarly, in our case mediation services offered by a notary are clearly outside of the usual scope of activities performed by a notary, whose usual responsibility is to authenticate signatures, documents and copies, and such mediation services constitute ancillary activities that are not connected with the exercise of official authority. Therefore, there may be a plausible argument that mediation services offered by notaries fall within the scope of the Services Directive.

#### Mediator Qualification Requirements and Freedom to Provide Services

As it has been mentioned above, some Member States have set requirements to mediator's qualifications, however, such requirements are not uniform among the Member States. An important issue is whether a mediator, established in a Member State that requires mediators to have relatively low number of training hours, may enjoy the freedom to provide mediation services in another Member State, where mediators are subject to training of longer duration.

Pursuant to Art. 5(1) of the Professional Qualifications Directive, Member States are prohibited to restrict, for any reason relating to professional qualifications, the free provision of services in another Member State if the service provider is legally established in a Member State for the purpose of pursuing the same profession there. Therefore, a mediator established in a Member State may provide mediation services in another Member State even if the host Member State requires more lengthy professional training than the home Member State (however, according to Art. 5(2) of the Services Directive, this provision applies only when the service provider moves to the territory of the host state to pursue its profession on a temporary and occasional basis).

With respect to the freedom of establishment, under Art. 13(1) of the Services Directive, if access to or pursuit of a regulated profession in a host Member State is contingent upon possession of specific professional qualifications, the competent authority of that Member State shall permit access to and pursuit of that profession, under the same conditions as apply to its nationals, to applicants possessing the attestation of competence or evidence of formal qualifications required by another Member State in order to gain access to and pursue that profession on its territory. Such attestations of competence or evidence of formal qualifications shall attest a level of professional qualification at least equivalent to the level imme-

diately prior to that which is required in the host Member State (as described in Art. 11).

In the absolute majority of cases mediators fulfil this requirement – they hold a diploma certifying successful completion of training at post-secondary level of at least three years' duration at a university or establishment of higher education as well as some professional training (i.e., professional mediation training), which corresponds to level of qualification provided for in Art. 11(d) of the Professional Qualifications Directive, which is immediately prior to the highest level of qualification, provided for in Art. 11(e).

Thus, under the Professional Qualifications Directive a mediator may exercise its freedom to provide services or freedom of establishment, even if a Member State where a mediator is established requires professional mediation training of shorter duration than a Member State where the mediator seeks to exercise these freedoms. In practice, this means, for instance, that a German mediator, after completion of the EMTPJ course and accreditation in Belgium, may offer mediation services in Austria despite the Austrian requirement of 200 hours of training.

### The Services Directive and Professional Insurance Requirement

Some Member States require mediators to procure adequate insurance coverage, but would a requirement for mediators to purchase insurance as a precondition to exercise freedom of movement of services or freedom of establishment be compatible with the provisions of the Services Directive?

The Services Directive by its Art. 14(7) prohibits Member States to make access to, or the exercise of, a service activity in their territory subject to, in particular, an obligation to take out insurance from a provider or body established in their territory. Previously, the ECJ has addressed similar requirements, in particular, the ECJ concluded that it: is contrary to the EU legislation for national rules to require that, where financial security is provided by a credit institution or insurance company situated in another Member State, the guarantor must conclude an agreement with a credit institution or insurance company situated in France (Case C-410/96); by requiring undertakings engaged in the provision of temporary labour which are established in other Member States to lodge a guarantee with a credit institution having its registered office or a branch office on Italian territory, the Italian Republic has failed to fulfil its obligations under the EU law (Case 279/00).

Therefore, it is prohibited for a Member State to require a mediator established in another Member State to procure insurance from an insurance company established in the Member State where the mediator seeks to provide its mediation services. To hold otherwise would, first, put additional constraint on a mediator by requiring him/her to have duplicate insurance and, second, unreasonably favour insurance companies established in the Member State where mediation services are to be rendered.

However, the Services Directive does not affect the possibility for Member States to require insurance as such (Arts. 14(7), 23 of the Services Directive). Nevertheless, such requirement is also subject to a number of limitations, so that mediators may be required to procure professional insurance only appropriate to the nature and extent of the risk to their clients – parties in a dispute, and such insurance may be required to have cross-border coverage only if a mediator actually mediates cross-border disputes. Also, a Member State where a provider (i.e., a mediator) seeks to be established, may not require professional liability insurance if the

provider is already covered by an insurance which is equivalent, or essentially comparable, in another Member State in which the provider is already established.

### Requirements to Nationality of a Mediator or Parties and the EU Law

Pursuant to Art. 6 of the Mediation Directive, Member States shall ensure that it is possible for the parties (or for one of the parties with consent of the others) to request a settlement agreement resulting from mediation to be made enforceable. Thus, a question arises whether requirements, for instance, that only nationals of a Member State where enforcement of such agreement is sought may request enforcement, or that a settlement agreement needs to be signed by a mediator who is a national of the Member State where enforcement is sought, are compatible with the EU law.

First, Arts. 14(1), 16(1)(a) of the Services Directive prohibit Member States to make access to, or exercise of, a service activity in their territory subject to compliance with discriminatory requirements based directly or indirectly on nationality. Furthermore, authorization schemes and other restrictions, even if justified by overriding reasons relating to the public interest, should not be discriminative on grounds of nationality (recital 56 of the Services Directive). The Services Directive also addresses possible discrimination through the "backdoor": **Member states are obligated to ensure that the recipient of services is not subject to discriminatory requirement based on its nationality (Recitals 94, 94, Article 20(1)).**

Second, Art. 4(1) of the Professional Qualifications Directive provides that the recognition of professional qualifications by the host Member State allows the beneficiary to gain access to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State "under the same conditions as its nationals".

Thus, the Services Directive and the Professional Qualifications Directive prohibit Member States, first, to impose discriminatory requirements based directly or indirectly on the nationality of the mediator and, second, to impose such requirements on the recipients of the mediation services – parties to the mediated dispute. In particular, requirements that, to be enforceable, a settlement agreement resulting from mediation shall be signed by a mediator of a particular nationality, or that only nationals of a particular Member State may request enforcement of a settlement agreement reached in mediation, are contrary to the EU law.

As a conclusion, even though the issues of freedom of establishment and freedom to provide services are not addressed directly in the Mediation Directive, mediators who are nationals of the Member States may benefit from those freedoms pursuant to the Services Directive and the Professional Qualifications Directive. These instruments of the EU law prohibit the discrimination on the grounds of nationality of a mediator, restrict the authority of Member States to mandate professional insurance, and, most importantly, **provide for recognition of mediators' qualifications in another Member States so that mediators who got training through courses such as the EMTPJ may get their qualification recognized and provide mediation services throughout the 27 Member States of the European Union including Denmark, even though it opted out from the Mediation Directive.**



## Book Review: The core standard of international investment protection

by Missuly Clark



The book "The Core Standard of International Investment Protection: Fair and Equitable Treatment" by Alexandra Diehl, is the twenty-sixth title in the series International Arbitration Law Library, published by Wolters Kluwer Law & Business. The author explores the criticism of the international investment protection regime and questions whether or not 'Fair and Equitable Treatment' ("FET") is a safeguard for investors and States.

The book consists of two parts and six chapters: (1) sources of the FET standard, (2) forum for solving investment disputes dealing with FET (3) concluding analysis: the investment regime as a regime of networks, (4) determining the applicable law, (5) direct or derivative rights, and (6) the content of the FET standard.

In the first part of the book (chapter 1, 2 and 3), the author begins chapter one by discussing that the FET standard should be recognized as a general principle of law because this recognition seems appropriate in the context of international investment law, since this area does not fall into the scope of either national or international rules. The author explains that the fact that this matter is governed by treaties is not enough and general principles of law should be applied to fulfill gaps and resolve issues arising out of investor-State disputes.

The second chapter discusses how investors are no longer limited to litigation and how they can make use of arbitration or conciliation as methods for solving disputes. Most BITs provide for ICSID arbitration, which means that there is no involvement of local courts.

Chapter three continues an analysis of everything that was discussed in the first two chapters. It analyses the framework and sources of the FET standard.

The second part of the book (chapter four, five and six) focuses on the content and scope of the FET standard.

Chapter four discusses how to determine the applicable law. For this mean, the author divides the chapter in four steps. First, she explains that tribunal should look for an explicit parties' agreement. Second, if there is no explicit agreement, then the tribunal should look whether or not there is an implicit agreement. The third step is that if the parties reached an agreement, either explicit or implicit, the tribunal has to review if there are any limitations to the parties' choice. Fourth, if the parties did not reach any agreement on the applicable substantive law, the tribunal has to act in accordance with the rules of the authorizing documents, such as Article 42(1) ICSID Convention.

In chapter five, the issue is whether the substantive rights asserted in Investment treaty arbitration belong to the claiming investor or to the investor's home State. The author explains how investors are beneficiaries under BITs, even though they are not direct signatories of the treaty. To discuss further on this issue, she focuses on the article "The Hybrid Foundations of Investment Treaty Arbitration" by Zachary Douglas, who is the only scholar to address this issue.

Chapter six explores the content of the FET standard. In the first section of the chapter the author focuses on the terms 'fair' and 'equitable'.

Overall this book provides a good practical analysis that will be of great help for arbitrators, academics, lawyers, among others.

For further information about the book and where to purchase it, please visit the Wolters Kluwer website: <http://www.kluwerlaw.com/>

AIA Members receive a 10% Discount on this book.

## Kyiv Commercial Court Reviews ICSID Award Against Ukraine

by Pavlo Byelousov

(also published at [www.cisarbitration.com](http://www.cisarbitration.com))



A recent decision of the Kyiv Commercial Court is of particular importance to arbitration practitioners since it involves not only the issues of invalidation of a joint investment activities agreement, but also application of findings of the ICSID Tribunal which were previously made in respect of such agreement. The Ukrainian court invalidated the agreement which the ICSID tribunal has previously recognized as "legitimate".

The Kyiv Commercial Court invalidated 1999 Agreement on Joint Investment Activities between among others Alpha Projektholding GmbH and the Ukrainian Hotel "Dnipro" certain addenda thereto ("1999 JIA Agreement"). Earlier, the same agreement was the basis for a major part of Alpha's claims in the ICSID arbitration against Ukraine, which resulted in an award in Alpha's favour rendered in 2010.

On 23 May 2012 the Commercial Court in the city of Kyiv held that the 1999 JIA Agreement was invalid, since (a) it was a mock transaction and (b) the terms and conditions of the agreement contradicted the provisions of the Civil Code of USSR and the Act of Ukraine on Investment Activities (effective as of the date of the 1999 JIA Agreement execution).

The above judgment was rendered by the Kyiv Commercial Court despite the fact that on 20 October 2010 an ICSID tribunal already considered the JIA Agreement and held it to be "legitimate". The Ukrainian court expressly refused to follow the ICSID tribunal's award. The case is interesting because an ICSID tribunal's award was recognized and enforced in Ukraine and the amount awarded in the ICSID arbitration has apparently already been paid by to the claimant.

### The ICSID Case

In the ICSID case *Alpha Projektholding GmbH v. Ukraine*, Alpha claimed violations by Ukraine of its obligations under the BIT with Austria and certain provisions of the Act of Ukraine on Foreign Investment. The dispute concerned Alpha's investment in renovation of Hotel Dnipro in Kiev, which was carried out under several agreements including the 1999 JIA Agree-



ment.

Under the 1999 JIA Agreement the hotel was required to make regular payments to Ukraine. However, the transfer of **authority to manage the state's ownership of Hotel Dnipro** from the State Tourist Administration to the State Administration of Affairs in 2004 resulted in a complete cessation of all payments owed to Alpha under the investment agreements, including the 1999 JIA Agreement.

In the arbitration proceedings, Alpha argued that Ukraine violated its investment obligations by ordering Hotel Dnipro to cease making payments and performing other contract obligations owed to Alpha.

In its award of 20 October 2010 the ICSID tribunal found that (i) "[Alpha] has been deprived of all remaining value of the... [1999 JIA Agreement]" , (ii) **generally the 1999 JIA Agreement is a "legitimate joint activity agreement..."**, while concluding that (iii) some of the provisions of the JIA Agreement were inval

The ICSID tribunal concluded that Ukraine expropriated Alpha's rights and interests in the JIA Agreements and violated the fair and equitable treatment guarantee provided by the BIT.

The ICSID Tribunal ordered Ukraine to pay USD 2,979,232 with additional interest accruing from 1 July 2004, at a rate of 9.11 percent compounded annually. This ICSID case was the first investment proceeding ever to be lost by Ukraine.

It is worth noting that on 23 June 2011 the Pecherck District Court of Kyiv recognized and enforced the said ICSID award in Ukraine. Moreover, according to the Ministry of Justice, Ukraine has already paid UAH 44,696,400.00 (appr. USD 5,587,050.00) to the claimant.

The ICSID award is available [here](#) (in English).

### Findings of the Kyiv Commercial Court

The Ukrainian court rejected Alpha's argument that the JIA Agreement was recognized as "legitimate joint activity agreement" in full compliance with the Ukrainian legislation by an ICSID tribunal. The Kyiv Commercial Court reasoned that the tribunal did not consider the validity of the JIA Agreements "as a whole".

In the proceedings, the Deputy Prosecutor of Kyiv, who acted in the interests of the Ukrainian state authorities, claimed that the 1999 JIA Agreement violated mandatory provisions of Ukrainian legislation effective as of the date of conclusion of such agreements.

In particular, the prosecutor submitted that the 1999 JIA Agreement did not provide for any social effect in the form of creation of the material benefits, goods, etc., which should be the purpose of an agreement on joint activities according to Ukrainian laws. Therefore, according to the prosecutor, the 1999 JIA Agreement was a bilateral credit agreement, and so it did not meet the requirements imposed by Ukrainian laws on joint activities agreements.

Endorsing the above-described argument, the Kyiv Commercial Court invalidated the JIA Agreement. This decision could have been further appealed within 10 days from the date of its rendering. However, no information in respect of possible appeal is available as of the date of this article.

The Decision of the Kyiv Commercial Court dated May 23, 2012 in case No. 17/434 is available [here](#) (in Ukrainian).

## Book Review: The Energy Charter Treaty: The Notion of Investor

By Maarten Bentein



The book *The Energy Charter Treaty: The Notion of Investor* is the twenty-fifth title in the series International Arbitration Law Library, published by Wolters Kluwer Law & Business. This book, written by CRINA BALTAG, is the amended version of her Ph.D. thesis, written under the supervision of Professors Loukas Mistelis and Julian Lew.

The Energy Charter Treaty (ECT) was born out of a growing need for a stable and predictable investment environment in the nineties and focuses on four broad areas: Investments, Trade, Dispute resolution, and Promotion of energy sufficiency.

The book is composed of five chapters: (1) Energy Resources and the ECT; (2) Investor and Contracting Parties to the ECT; (3) Natural Persons and Legal Entities as Investors under the ECT; (4) Investor and the Notion of Investment Under the ECT. The fifth chapter is reserved for the conclusion.

The notion of investor is, despite the definition provided by the ECT, a very broad concept shaped by the provisions of the ECT (and related treaties) and rules under the dispute resolution mechanism of the Treaty. Therefore, it will come as no surprise that the notion of investor is difficult to define and that it is very adaptable. An in-depth analysis of the subject is desired.

In relation to the notion of investor, the author also examines the notions of Investment and Contracting Parties of the ECT.

The author concludes that *"investor means a natural person – national, citizen or permanent resident, or a legal entity – company or any other organization, of a contracting party or of a signatory, applying the ECT on a provisional basis, who has an investment in the Area of another Contracting Party or of a signatory"*.

This book gives the necessary support for everyone dealing with the ECT. For more information about the book and where to purchase it, please visit: <http://www.kluwerarbitration.com/>

AIA Members receive a 10% Discount on this book.

## Come visit Peru: A good place for Tourism, Cuisine and Arbitration

by José Steck



In the last years, Peru has become a remarkable place to visit in order to make tourism and try its cuisine. Since Machupicchu was elected one of the new seven wonders of the world, tourism has considerably increased. In accordance with the Foreign Trade and Tourism Department,

about 1'063,606 foreign people arrived to Peru in 2002. Nowadays, that number has changed considerably due to several activities national government and private companies have been arranging, resulting in a number of 2'597,803 foreign



visitors in 2011.

Likewise, Peruvian cuisine has become famous around the world because of its mixture of tastes and cultures, which makes Peru a great place for tourists interested in trying delicious dishes. In Peru, you may find different dishes and beverages, which come from Spain, Italy, China, Japan and many other countries that have influenced food in Peru.

In addition, investments of foreign companies have increased. In accordance with the National Institute of Statistics and Informatics, Spain, United Kingdom and The United States of America are the main investors in Peru with a percentage of 57.48% of the whole foreign investment.

Not only Peruvian tourism and cuisine has considerably improved over the last years, but arbitration, as well.

I will make a brief of the main characteristics of the arbitration practice in Peru, making direct reference to the Peruvian Arbitration Law.

The current Peruvian Arbitration Law came into force on the 1st of September, 2008, bringing new changes in favor of arbitration. Before that, 1996's Arbitration Law, based on the UNCITRAL Model Law on International Commercial Arbitration, had already included good changes to the arbitration practice in Peru. Nevertheless, it was necessary to make several changes to continue improving the growing arbitration practice, so that it would be in accordance with the international standards.

Before the current Peruvian Arbitration Law there was a dualist regime, which regulated in different ways Domestic and International Arbitration. With the current Arbitration Law, the regime has become monist. Now, the treatment for Domestic and International Arbitration is almost the same.

The arbitral agreement must be in written form in accordance with article thirteen of the Peruvian Arbitration Law, understanding written, as any form in which the agreement to submit a dispute to arbitration is clear and concise. Some examples of this are the clear agreement in a contract, the behavior of the parties, sending and reception of data through e-mail, SMS, fax, e-chat, exchange of claim, and answer. Said article is the mixture of both options of article seven of the UNCITRAL Model Law on International Commercial Arbitration. This change makes parties go to arbitration when they agreed upon that at the outset and prevents them from blocking arbitration once the controversy appears.

In addition, rule fourteen of the Peruvian Arbitration Law refers to the extension of the arbitral agreement to those parties who have not expressly signed the arbitration agreement, but somehow have expressed their will to submit any dispute to arbitration because of their active participation in negotiation, execution or conclusion of the contract containing the arbitral agreement. This rule also covers those who receive either rights or benefits through the contract.

Peruvian Arbitration Law contains some of the main general contract and agency principles by which a court may bind non-signatories to arbitration: i) incorporation by reference; ii) assumption; iii) agency; iv) veil-piercing/alter ego; and v) estoppel.

At the same time parties are free to establish the appointment and recusation rules for an arbitrator.

Likewise, in cases when one arbitrator is not appointed by a party, this duty is performed by a Chamber of Commerce. Before the Peruvian Arbitration Law was enforced, courts had this duty. In the past, when a party was not interested in arbitration it did not appoint an arbitrator. Therefore, the appointment was made by courts and the arbitration was

delayed for years. The same problem used to happen with recusations. Nowadays, both, appointments of arbitrators and recusations are within the competence of Chambers of Commerce. This helps considerably to solve said matters in weeks and go on with arbitration.

One of the remarkable characteristics of Peruvian Arbitration Law is the permission for parties to freely regulate the rules of their arbitration procedure, respecting arbitration principles such as equal treatment of the parties and opportunity to present their case.

In case of lack of rules established by parties or the Arbitral Tribunal, habits and customs in arbitration might be applied. Moreover, the tenth complementary disposition of Peruvian Arbitration Law states that arbitration rules contained in said law prevail over any judicial act or rules contained in the Procedural Code. This clearly marks independence of arbitration from an ordinary process. Many years ago, when arbitration started in Peru, lawyers used to apply ordinary process rules to arbitration, something absolutely wrong. Nevertheless, that way of treatment of the procedure is in the past.

At this moment, arbitration has become more autonomous. This means that arbitration is regulated by its own rules, specially defined by parties and complemented by arbitrators, who have plenty faculties to solve any matter of the arbitration process.

What is needed to be an arbitrator? In order to be an arbitrator, it is only required to be a natural person allowed to execute his civil rights, not having incompatibility to assume such position, such as a government employee.

Peruvian Arbitration Law allows arbitrators to order provisional measures to ensure the final award will be executed. Arbitrators have plenty of faculties to execute their decisions or, when necessary, they may ask a judge to order the execution. The court must order this execution, based only on the decision of the arbitrator and the arbitral agreement.

Years ago, there were problems to execute arbitrators' decisions because third parties did not believe arbitrators could order them to proceed in any way. This has changed with the current Peruvian Arbitration Law, and it has already been cleared that arbitrators are empowered to execute their decisions. Moreover, the second complementary disposition of current Peruvian Arbitration Law allows arbitral institutions to celebrate cooperation agreements with the government and private institutions to facilitate the execution of provisional measures or awards.

In addition, provisional measures rendered by an Arbitral Tribunal outside Peruvian territory may be executed in Peru because the Peruvian Arbitration Law allows this.

As in many places in the world, confidentiality is one of the main features of arbitration, which is also contained in Peruvian Arbitration Law. In cases when the State is party to the arbitration procedure, the award becomes public after the arbitration process is concluded.

Following the international tendency, the arbitral tribunal is allowed to render as many awards as necessary to solve different aspects of the controversy. In this case, parties may forbid the arbitral tribunal to proceed that way with an agreement.

There is no term for rendering the final award in Peruvian Arbitration Law. However, parties, rules of the arbitration or the arbitral tribunal may establish it. In many cases, it is recommended not to establish be-

forehand the term to render the award up to the moment when the Arbitral Tribunal have known deeply the essence of the dispute between the parties. This is a very practical rule, because the arbitral tribunal may fix the award term after having determined whether it has to face a complex or a simple controversy.

In accordance with the Peruvian Arbitration Law, parties are permitted to give the opportunity to the arbitral tribunal to correct, interpret, include or even exclude any matter of the award when necessary.

Peruvian Arbitration Law incorporates very specific grounds for the annulment of an award, just the same way the UNCITRAL Model Law on International Commercial Arbitration does. These include violation of due process or when the defense right is affected, problems with proceedings to appoint the members of the arbitral tribunal.

Foreign awards could be executed in Peru in accordance with Peruvian Arbitration Law, applying the following instruments: i) Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the “New York” Convention; ii) Inter-American Convention on International Commercial Arbitration, iii) Any other agreement about recognition and enforcement of awards to which Peru is a member State.

The principal objective of this article is to make international community aware about the advantages of arbitration in Peru. This does not intend to become a complete explanation of the Peruvian Arbitration Law, but presents its main features.

In a few years, I believe Peru will not only be well-known for its tourism and great cuisine, but also because of being a place with complete rules to have an arbitration process and ensuring the execution of the award.

most important off-shore jurisdictions, such as Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man, Jersey.

For instance, the chapter on dispute resolution in the Netherlands emphasizes that no two legal systems are the same, even if both are located within the European Union, and addresses two types of Dutch proceedings of an atypical nature: (i) inquiry proceedings and (ii) proceedings for the settlement of collective claims (“collective claims proceedings”). After addressing characteristics common for both types of proceedings, the author gives an overview of general features of inquiry proceedings, possibility of obtaining interim relief, impact of the proceedings on refinancing of a company in distress and fights for corporate control, as well as efficiency of the proceedings and risks involved. With respect to the collective claims proceedings, the chapter focuses on their history and development, tests applicable to evaluation of a collective settlement agreement (representation; certain legally required minimum provisions; reasonable compensation), and enforcement.

As a conclusion, this book may be recommended to those seeking information regarding practical aspects of litigation and ADR around the globe, including settlement of disputes in multiple jurisdictions under either civil or common law, as well as dispute resolution mechanisms for transactions involving an off-shore component.

Further information about purchasing this book is available on the Global Legal Group’s web-site: <http://www.globallegalinsights.com/practice-areas/litigation-and-dispute-resolution/litigation-and-dispute-resolution-1st-edition-0>

## Book Review: Litigation & Dispute Resolution

by Dmytro Galagan



The *Litigation & Dispute Resolution* book was published by Global Legal Group in 2012 in the United Kingdom. Its contributing editor is Michael Madden.

The book is designed to inform practicing lawyers and those interested in settlement of disputes about the peculiarities of legal framework and practice of litigation and dispute resolution around the world. The issues addressed include the efficiency and integrity of judicial systems, enforcement of judgments and arbitral awards, confidentiality obligations, privilege and disclosure, costs and funding, interim relief, arbitration, mediation and other ADR methods.

To produce the book, the publishers had collected opinions of leading dispute resolution lawyers in each of the covered jurisdictions. The *Litigation & Dispute Resolution* is comprised of 31 chapter that cover jurisdictions on every continent: Africa (Nigeria), Asia (China, Hong Kong, India, Indonesia, Japan, Malaysia, Turkey), Australia, Europe (Belgium, Bulgaria, Cyprus, England & Wales, Estonia, France, Germany, Italy, the Netherlands, Spain, Switzerland, Ukraine), North (USA) and South Americas (Costa Rica, Ecuador, Mexico). A distinctive feature of the book is its substantial cover of the

## AIA Recommends to Attend

### Baku Conference: Arbitrators and Mediators in Settling National and International Disputes

This autumn the city of Baku, Azerbaijan hosts an international conference on Arbitrators and Mediators in Settling National and International Disputes, which is a part of the series of events on *Arbitration and Mediation in Central and Eastern Europe and Some Asian Countries*.

This conference will focus on several issues, such as the regulation of the status of arbitrators and mediators in certain countries, their relations with parties to disputes and arbitration institutes, codes of ethics regarding the conduct of arbitrators and mediators, and other peculiarities of national legal regulations concerning arbitrators and mediators in European and Asian countries.

The organizers of the conference from the Polish side are *The Court of Arbitration at Nowy Tomyśl Chamber of Commerce in Nowy Tomyśl* and *Polish Association for Arbitration and Mediation, Poznań*, and from the Azerbaijan side – *Azerbaijan Arbitration and Mediation Centre, Baku*.

Conference date: October 25, 2012  
Location: Grand Hotel Europe Baku.

Please address your inquires to the organizers:

In Azerbaijan - Alida Mahmudova,  
tel.: +994 50 362 78 79, e-mail:  
[alida\\_ms@yahoo.com](mailto:alida_ms@yahoo.com)



In Poland - Włodzimierz Brych , tel.: +48 608 080 345, e-mail: [sa@nig.org.pl](mailto:sa@nig.org.pl)

## International Arbitration Congress in Barcelona: Back to the Future



Arbitration definitely replaced the use of litigation in those specialized disputes arising from global business transactions. Arbitration has created a niche in the modern economic environment because of the large amount of time it saves for the firms/particulars involved, the predictability of resolutions and awards –compared to litigation- and the ability to keep the proceedings confidential between the parties. Spain, a steadfast player in arbitration worldwide, seeks to consolidate its presence as an internationally recognized and reliable arbitration center.

Under this framework, The Barcelona Bar Association (ICAB) is pleased to announce the 1<sup>st</sup>. INTERNATIONAL ARBITRATION CONGRESS-Back to the Future, which will be held in Barcelona next 18-20 October 2012, under its auspices. The Congress will focus on the latest trends and amendments in both international and domestic arbitration rules and in certain specific areas of specialization. Speakers will be composed of renowned international experts in arbitration and representatives of major international and domestic arbitration institutions, along with international practitioners in the area.

The Congress will cover the following topics:

1. Searching for predictability: A comparative discussion of the recent amendments of arbitration laws, institutional rules and guidelines in international arbitration.
2. International arbitration in practice: Including, a pragmatic look at challenges and future of the use of emergency arbitrators and an updated approach to company and finance disputes, to the increasing importance of arbitration and mediation in engineering projects and to the latest developments in investment arbitration..

To participate at International Arbitration Congress is necessary to submit the registration form at [www.icab.cat](http://www.icab.cat) and send it by fax (+ 34 93 487 94 18) or by e-mail ([internacional@icab.cat](mailto:internacional@icab.cat)) before 12 October 2012:

## Kiev Arbitration Days 2012: Think Big!

Ukrainian Bar Association has the pleasure invites you to participate in the second international conference **"KIEV ARBITRATION DAYS 2012: Think Big!"** to be held on 15-16 November 2012 in Kiev.

For two days, leading experts from around the world will discuss the most topical and complicated issues in International arbitration, an area closely related to international business and cross-border transactions.

The outcomes of the last year have proved that this event is extremely relevant and up-to-date. Thus, the conference provides for a perfect opportunity for the leading interna-

tional experts to meet with European and Ukrainian colleagues and open the relatively new and promising jurisdiction.

The two-day conference program was designed to include the most complicated and burning issues of international arbitration that will be followed by a comprehensive analysis of investment arbitration lifecycle – from preparation for arbitration to enforcement of arbitral awards.

The conference will attract plenty of leading professionals in commercial arbitration and dispute resolution from Ukraine, CIS and Europe, arbitrators, state officials and lawyers practicing commercial arbitration.

Please use this link to check the preliminary program of the conference <http://www.uba.ua/eng/events/719/>

For more information about the conference, please contact Iya Savchenko by phone:

+380 (44) 492-8848 or e-mail: [conference@uba.ua](mailto:conference@uba.ua)

## Hong Kong Arbitration Week



From 15 to 18 October, the Hong Kong International Arbitration Centre ("HKIAC") will be hosting the inaugural Hong Kong Arbitration Week.

As economic forces and commercial interests have begun to shift the epicentre of international arbitration eastward to Asia, many questions have arisen concerning the impact of Asian users, Asian law and practice, and Asian subject-matter on the practice of international arbitration. HKIAC has established the Hong Kong Arbitration Week to facilitate discussion between users and practitioners about the changing landscape in international arbitration. Through active dialogue, HKIAC hopes to raise awareness of emerging trends and to help bridge the gap between cultures.

The Hong Kong Arbitration Week seeks to provide a multitude of forums in which users and practitioners can exchange ideas on how best to manage the increase in demand for arbitration services within Asia. Our programme for this year includes:

15 October 2012: ICC/HK45 Early Evening Seminar and Cocktail Party.

16 October 2012: ICSID 101 and HK Arbitration Charity Ball.

17 October 2012: ADR in Asia Conference and the HKIAC New Premises Launch Party.

18 October 2012: GAR Live 2nd Annual Asia Conference.

For more details visit: <http://www.hkiac.org/hkaweeek>.

Registration is on a first-come-first-served basis and can only be confirmed upon payment. Discounts are available if you wish to attend more than one of the events mentioned above.

Please do not hesitate to contact Karen Tan or Hrair Simonian at [hkaweeek@hkiac.org](mailto:hkaweeek@hkiac.org) or (852) 2525 2381 if you have any questions.

