Association for International Arbitration
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January 2011

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AIA Upcoming Events

The Association for International Arbitration is proud to invite you to its upcoming conferences on

The Introduction of Class Actions in Belgium

The program will include lectures regarding the political, legal and ethical context of class actions, reactions from the market and the interferences with alternative forms of dispute resolution.

Location: Brussels (exact location to be confirmed)

Date: Friday, 25 March 2011

for further information please visit

www.europeanclassactions.eu

or contact

Philippe Billiet at events@arbitration-adr.org

and

Dispute Resolution in the Aviation Sector

Location: Brussels

Date: 10 June, 2011

For further information on conferences organized by AIA please visit our website www.arbitration-adr.org

Inside this month's issue:

AIA presents the European Mediation Training for Practitioners of Justice 2011

After Last year's success, AIA is proud to announce the second EMTPJ course. EMTPJ is a two-week training program in cross-border civil and commercial mediation, sponsored by EU commission and organized by the Association for International Arbitration (AIA).

This year the course will take place from 5th to 17th September 2011 in Brussels, Belgium. It will be a 100 hour training program including the Assessment day, which will cover the following essential areas; The stages in mediation process, analytical study of conflict resolution, theory and practice of EU and mediation acts, theory and practice of negotiation in mediation, International and cross – border mediation, the role of experts and counsel in civil and commercial mediation, the role experts and counsel in civil and commercial mediation, theory and practice of contract law in Europe, interventions in specific situations and EU ethics on mediation.

For additional information and the registration form please visit:

www.emtpj.eu

New Arbitration Ordinance – A Major leap by Hong Kong

By - Bs. Ajatshatru Singh Meena

In this era of lengthy and complicated business contracts, one of the most common clauses is an arbitration clause. There are several reasons behind this common practise but the most noticeable and important is that an arbitral award pronounced in the arbitral proceedings are easily enforceable than the judgements passed in a foreign court. This has made International Commercial Arbitration (ICA) as one of the most effective tools for resolving the disputes between multi-national parties. International Commercial Arbitration is a private mechanism which is regulated by the commands of the parties rather than the court's regulations; nonetheless, it needs laws based on sound international principles to function effectively. As a result legal systems around the world are constantly amending their arbitration laws to meet the requirements of international instruments like UNCITRAL Model Law, in order to lure investors across the globe. One of such examples is the New Arbitration Ordinance passed by Hong Kong Legislature on 10th November 2010. This new ordinance is expected to replace its predecessor within a period of next six months.

The aim of this ordinance is to simplify the laws of arbitration in Hong Kong by adopting unitary regime, for both international and domestic arbitration, based on UNCITRAL Model Law (UML). The ordinance has adopted UML and enacted additional provisions to make arbitration more users friendly and moreover to curtail judicial intervention.

Outline of the Ordinance

The new ordinance is divided into 14 parts, which consists of 112 sections and 4 schedules.

Part I – Deals with preliminary aspects of the ordinance stipulating the object of the ordinance i.e. to facilitate fair and speedy resolution of disputes by using arbitration without incurring unnecessary expenses. *Section 4* under this part, expressly provides for the enforceability of UNCITRAL Model Law in Hong Kong. *Section 5* defines the scope of the ordinance. It stipulates that this ordinance will apply to all arbitrations which take place in Hong Kong irrespective of the place where the arbitration agreement was entered into by the parties. This provision abolishes the separate regimes of domestic and international arbitration and establishes a common platform for arbitration in Hong Kong.

This unification of domestic and international regimes can be a turning point for the growth of Arbitration practice in Hong Kong. It will not only encourage participation but also lessen the scope of confusion regarding the applicability of laws among lawyers.

Part II – Deals with the general provisions for the administration of arbitration in Hong Kong. *Section 9* provides that while interpreting this law regard must be given to its International origin; to promote uniformity in its application and the observance of good faith. *Section 12* curtails judicial intervention by stipulating that, no court shall intervene except where so provided in this law. *Sections 14* lays down that the Limitation ordinance and any other ordinance in relation with limitation of actions, will apply to arbitrations as they apply to actions in the court. *Section 17* secures the confidential character of arbitration proceedings by putting restrictions on reporting of the "closed proceedings". It provides that a court must not give a direction to publish the report unless it is agreed either by the parties or where the court is satisfied that the report will not reveal the identity of the parties. However, Court can direct the reporting of the proceedings if it involves major legal interest. But, if the direction by the Court is in conflict with the wishes of the parties regarding a particular matter, then court must give order to conceal that matter. Nonetheless, if reports still reveal the said matter then the court must direct not to publish the report until after the end of a period not exceeding10 years.

Section 18 further prohibits the disclosure of the arbitral proceedings or an award unless otherwise agreed between the parties.

These provisions enhance the confidentiality characteristic of arbitration proceedings. This will encourage the participation of parties, who have vested interest in keeping arbitral proceedings confidential.

Part III – Enumerates the provisions in relation to the arbitration agreement. *Section 19* provides the definition and form of arbitration agreement, based on Article 7 of UML. This provision widens the scope of "written" requirement in the arbitration agreement. It includes "electronic communication" through data messages, which means information generated, sent received or stored by electronic magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. *Section 20* deals with substantive claim before the court, based on Article 8 of UML. *Section 21* deals with Arbitration agreement and interim measures by court, based on Article 9 of UML.

Part IV – Deals with composition of arbitral tribunal which is divided into two divisions, division I deals with arbitrators and division II deals with mediators. *Section 30* of the ordinance provides that when there are even numbers of arbitrators in the tribunal then they themselves may appoint an umpire at anytime after their own appointments, unless otherwise agreed by the parties. The parties derive authority to lay down the function of the umpire under section 31. However, in the absence of any agreement, arbitrators are free to agree on the functions of the umpire. The section further

provides that if arbitrators cannot agree on a matter relating to the dispute submitted for arbitration, in that case umpire will replace the arbitrators and act as the arbitral tribunal with the powers to make orders and awards. However, despite the replacement of arbitrators with an umpire, arbitrators may still make orders and awards with respect to the other matters that are not submitted to the umpire.

Division ii brings mediators under the practice of arbitration in Hong Kong by virtue of *Section 32,* which *provides* for the appointment of mediators. It stipulates that if any arbitration agreement provides for the appointment of a mediator by a person who is not one of the parties and, if that person refuses to make the appointment or does not make an appointment within a reasonable time then, HKIAC can appoint a mediator on moving of the application by the other party. The section also provides that the mediator can be appointed as an arbitrator, if provided in the arbitration agreement. The appointment of mediator turned arbitrator cannot be challenged on the ground that the person had acted previously as a mediator in connection with some or all the matters relating to the dispute.

Section 33 empowers the arbitrator to act as a mediator with the written consent of the parties, but during the interim period, arbitration proceedings must be stayed to facilitate mediation proceedings. However, if during the mediation proceedings mediator receives confidential information from a party, in that case mediator turned arbitrator, before resuming arbitration proceedings must disclose such information as he considers significant to all the other parties.

The addition of mediation will certainly streamline the proceedings in international Arbitration and help parties to reach at a settlement expeditiously. The insertion of mediation in international arbitration has got the backing from jurists like Lord Woolf , who introduced the "mediation window" in the rules of CEDR (Centre for Effective Dispute Resolution) for the facilitation of settlement in international Arbitration. He said

"International arbitration had 'lost its way' and is falling behind the commercial courts because its procedures have not been modernised... Mediation and other early settlement techniques are being encouraged by the commercial court, but this is not taking place in international arbitration. If this continues clients will walk away from it."

Part V – Deals with Jurisdiction of Arbitral Tribunal based on Article 16 of UNCITRAL Model Law.

Part VI – Deals with Interim measures and preliminary orders. This part is divided into six divisions and structured in the same way as Part IV A of UML. This part grants power to the arbitral tribunal to pronounce interim measures in order to maintain or restore the status quo between the parties, pending the determination of the dispute. The tribunal also has the power to grant preliminary orders directing a party not to frustrate the purpose of the interim measures. These preliminary orders shall be binding on the parties but are not to be subjected to the enforcement by a court and does not constitute an award. Division V of this part deals with court-ordered interim measures. *Section 45* provides that court may grant an interim measures in relation to any arbitral proceedings which have been or are to be commenced, in or outside, Honk Kong. However, court can use this power only if, *first*, the arbitral proceedings are capable of giving rise to an arbitral award that may be enforced in Honk Kong under this ordinance or under any other ordinance. *Secondly*, the interim measure is of the nature that can be granted in Hong Kong in relation to arbitral proceedings and *finally*, court should have a jurisdiction over the subject matter of interim application. Notwithstanding, these powers court must give due regard to the fact that the court's powers are ancillary to the powers of the arbitral proceedings held outside Hong Kong. These provisions will enhance the faith of domestic and international corporations in the institution of International Arbitration as a whole.

Part VII- Deals with conduct of Arbitral Proceedings. This part pertains to the basic rules required for conducting arbitral proceedings as is stipulated in UNCITRAL model law of 2006. In addition to the provision of UNCITRAL model law, the ordinance also gives power to arbitral tribunal to limit the amount of recoverable costs, power to extend time for arbitral proceedings and other general powers including power to issue Minerva injunction and Anton Pillar Awards. Section 61 provides for the enforcement of orders and directions of arbitral tribunal in Hong Kong. It stipulates that an order or direction pronounced by an arbitral tribunal whether, in or outside Hong Kong, will have the same effect as that of the order of the court, but only with the leave of the court. It further stipulates that a decision of the court to grant or refuse to grant leave is not subject to appeal. This part curtails down the judicial intervention in arbitral proceedings, which can be quite crucial for the practice of arbitration in Hong Kong.

Part VIII – Deals with making of an award and termination of proceedings. It includes the provisions which are identical to UNCITRAL model 2006 such as rules applicable to the substance of the dispute, decision making by panel of arbitrators, form and contents of award, termination of proceedings, correction and interpretation of awards. However, in addition to this, the part also stipulates extensive provisions on costs of arbitration proceedings and taxation of costs of arbitration proceedings (other than fees and expenses of arbitral tribunal). These detailed provisions will provide a detailed structure to the fees and policy of taxation which in turn reduce the expenses for arbitration.

Part IX – Pertains to recourse against the arbitral award. This part is based on the effect of Article 34 of UNCITRAL

Model law, which deals with the application for setting aside an arbitral award. The grounds laid down in Article 34 for setting aside an award can be found in section 81(1). However, section 81(1) doesn't affect the power of the court to set aside arbitral award if it upholds the challenge against the appointment of an arbitrator. The provision also doesn't affect the right to challenge arbitral award on grounds of serious irregularity, and right to appeal against arbitral award on question of law under schedule 2. Nonetheless, the right to appeal under schedule 2 does not give jurisdiction to the court to set aside or remit an arbitral award on the ground of errors of fact or law evident on the face of the award.

Part X – pertains to the recognition and enforcement of awards. This part is divided into three divisions. *First division* is Enforcement of Arbitral awards, *second division* deals with enforcement of convention awards and *third division* deals with enforcement of Mainland China awards (Mainland awards). The third division is quite significant since it deals with the enforcement of arbitral awards pronounced in Mainland China. Section 92 stipulates that the mainland awards are enforceable in Hong Kong either by action in the court or in the same manner as an arbitral award. However, *section 96* restricts the enforcement of Mainland award in case:
A) - A mainland award was, at any time before 1st July 1997, a convention award within the meaning of part IV of the repealed ordinance and,
B) - If the enforcement of the award has been refused at any time before the commencement of section 5 of the arbitration (amendment) ordinance 2000 under section 44 of repealed ordinance. These detailed provisions provided for the enforcement of Mainland award can prove to be quite effectual for the western parties investing in China.

Part XI – Enumerates provisions that may be expressly opted for or automatically apply.

Part XII – Enumerates Miscellaneous Provisions

Part XIII – Enumerates consequential and related amendments

Part XIV – Enumerates repeal, savings and transitional provisions.

Schedule I – UNCITRAL Model Law on International Commercial Arbitration

Schedule II – Contains provisions that may be expressly opted by the parties or automatically apply to the dispute. This schedule contains all the existing domestic arbitration provisions, which can be applied in two situations. Firstly, if an arbitration agreement expressly provides for it. Secondly, if for a period of 6 years after the ordinance comes into existence, an arbitration agreement provides that arbitration is to be treated as a "Domestic Arbitration", in that case this schedule will automatically apply.

Schedule III – Contains savings and transitional provisions

Schedule IV – Contains consequential and related amendments

Conclusion

Hong Kong is one of the most popular hubs for arbitration in today's world. Its user-friendly arbitration laws, pro-arbitration judiciary and close association with Mainland China have provided meteoric growth to the practice of arbitration. This new arbitration ordinance founded on UNCITRAL model will provide a great stimulus to Honk Kong´s persistent efforts to become a leading arbitration center in Asia.

Report on Remedies in International Arbitration Seminar Perm, Russia

An International seminar on "Remedies in International Arbitration" was organized by the Perm Chamber of Commerce and Industry (PCCI), in cooperation with the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) at Perm, Russia. The two day event which began on 8th December 2010 provided a platform for lawyers, practitioners, researchers, students and others with interest in international arbitration to learn, discuss and share their disparate experiences. The seminar was in Russian and English language.

The leading members of Russian and Swedish legal fraternities were present to share their knowledge and views on the topic. The speakers were *CHRISTER SÖDERLUND* - former member of the SCC Board, experienced arbitrator under the rules of the SCC, ICC, LCIA, ICAC and HKIAC; *BO G.H. NILSSON* - partner, law firm Lindahl, Stockholm, head of the firm's Arbitration & Litigation Department, chairman of the Swedish Arbitration Association; *VLADIMIR KHVALEI* - partner, law firm Baker & McKenzie, head of the firm's CIS Arbitration Group, Vice-President of the International Court of Arbitration of the ICC; *JAKOB RAGNWALDH* - partner, law firm Mannheimer Swartling, Stockholm, SCC Board member; *OLEG SKVORTSOV* - Doctor of Law, Legal Director at DLA Piper in St. Petersburg, professor of the Commercial Law Department at St. Petersburg State University's Law

Faculty; *ROMAN ZYKOV* - PhD, LL.M, Senior Associate with the International Arbitration practice of Hannes Snellman (Helsinki, Moscow); *NATALIA PETRIK* - legal counsel at the SCC since 2005; *TIMUR AITKULOV* - partner in the Litigation, Arbitration and Dispute Resolution practice of the Moscow office of Clifford Chance.

The seminar consisted of eight topical sessions. Each session began with a brief introduction by a moderator, followed by the speakers' presentation and interesting debates during the question and answer session.
After a brief welcome speech by the representatives of PCCI and the SCC, the first panel took the floor. The topic was "In anticipation of arbitration". Under this topic participants addressed the issues pertaining to the tasks of in-house lawyers at the stage of drafting arbitration agreements, legal and practical effects of arbitration agreements, the role of a counsel, preparations for the proceedings with foreign counsel, fact-finding and collecting evidence.

The second panel addressed the stages of initiation of arbitration and constitution of the arbitral tribunal. The speakers and the audience discussed the essential information deemed for Russian parties to know about arbitration in Stockholm; conflict of interest issues , questions of financing the proceedings, selection and appointment of arbitrators.

The third panel concentrated on the proceedings before the tribunal and analyzed in particular the schedule of the proceedings, procedural documents and statements of the parties, hearings, prerequisites for producing documents and finally formal requirements for arbitral awards.

The fourth and the last panel of the first seminar day provided a deep insight into the role of the courts in enforcing arbitration agreements, imposing interim measures, enforcing final and partial foreign arbitral awards.
These four sessions on the first day gave a general overview of various stages in international arbitration proceedings. These sessions prepared the audience for more specific topics of "Remedies in International Arbitration" which were discussed quite extensively on the second day of the seminar.
The second seminar day was also divided into four sessions, which dealt with special features of remedies in arbitration, damages, loss of profit and good-will and finally other forms of compensation.

The fifth session was based on the special features of remedies in arbitration. During this speakers threw light on the burden of proof and evidence in arbitration, expert evidence and existing approaches in foreign legal systems for specific performance of compensation and finally, methods of evaluation of compensation.

The panel of the sixth session dealt with the damages in international arbitration. The main focus was on the direct and indirect damages, unjust enrichment, anticipation and mitigation of damages, penalties, limitation of liability and force-majeure clauses.

The speakers of the seventh session shared their views on culpa and negligence, compensation for lost profit, lost value, and loss of goodwill and opportunity. The final session of the seminar concentrated on the issues of pre-contractual liability, interests, compensation for changes in currencies and compensation of arbitration costs.

After the closing speech by the head of the Legal Department of the PCCI, Ilkova Svetlana and the Legal Counsel of the SCC, Natalia Petrik, the certificates of participation were handed to all the attendees.

The seminar provided participants and speakers with a platform to exchange their views and share experiences of the International Arbitration landscape.

New evolution in European cross- border mediation: **The introduction of 'European Mediators'**

Philipe Billiet (Lawyer at Verwal)
EwaKurlanda (LegaladviseratMott Mc Donald)

Introduction

A successful mediation brings huge advantages in litigation. One can for instance, think of protecting future business relationships through the confidential nature of the mediation process and its voluntary nature in close regard to its speediness and lower costs compared to litigation and possible synergy effects between disputing parties.
However, the current mediation practice in Europe still seems to be insufficiently adapted to the ever increasing international business relationships within the European Community. This article demonstrates that the problem essentially lies in the absence of European-wide accredited mediators. Subsequently, this article will explain how this issue has gradually been dealt with.
The authors will conclude that reactions have now reached a turning point under the EMTPJ Project. The authors expect that the EMTPJ Project will significantly change the landscape of cross border mediation in Europe as it introduces European Mediators into the European mediation practice.

Problem:

Legal status of settlement agreement depends on the national or private accreditation of the mediator Several national legislations in Member States attach specific legal consequences to settlement agreements obtained through the intervention of an accredited mediator. These consequences are different from legal consequences of settlement agreements that were entered into through the intervention of a non-accredited mediator.
Currently, there is no common set of rules in Europe on the conditions to become an accredited mediator and in each Member State different conditions exist to become one. In certain Member States the conditions are set out by the Regulator, while in

other Member States the conditions are set out by private mediation providers.
The fact that different mediation cultures exist in Europe is often used to defend the upholding of this practice. However, the idea gains field that this practice enables unwanted forms of protectionism in preventing foreign mediators to effectively operate on the national market. The latter idea has provoked increased advocacy to implement the freedom of establishment for mediators throughout the European Union.

Reaction of the European Commission: Harmonization steps

In 2004, the European Commission issued a voluntary code of conduct for mediators. This code of conduct has no binding force and can voluntarily be subscribed to by different mediation providers. The code sets out a body of ethical rules to follow when conducting mediator activities. Unfortunately, this non-binding instrument did not create a practice under which mediators who respect these rules can effectively provide mediation services throughout Europe.
Subsequently, the European Commission realized that more efforts must be taken in light of the free movement of people and the proper functioning of the internal market concerning the availability of mediation services in cross-border disputes. The answer to this problem was the issue of the European Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters. This Directive aims to harmonize mediation practices for the said cross border disputes in Europe and is to be fully implemented by the Member States by 21st May 2011.
One particularity about this Directive is that, instead of imposing a specific practice on the European market, its broad formulations allow the European Commission to support a bottom-up approach by which the European market organizes itself within the borders that are set out in the said Directive.
In response, the market-driven EMTPJ Project arose under the auspice of the European Commission. Under this project, mediation trainings are provided which incorporate, as far as possible, varied conditions for accreditation and different mediation cultures existing within the European Union.

Solution: The introduction of European Mediators

The purpose of the EMTPJ Project is to introduce 'European Mediators' into the European mediation practice. These mediators should, insofar as achievable, be able to intervene as fully accredited mediators in all civil and commercial cross-border disputes throughout Europe.
The introduction of European Mediators is widelyconsidered as a turning point for European cross-border mediation practices. The intensive training to become a European Mediator takes 12 full days and a first group of participants have already graduated in August 2010 at the University of Warwick (UK). Next training sessions are scheduled for September 2011 and will take place at the HUB University of Brussels (Belgium). More information is available on www.emtpj.eu.

Conclusion

Mediation practice for civil and commercial cross-border disputes in Europe has reached its turning point. Thanks to the EMTPJ Project this practice will greatly evolve in the coming years. It is expected that local protectionism of certain mediation providers will gradually fade out, as the mediation providers which recognize the EMTPJ Project will benefit from increased number of cross-border mediations.

Global and Globex v. Ukraine: Sale and Purchase Contracts are not Investments

In December 2010, an ICSID Tribunal made a decision that applied Rule 41(5) of the ICSID Arbitration Rules. This rule opened the way to either party to apply to the Tribunal at a very early stage in the arbitral proceedings to rule that "a claim is manifestly without legal merit". In this case, there is an important backing of the Salini test, as it has been construed by previous ICSID decisions, and a clear message for claims lacking legal merit under the ICSID framework.

Background

On 21 May 2009, the International Centre for Settlement of Investment Disputes received a request for arbitration dated 18 May 2009 filed by Global and Globex against Ukraine. The request was filed on the basis of the Treaty between the United States of America and Ukraine concerning the Encouragement and Reciprocal Protection of Investment, which entered into force on 16 November 1996.
The Claimants alleged that due to the structure of the Ukrainian poultry market, imports had been severely limited with result that domestic prices soared to the benefit of domestic poultry producers and the to detriment of the Ukrainian consumer. Then, the Ukrainian government proposed a poultry 'purchase-and-import program' as a special government initiative for the express purpose of correcting what it was perceived to be anti-competitive and inflationary conditions in the Ukrainian poultry industry. This led directly to the poultry sales and purchase contracts negotiated by the Claimants with senior Ukrainian officials. The Request for Arbitration set out in detail the steps taken by both Claimants to perform their respective purchase and sale contracts, Ukraine's failure to pay for and take delivery of most of the poultry shipped to the designated port, the efforts of the United States Embassy to convince Ukraine to fulfill its contractual obligations to the two exporters, and the resulting losses, including demurrage charges, incurred by the Claimants before they finally disposed of the goods. Ukraine argued that Claimant's claims represen-

ted nothing more than claims to payment under trading contracts, and do not therefore amount, in law, to investments.

Discussion and Decision

In this case, the Tribunal considered three main issues: (i) procedure under Rule 41(5) of the ICSID Arbitration Rules; (ii) the conditions to be met for the Tribunal's jurisdiction: and (iii) Article 25 of the ICSID Convention. Next, the most important arguments pointed out by the Tribunal will be explained.

Procedure under Rule 41(5)

The Tribunal explained that Rule 41(5) brings one very interesting question, one that lies half-way between procedure and substance, namely, under what circumstances ought a tribunal to consider it proper to dispose of an objection summarily, at the pre-preliminary stage? or in other words: when can a tribunal properly be satisfied that it is in possession of sufficient materials to decide the mater summarily?

In this subject, the Tribunal reached the following conclusion:

"Here, a balance evidently has to be struck between the right (however qualified) given to the objecting party under Rule 41(5) to have a patently unmeritorious claim disposed of before unnecessary trouble and expense is incurred in defending it, and the duty of the tribunal to meet the requirements of due process. Once again, the matter seems to this Tribunal to present itself differently according to whether the outcome is to be to reject the objection, or to uphold it. In the former eventuality, a tribunal that is in doubt as to whether the claim is 'manifestly' without legal merit can decide not to determine the issue summarily, but to leave it over for decision later on, at a more develop stage of the proceedings. In the latter eventuality, it would seem that the tribunal is under an obligation, not only to be sure that the claim objected to is 'manifestly without legal merit', but also to be certain that it has considered all the relevant materials before reaching a decision to that effect, with all the consequences that follow from it."

Conditions to be met for the Tribunal's Jurisdiction

The Tribunal concluded that there are two independent parameters for determining the existence of an investment and, in this context, the Tribunal's Jurisdiction. According to the Tribunal, the two independent parameters are: what the parties have given their consent to, as the foundation for submission to arbitration; and what the Convention establishes as the framework for the competence of any tribunal set up under its provisions. In short, the Tribunal gave an important weigh of authority to the *Salini test* and the line of previous decisions backing this position.

The Tribunal presented the argument as follows:

"The Tribunal need do no more that refer in this connection to a long line of previous decisions starting with Alcoa Mineral v. Jamaica in 1975 through Salini Costruttori S.p.A. v. Kingdom of Morroco (and the various subsequent cases in which tribunals have discussed, modified and grafted on various indicia to the so called Salini test for determining the existence of an investment), and culminating most recently in Saba Fakes v. Republic of Turkey. These decisions have held that the notion of 'investment', which is one of the conditions to be satisfied for the Centre to have jurisdiction, cannot be defined simply by reference to the parties' consent. The weight of authority is thus in favour of viewing the term 'investment' as having an objective definition within the framework of the ICSID Convention. Accordingly, as noted in the Joy Mining Machinery Limited v. Arab Republic of Egypt case, the "parties to the dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention."

"Although, no doubt, in the overwhelming majority of cases what the State Parties settled as the definition of 'investment' in their bilateral treaty is unarguably inside the boundaries set by the Convention – so that the two-fold test melts, in effect, into one – the generous margin of freedom left under the Convention is not absolute. It does not extend to allowing State Parties (or indeed others) to deem an activity to be an 'investment' without regard to whether it meets the meaning of that term as used within the ICSID Convention, and specifically Article 25(1) thereof, properly interpreted according to the applicable rules of international law. Had the drafters of the Convention wished to accord and absolute freedom of that kind, they would have said so, not simply left Article 25 without a formal definition for the term 'investment'."

"It seems to the Tribunal that what the drafters of the Convetion had in mind was an objective and autonomous definition of the term 'investment' in Article 25, without which an essential component of Article 25 itself would have been stripped of its meaning."

Article 25 of the ICSID Convention

The Tribunal considered the question: is the supplier's outlay of money in performing a contract for the transboundary purchase and sale of goods capable of constituting an investment? The Tribunal concluded that the sale and purchase contracts entered into by the Claimants (Global and Globex) were pure commercial transactions that cannot on any interpretation be considered to constitute 'investments' within the meaning of Article 25 of the ICSID Convention. The Tribunal gave the following reasons:

"When the circumstances of the present case are examined and weighed, it can readily be seen that the money laid out by the Claimants towards the performance of these contracts was no more than is typical of the trading supplier under a standard CIF contract. The fact that the trade in these particular goods was seen to further the policy priorities of the purchasing State does not bring about a qualitative change in the economic benefit that all legitimate trade bring in its train. Nor can an undertaking by official of the State to honour the contractual commitments to be concluded transform a sale and purchase agreement into an investment. (...) the Tribunal is compelled to the conclusion that these are each individual contracts, of limited duration, for the purchase and sale of goods, on a commercial basis and under normal CIF trading terms, and which provide for delivery, the transfer of title, and final payment, before the goods are cleared for import into the recipient territory; and that neither contracts of that kind, nor the moneys expended by the supplier in financing its part in their performance, can by any reasonable process of interpretation be construed to be 'investment' for the purposes of the ICSID Convention.

Comment

The expedited procedure in Rule 41(5) of the ICSID Arbitration Rules is relatively new and this decision provides helpful guidance on its scope. It clarifies that, although it does not refer to objections to jurisdiction, such objections may be advanced pursuant to this provision. In addition, this Rule has proven to be a very useful tool to end up cases in which a long debate and procedure is unnecessary because there is a lack of legal merit.

The decision is available at http://icsid.worldbank.org/ICSID/FrontServlet?requesType=CasesRH&actionVal=showDoc&docId=DC1771_En&caseId=C660

Post Graduate in International Business Arbitration Moot Arbitration - Brussels

The Post Graduate in International Business Arbitration (PIBAB) organized a moot arbitration workshop in Brussels on 3 rd December 2010. It was the first time that PIBAB moot arbitration session took place in which thirty students participated. PIBAB runs a Postgraduate course on International Business Arbitration under the new VUB programs.

The first case, drafted by Philippe Billiet, invoked UNIDROIT principles (www.unidroit.org) and attracted attention of several prominent academics and arbitrators. The case concerned an international transfer of shares, following which discussions arose between the buyer (claimant) and the seller regarding disclosure obligations at the negotiation stage. A separate but related dispute arose between the buyer and another company that had to assist the former throughout the process of acquisition of shares. Both disputes were closely related and the underlying arbitration agreements provided for arbitration in Brussels before the Belgian Institute of Arbitration conform to its procedural rules (www.euro-arbitration.org).

A panel of 3 well-known arbitrators was present to assess the participants on their theoretical and practical skills. Their main points in focus were:

Scope of the arbitration clause.

- Joinder of both disputes in one arbitration procedure.
- Applicability of UNIDROIT Principles as applicable/sole substantive law (for contractual parts of the disputes).
- Completion of stipulated conditions before conducting arbitration.

After the assessment on the above points the panel awarded Mr. Chai Zheng as the best pleading performer and Ms Cui Yi as runners up.

More information on this new Postgraduate Course can be found at:

www.vub.ac.be/iPAVUB/Resources/InternationalBusinessArbitration.pdf

CALL FOR PAPERS:

Upcoming Conferences of AIA on Class Actions, Dispute Resolution in the Aviation Sector and Dispute Resolution in the Maritime Sector

Alongside with its upcoming conferences, AIA also plan to publish three books through the year 2011. Therefore, the association would like to spread out a call for papers with respect to class actions, dispute resolution in the aviation sector and dispute resolution in the maritime sector. The expected papers shall be 15 microsoft word pages, long at minimum, written in flawless English language, and shall cover one of the following topics:

Class actions

(Deadline for submission: 1st March 2011)

⇒ Papers on various national class action systems;
⇒ Papers on interrelation with arbitration;
⇒ Papers on interrelation with mediation;
⇒ Papers with critical comments on class action systems.

Dispute resolution in the aviation sector

⇒ Papers on dispute resolution in passenger rights;
⇒ Papers on dispute resolution in package travelling;
⇒ Papers on consequences of class action/ collective redress mechanisms;
⇒ Papers with critical comments on passenger right system, package travelling system and class action system.

Dispute resolution in the maritime sector

Papers on dispute resolution-related topics in the maritime sector.

Please submit your paper and any question you may have to:

administration@arbitration-adr.org

HAPPY NEW YEAR

The Association for International Arbitration would like to express its heartfelt gratitude to all its members and organizations for giving their support to the association in accomplishing one more successful year. The association would also like to thank ardent readers of the news letter for contributing their valuable suggestions and feed-backs which helped in improvising the news letter. This Year we aspire to take this relationship between its readers, members and association to a next level by planning and organizing more conferences and by sharing current topics on Alternate Dispute Resolution through news letter.

AIA and its entire staff wishes all our members and readers across the globe a very happy new year.