Association for International Arbitration
In Touch

March 2011

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Inside this month's issue:

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: Palace of Justice, Court of Appeal of Brussels,
Salle des Audiences Solennelles, Plechtige Zittingszaal (Room 1.35),
Place Poelaert 1 Poelaertplein,
1000 Brussels, Belgium
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: 24 June, 2011
For further information on conferences organized by AIA please visit our website
www.arbitration-adr.org

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 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

CASE NOTES ON DISPUTE RESOLUTIONS IN THE AVIATION SECTOR

by AURELIA CADAIN AND JONATHAN RUBINSTEIN

1. The two-year limitation period established by Article 35 of the Montreal Convention is subject to interruption pursuant to French law and may therefore run anew

Mr and Mrs Butin v SARL Nessia v Royal Air Maroc – CA Paris 21 October 2010 No 08/13968

An appeal court decision recently confirmed that that the two-year limitation period under the Montreal Convention may, like the limitation period under the Warsaw Convention, be interrupted pursuant to French law.

Mr and Mrs Butin had booked a Paris/Ouarzazate/ Casablanca flight with a travel agency named Nessia. Owing to a delay in the Paris/Ouarzazate leg, they were unable to take their connecting flight to Casablanca and had to spend the night in Ouarzazate.

Mr and Mrs Butin therefore brought an action for damages against Nessia, and Nessia issued the airline, Royal Air Maroc, with third-party notice for indemnity.

The court of first instance ordered Nessia to pay damages to Mr and Mrs Butin, and Royal Air Maroc to indemnify Nessia.

On appeal, Royal Air Maroc contended that the judgment at first instance should be set aside on the ground that Nessia's right of action against it was time-barred by Article 35 of the Montreal Convention.

The court of appeal upheld the judgment. Nessia's right of action against Royal Air Maroc was not time-barred, even though it was exercised more than two years after the date of arrival of the flight, i.e. 4 September 2005. The court held that a passenger compensation offer made by Royal Air Maroc on 1 February 2006 had, pursuant to Article 2248 of the French Civil Code, interrupted the limitation period that was then running under the Montreal Convention and triggered the running of a new two-year period.

2. **The concept of 'damage' under Article 22(2) of** the Montreal Convention covers both material and non-material damage

Axel Walz vs. Clickair SA – ECJ Judgment of 6 May 2010 – Case C-63/09

The European Court of Justice has decided that in the case of loss of baggage in international carriage governed by the Montreal Convention, the term 'damage' covers both material and non-material damage and that the air carrier liability limit of 1,000 Special Drawing Rights (SDRs) is a combined limit for both kinds of damage.

Mr Walz brought an action in a Spanish court against the airline Clickair for loss of checked baggage on a flight operated by that company. He claimed compensation for both material and non-material damage: €2,700 for the value of his lost baggage and €500 for emotional distress.

The Spanish court referred a question to the European Court of Justice about the interpretation of Article 22(2) of the Montreal Convention, which provides that the liability of an air carrier in the event of destruction, loss, damage or delay of baggage is limited to 1,000 SDRs. The question was whether the limit applied to material and non-material damage jointly or separately.

The European Court considered international rules addressing the concept of 'damage.' In this respect, it cited Article 31(2) of the Articles on State Responsibility for Internationally Wrongful Acts, drawn up the UN International Law Commission and annexed to UN General Assembly resolution 56/83 of 12 December 2001, in which 'injury' is defined as including 'any damage, whether material or moral, . . .'.

Consequently, the European Court held that in the context of Article 22(2) of the Montreal Convention, the term 'damage' must be interpreted as including both material and non-material damage.

3. European Court of Justice extends the flat-rate compensation under Regulation 261/2004 for passengers of cancelled flights to passengers of delayed flights

Sturgeon v Condor Flugdienst GmbH and Böck and Lepuschitz v Air France SA – ECJ Judgment of 19 November 2009 – joined Cases C-402/07 and C-432/07

The European Court of Justice has decided that passengers who reach their final destination three hours or more after the scheduled arrival time may — like passengers whose flight was cancelled and whose replacement flight arrived at destination with a delay of three hours or more — seek the flat-rate compensation provided for in Regulation (EC) 21/2004, even though the Regulation does not explicitly provide such right.

In each of the two joined cases, the passengers experienced substantial delays in their flights: 25 hours in one case and nearly 22 hours in the other.

The passengers claimed compensation from the airlines under Articles 5(1) and 7 of Regulation (EC) 261/2004. The airlines refused the claims on the ground that, in each case, the flight had been delayed, not cancelled, and that Regulation (EC) 261/2004 does not provide for compensation in the event of a flight that has merely been delayed.

The European Court first held that a delayed flight, irrespective of the length of the delay, cannot be regarded as having been cancelled.

Nevertheless, in light of the general principle of equal treatment for persons in comparable situations, the European Court recognised that passengers of delayed flights should have the same right to compensation as do passengers of cancelled flights, when they arrive at destination with a delay of three hours or more.

This judgment has been criticized because, by allowing passengers of delayed flights the right to seek flat-rate compensation under Regulation (EC) 21/2004, even though the Regulation does not explicitly provide such right, the European Court could be considered to have exceeded its jurisdiction and acted *ultra*

vires.

Finally, it should be recalled that the right to compensation for delay is already governed by the Montreal Convention and there could be a conflict with Article 29 thereof, which states that the bringing of any action for damages is subject to the conditions and limits of liability set out in the Convention.

Book Review: Droit des sociétés et de **l'arbitrage international –** Pratique en **droit de l'Ohada**

by Frederic Savoie

A new publication was recently released in January 2011 by the Joly Editions, titled «Droit des societies et de l'arbitrage international – Pratique en droit de l'Ohada», by Benoit Le Bars. Mr. Le Bars is a founding partner of Lazareff Le Bars (AARPI), a law firm in Paris associated with Girard Gibbs from New York and San Fransisco to form a team of experts in International Arbitration and Dispute Resolution. In addition, Benoit Le Bars is an Associate Professor at the Vermont Law School in the United States, Director of the Master II DJCE of Cergy-Pontoise and an outstanding arbitrator registered with the CCJA, the French Arbitration Committee (ICC) and many other arbitration organisations.

The book is structured in three parts, starting with "Le droit commun des sociétés", followed by "Le droit special des sociétés", and the last part is "Le droit des groupes et des restructurations". The book is an excellent piece of work, that examines the different norms in the Ohada business law since the Treaty of Port Louis in 1993, harmonizing the business laws among African signatory states. The book gives a vision on how commercial interests can be protected, and offers different solutions for anyone involved in the Ohada area. It aims to be a tool for students as much as for professionals and business people alike. It is clear, detailed and very well explained.

To put the readers into context, the author starts by exposing some of the notions of the uniform business law of Ohada, including aspects about the creation and management of a corporation. For readers that are not familiar with Ohada, it is an acronym for "Organisation for the Harmonisation of Business Law in Africa". The *Ohada Treaty* signed in Port Louis initially consisted in fourteen signatory states, but since then two additional states have joined the agreement. After the first two chapters focusing more on Ohada business law, the author talks about the management of issues, controversies and arbitration as a dispute resolution mechanism. In Ohada law, arbitration can be conducted either as institutional arbitration, meaning under the rules of the CCJA (stands for "Cour Commune de Justice et d'Arbitrage"), or as *ad hoc* arbitration, meaning under no specific institutional rules and based only on what the parties have agreed to or on the discretion of the arbitral tribunal. When the parties in the arbitration agreement state that they want arbitration according to the *Ohada Treaty* or the rules of the CCJA, the proceedings will be conducted within the CCJA institutional framework, which is very similar to the ICC (International Chamber of Commerce) proceedings. On the other hand, the parties can opt-out of those rules by contract, in which case only the imperative rules of the Ohada Uniform Act of 1998 will be applicable. The differences between arbitration under the Uniform Act versus under the aegis of the CCJA and the ICC, regarding formalism in the agreement, autonomy of the parties, election of the arbitral tribunal, proceedings and enforcement of arbitral awards, to name only a few, are very well detailed in the book. A comparison table is also included for that matter in the chapter.

In addition, the book also deals with how arbitration clauses can be used in a risk management business strategy, whether with its internal workers or for the activities of the business. Contentious matters can be a big expense either because of litigation or from business transactions. In most cases, arbitration agreements are very useful at protecting parties' interests as long as the clauses are drafted properly.

For more information on arbitration in Ohada law, this book from the Joly Editions can be purchased online for 61,75 € at http://www.lgdj.fr/documents/226035/droit-societes-arbitrage-international?_IDPrv=ID00041. Copies of the book can be ordered from this website and shipped in 24 hours.

Report on the ICC's International Mediation Conference in Paris, February 10, 2011

by Dilyara Nigmatullina

ICC's 2nd International Mediation Conference titled « Win-Win Strategies : Tools for corporate dispute management" took place at the ICC headquarters in Paris on February 10, 2011. Following the six-day 6th ICC International Mediation Competition, the Conference brought to a close ICC's Mediation Week 2011.

The Conference focused on the implementation of in-house dispute management systems for business conflicts and combined theoretical and practical approaches. It is acknowledged that an established in-house dispute management system helps companies to create their dispute resolution strategy as early as at the stage of drafting contracts, prevent disputes from escalating and choose the most suitable dispute resolution procedure at different stages of disputes. Aiming to provide practical guidelines to companies to elaborate an efficient in-house dispute management system, experienced dispute resolution lawyers together with corporate representatives analyzed and discussed concrete examples, case studies and well-proven tools.

In the course of the first morning session, Professor Dr. Ulla Glässer addressed the initiative of the European University Viadrina Frankfurt (Oder) and PricewaterhouseCoopers in conducting in Germany five empirical studies aimed at de-

veloping conflict management systems. Professor Dr. Ulla Glässer presented the results of the three studies that already took place in 2005, 2007 and 2011, namely "Commercial Dispute Resolution – Procedures in Comparison", "Practicing Conflict Management" and "Conflict Management – Elements, Components, System" and provided insight into the upcoming studies on "Costs/Controlling/Quality Assurance" (Study 4) and "10 years after – Assessing the Development of Conflict Management of German Corporations 2015" (Study 5).

Dr. Alexander Steinbrecher, corporate legal counsel in the legal department of Bombardier Transportation (hereinafter "BT") shared with the audience Bombardier's experience in establishing efficient dispute management system. More specifically, Dr. Steinbrecher concentrated on the evolution of resolving business disputes, designing a system for managing business disputes, organizational integration of dispute management and complementary tools, using multi-tiered dispute resolution clauses and processes, key empirical findings of BT's mediation practice and snapshots of BT's tools for managing business disputes.

The speakers of the second morning session, Dr. Anke Sessler, Chief Counsel Litigation at Siemens AG, Germany and Elie Kleiman, Partner at Freshfields Bruckhaus Deringer LLP, France focused their presentations on the in-house counsel's point of view on dispute resolution clauses and drafting efficient mediation clauses. Dr. Anke Sessler advised the in-house counsel to prevent unpleasant surprises already at the stage of drafting a dispute resolution clause by ensuring procedural standards, avoiding foreign state courts and using, where appropriate, the opportunity to resort to multi-tiered clauses. There is never a disadvantage in having a good clause, but a poorly drafted clause may do more harm than good. Elie Kleiman provided practical guidelines for the counsel to prepare for mediation and act efficiently once the parties are in the room.

During the third morning session, all participants of the conference were divided into four working groups to conduct clause drafting exercises and discuss the do's and don'ts when drafting dispute resolution clauses for international contracts. The participants were provided with two hypothetical cases where they had to make an early case assessment, detect errors and re-draft an appropriate clause.

After the lunch break Jean-Claude Najar, General Counsel France and Senior Counsel EMEA at General Electric, France and Christopher Newmark, Partner at Spenser Underhill Newmark LLP, UK presented a case study and introduced participants to useful tools for early case assessment. Christopher Newmark, in particular, addressed the role of counsel in early case assessment, the steps to be taken if the dispute resolution clause was wrong and the type of assistance that the neutrals could render.

Throughout the second afternoon session David H. Burt, Corporate Counsel at DuPont, USA and Aisha Nadar, Consultant and Research Fellow at the Centre for Commercial Legal Studies at Queen Mary University of London, USA & Egypt discussed amicable dispute resolution techniques, dispute boards, standing neutrals and non-formalized types of dispute resolution as means of de-escalating disputes during the course of a contract. The central topic of Aisha Nadar's presentation was dispute boards, their background, types, essential features, benefits and practical implementation. Dispute boards are usually composed of one or three members and their decisions are contractually enforceable. The benefits of dispute boards include, among others, ability to refocus the matter, resolution of disagreements before they become disputes, avoidance of frivolous claims and assistance in preservation of good relationships.

The last session of the conference called "Dispute resolution in 2020" started with the short video "Shift happens" evidencing the quickness of changes taking place in the world (available on http://www.youtube.com/watch?v=emx92kBKads) which triggered further active discussions amongst all of the conference panelists and attendees regarding the future of dispute resolution. As noted by one of the participants, the accelerating world would continuously pose new questions and doubts arise whether the mankind will manage to find answers to those questions as quickly as necessary.

Mandatory arbitration provisions in double taxation treaties: recent developments

by Marina D. Bousi

It was in 2000, that the ICC Commission on Taxation prepared a *Policy Statement* concerning Arbitration in taxation matters and proposed a model article, which could be adopted in bilateral taxation conventions, encouraging governments to accept compulsory arbitration in international tax conflicts. Despite the then progress in the international tax arena, the acceptance of proper arbitration provisions was still not widespread. However, during the intervening ten years, governments have changed their tax policies, negotiating or amending their bilateral tax conventions, so as to introduce arbitration clauses.

Among the developments towards this direction is the Model Tax Convention adopted by the Organization for Economic Co-operation and Development (hereinafter "OECD Model Tax Convention"). In its article 25 (2), the Mutual Agreement Procedure (hereinafter "MAP") is foreseen as a means of dispute resolution. The MAP has traditionally been the mechanism to resolve cross-border tax disputes. However, taking into consideration that:

(i) the purposes of a tax treaty (i.e. the prevention of double taxation) in practice are not always achieved under the MAP;

(ii) the taxpayers are not actively taking part in this procedure, being without substantial procedural rights;

(iii) the non-transparent decision-making procedure and

(iv) the length of the procedure

OECD published a Report in February 2007 (adopted by OECD Committee on Fiscal Affairs (CFA), on January 30,

2007: "*Improving the Resolution of Tax Treaty Disputes*" followed by the 2008 updated version), which main characteristic was to *supplement* the MAP procedure by mandatory arbitration. Since then, the OECD's member & non-member states have used it as a reference point, when negotiating their taxation policies.

The OECD has clarified that tax treaty arbitration is not an independent judicial dispute resolution mechanism but rather a supplement to the MAP under article 25 paragraph 5 of the Model Tax Convention: "*Recourse to these techniques* [i.e. dispute settlement] *... must be an integral part of the mutual agreement procedure and should not constitute an alternative route to solving tax treaty disputes between States, which would risk undermining the effectiveness of the mutual agreement procedure*". Paragraph 46 of the Report states that supplemental character of the arbitration, by mentioning that only if and to the extent that the competent authorities in the mutual agreement procedure have not reached agreement on disputed issues and have left them unresolved (usually within a two-year period), can arbitration proceedings be brought. If agreement has been reached on some but not all the issues, the taxpayer is prevented from submitting the issues on which agreement had been reached to the arbitrators, even if the taxpayer is dissatisfied with the result; only the remaining unresolved issues may be submitted to the arbitrators for decision (The OECD distinguishes between "*case*" and "*issues*").

Currently, many bilateral tax treaties follow the above mentioned OECD Model Tax Convention. Taking the example of the United Stated and Canada, the inclusion of an arbitration clause in their bilateral treaties is part of their standard treaty policy. However, despite the presence of these clauses, arbitration has never been used in practice; mainly because the MAP is a quite time-consuming process, which can exceed the foreseen time period of two years (KPMG TaxWatch Webcase: "*Developments in Arbitration for Addressing Double Taxation Issues*", January 18, 2011, Brian Trauman & François Vincent). Experiencing delays in their in-between cases, the United States and Canada have therefore renegotiated their Income Tax Convention to reduce delays in the MAP.

The latest Protocol to Canada-U.S. Income Tax Convention was signed on September 21, 2007 and came into force on December 15, 2008. Taking into account the 2006 U.S. Model and the 2008 OECD Model, negotiations led -besides others- to the introduction of mandatory and binding arbitration concerning certain disputes between the competent authorities (new paragraphs 6 & 7 of article XXVI); pursuant to article 6(b) of the Protocol, only disputes that the competent authorities have agreed to be suitable for determination by arbitration can be subject to it. For the purposes of the Protocol, concerned persons are residents of Canada and the United States that face issues of potential (juridical and economic) double taxation, which are not resolved by the competent authorities through the mutual agreement procedure. The arbitration provided for in the Protocol is "*baseball-style*", which means that each competent authority submits a settlement proposal to a three-person panel of arbitrators and the panel of arbitrators chooses one or the other settlement proposal (Lawrence M. Hill, Tamara Ashford: "*Baseball and Taxes: United States Makes Similar Agreements with France and Germany Detailing Mandatory Binding Arbitration Procedures for Unresolved Competent Authority Disputes*").

As in every type of arbitration, confidentiality is a vital element in the whole procedure, which is secured by a separate provision in the Protocol (confidentiality agreement). According to the Protocol's Technical Explanation for article 7 (d), "*all concerned persons and their authorized representatives agree not to disclose to any other person any information received during the course of the Arbitration Proceeding from either Contracting State or the arbitration board, other than the determination of the board*".

Under Subparagraphs 7(b),(c) of the Protocol, a case becomes eligible for arbitration on the later of (i) two years after the "*commencement date*" of the case (unless the competent authorities have previously agreed to a different date). The commencement date is the date, by which both competent authorities have received all information necessary to undertake substantive consideration for a mutual agreement; (ii) The earliest date upon which the nondisclosure agreements of each concerned person and their representatives or agents have been received by both competent authorities.

The first cases therefore between Canada and the United States became eligible for arbitration on December 15, 2010. In the meanwhile and in addition to the 2007 Protocol, the U.S. and Canada signed on November 2010 a Memorandum of Understanding (hereinafter "MOU") and a set of Arbitration Board Operating Guidelines agreeing on how the mandatory arbitration procedures will work in practice. As outlined in particular in the MOU, cases are divided into two categories: eligible and ineligible for arbitration. For example under paragraph 6 of article XXVI, eligible is any case where the competent authorities have endeavoured but are unable to reach an agreement under Article XXVI of the Convention. On the contrary, ineligible is a case for which a US/Canadian court decision has been rendered or where the taxpayer has docketed the case for litigation in a US/Canadian court (paragraphs 2,3 of the MOU).

Pursuant to the MOU, arbitration proceedings shall commence after the expiration of the two-year period, without the competent authorities to have resolved the case. Arbitration begins automatically, unless the competent authorities have agreed before that a case is ineligible for arbitration ("*US-Canada arbitration guidance released, Executive Summary*", Ernst&Young International Tax Alert, 30 November 2010).

The MOU also sets out how arbitration board members are appointed. In specific, each competent authority appoints its arbitrator within 60 days of the commencement day of the arbitration proceedings. Within another 60-day period, the appointed arbitrators should agree jointly on the third arbitrator, who will preside at the arbitration board. If either competent authority fails to appoint a member or if the two appointed members fail to agree upon the third member, the highest-ranking member of the Secretariat for Tax Policy and Administration at the OECD will make the necessary appointments (KPMG TaxWatch Webcase: "*Developments in Arbitration for Addressing Double Taxation Issues*", January 18, 2011, Brian Trauman & François Vincent).

Since as mentioned above the arbitration is "*baseball-style*", each competent authority shall submit its proposed resolution within sixty days after the Chair of the arbitration board has been appointed (Similar provisions for this kind of arbitration, also known as "*best offer*" or "*final offer*" arbitration, are found in the 2007 Protocol to the U.S.-Germany Tax Treaty, the 2007 U.S.-Belgium Taxation Convention and Protocol, the 2009 U.S.-France Tax Convention Protocol or the recently signed 2009 U.S.-Swiss Tax Treaty Protocol). The use of the "*last best offer*" approach limits the panel's options to one of

the figures proposed by the competent authorities. However, this method is intended to moderate the negotiators' positions, on the rationale that the arbitrators are more likely to accept a position that they view as reasonable or moderate. Consequently, the potential use of this method may lead the competent authorities to reach a mutually satisfactory agreement voluntarily during the mutual agreement procedure, prior to the issuance of the final arbitration decision or even before the case is referred to arbitration. This arbitration model may possibly make the process faster and less protracted. It is not the preferred option of the OECD or the European Union, but the US Treasury has expressed its preference towards this model ("*Explanation of the proposed income tax treaty between the United States and Belgium*", 2007, page 3).

Finally, an arbitration panel's determination must be delivered in writing within six months of the appointment of the board's Chair, via selecting between one of the resolutions proposed by the competent authorities. The decision of the board of arbitrators shall be presented by the competent authorities to the concerned taxpayer, who has thirty days to accept it; otherwise, the decision is considered to be refused. The arbitrators' decision has no precedential value and is binding. If the taxpayer rejects the board's determination, the case will be closed and will not be subject to any further mutual agreement procedure consideration (paragraphs 16(a), (b), (c) of the MOU).

Various time limits are set forth in the Memorandum, which reveals the common efforts from Canada and the United States towards a faster and more efficient resolution of cross border tax dispute cases (Christopher Steeves, Anna Dayan & Alain Ranger, "*Competent Authorities Release Memorandum of Understanding Regarding Mandatory Arbitration under Canada-US Treaty*", January 27, 2011, Taxation Bulletin). Time and practice will show whether these efforts will be indeed fruitful in the resolution of international tax disputes.

It is anticipated that the arbitration process may help expedite the mutual agreement process, promoting efficiency and prompter decision-making by the competent authorities ("*Canada-US arbitration guidance released*", Ernst&Young Tax Alert, 2010 Issue No. 41, 29 November 2010).

The fact that even more countries embrace the idea for including mandatory arbitration clauses in their double taxation treaties is justified by their concern to protect as much as possible the legal rights of their taxpayers. Quoting Benedetta Kissel's words (the US Treasury's head tax treaty negotiator) "*Taxpayers want certainty and they want to know that they can get it under their tax treaty*" ("*US to arbitrate US tax disputes*", International Tax Review, March 2007), arbitration is an efficient type of dispute mechanism to increase taxpayers' confidence that the tax treaty will resolve potential double taxation and that their fundamental right of hearing will be respected.

Dallah Mark IV: the ruling of the Paris Court of appeal of 17 February 2011

by Edouard Bertrand

The Dallah case has just seen an interesting new development.

Simply put, the case is about an agreement signed between a Saudi construction company and a Pakistani trust for the construction and financing of facilities for Pakistani pilgrims in Mecca. The agreement contained an arbitration clause providing for ICC arbitration in Paris.

Shortly after the contract was signed, the Trust went out of existence because the presidential order by virtue of which it had been created had lapsed. Soon after the formal demise of the Trust, an official of the Ministry of religious affairs, who was also a secretary of the Trust, sent to Dallah a letter blaming Dallah for contractual breaches and further construing these breaches as a repudiation of the agreement.

Eventually, Dallah commenced arbitration proceedings in Paris against the Government of Pakistan, naming Lord Mustill as its arbitrator. Its reason for attacking the Government was a practical one.The Trust no longer existed and had no assets, nor any liquidator or successor. The Government, which had been deeply involved in the negotiation of the contract and its execution, was close enough to the transaction to sit out as a tempting target for procedural attacks.

The arbitral tribunal, based on « transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in business », made a partial award in which it found it had jurisdiction over the Government of Pakistan. The arbitral tribunal determined that the Government of Pakistan was the alter ego of the Trust.

Subsequently, the arbitral tribunal found the Government of Pakistan liable in a second award, and ordered the payment of damages (circa 18 million US dollars) in a third and final award.

The case then changed its scene from Paris to London where Dallah sought an order to enforce the final award in England. Enforcement was consistently denied, in succession, by the High Court, the Court of appeals and the Supreme Court (the latter's decision was given on November 3, 2010).

The case received a lot of attention from 2006 to 2010, as it was a rare example of English courts refusing to enforce a foreign arbitral award.

In essence, the reasons of the English courts for refusing enforcement were fairly simple. French law, being the law of the country where the award was made, had to be applied to resolve the issue of the existence of the arbitration agreement. This was in strict compliance with the New York Convention.

Based on expert testimony given on French arbitration law, it was accepted that the test to be followed, pursuant to the Dalico jurisprudence, was whether there had been a common intent of the alleged parties to be a party to the arbitration agreement.

The courts then analysed the facts in detail and determined that there was no evidence of any such common intent.

Meanwhile, as the case was meandering its way through the English judicial system, Dallah had obtained an enforcement order in Paris in 2009. This order was challenged by the Government of Pakistan before the Court of appeal of Paris. After the ruling of the English Supreme Court, the attention of the international legal community shifted back from London to Paris.

On February 17 2011, the Court

of appeal of Paris gave judgment on the appeal confirming the validity of the enforcement order. Subject to a decision which might be taken by the Cour de cassation, the validity of the Dallah awards in France has thus been sustained.

The Paris Court of appeal also applied French law but relied on a different test. Instead of looking for traces of the common intent of the parties, the Court considered whether the Government of Pakistan had objectively behaved as a party to the contract. The Court concluded that it had and therefore that it was the true party to the contract. In other words, the Court found that the Government of Pakistan was the alter ego of the Trust.

This was new because so far the Cour de cassation, in the Elf Aquitaine v Orri case, had agreed to apply the alter ego doctrine only in situations where fraud was involved. In that case, an arbitration agreement signed by a company had been extended to its single shareholder only because the company had been interposed with a fraudulent intent to shield that single shareholder from all liabilities. In the Dallah case, no such fraud on the part of the Government of Pakistan had been alleged.

Why would the Paris Court of appeal depart from the widely accepted test set down by the Dalico jurisprudence ?

The analysis of the intent of the parties made by the English courts was very carefully done and their conclusion was well supported by compelling arguments. In the Pyramids case which also involved the applicability of an arbitration agreement to a Government, the Paris Court of appeal had engaged in the same kind of careful and detailed review of the parties' common intentions and reached the conclusion that the Government was not a party to the arbitration agreement, thus annulling the award which had ruled to the contrary.

If the Paris Court of appeal had applied the Dalico test, the odds were that it would have come the same conclusion as the English courts.

Yet, from the standpoint of good faith, the ruling of the English courts in the Dallah case was not satisfactory. The Government of Pakistan entirely ran the show from the Pakistani side. The phasing out of the Trust was its sole decision and there was no successor to the Trust under Pakistani law. Dallah had started performing the agreement and suffered damages as a result of its early termination. Who else could Dallah hold accountable for its predicament but the Government of Pakistan ?

There is a global perception in this case that it would not be fair to allow the Government of Pakistan to escape its responsibilities on a technicality of arbitration law. This is not to say that the Government of Pakistan had no defence. Possibly, Dallad did commit contractual breaches. Fairness would require however that the parties be allowed to resolve their dispute in an appropriate forum, in this case an arbitral tribunal as an arbitration clause had been included in the agreement. Proceedings were issued in Pakistan by the Government seeking a declaration to the effect that the Government was neither a party to the agreement nor a successor to the Trust. Pakistani courts did rule that the Government was not a party to the Agreement, thus ruling out Pakistani courts as a forum.

Insofar as the Paris Court of appeal could be guided by the notion that good faith and fairness in business transactions deserved to be protected, it had to find a more powerful legal theory than the Dalico doctrine to make the Government of Pakistan a party to the arbitration agreement. Hence its recourse to the alter ego doctrine, which fit well with the facts of the case.

If this matter is brought to the Cour de cassation, it will be interesting to see if the alter ego doctrine is allowed to stand where the interposition of a legal entity is an instrument for obstructing good faith and fairness in business, rather than an instrument of fraud.

Ultimately, the issue posed by the Dallah case is, to quote two of the arbitrators Lord Mustill and Dr. Shah, whether « in matters not concerning the conduct of proceedings but rather the identification of those who should be participants in them, a duty of good faith can operate to make someone a party to an arbitration who on other grounds could not be regarded as such».

Book review "Arbitraje internacional & medios alternativos de solución de **litigios: retos y realidades"**

The book under the translated title "*International arbitration & alternative dispute resolution mechanisms: challenges and realities*" was published in January, 2010 by the 'Association Andrés Bello des juristes Franco-Latino-Américains' and the 'Unión Nacional de Juristas de Cuba'. Edited by Francisco Victoria-Andreu (México/France), Rodolfo Dávalos (Cuba) and Narciso Cobo (Cuba).

The book is the collection of different articles that were presented at the "IV International Conference on Arbitration and Mediation", which was convened by the Cuban Societies of Commercial, Economic & Financial Law, International Law and by the National Union of Jurists in Cuba, under the auspices of the "Association Andrés Bello des juristes Franco -Latino-Américains".

Written by a notable team of professionals with international experience and expertise in arbitration (Rodolfo Dávalos, Yves Derains, Alexis Mourre, Christian Larroumet, Francisco Victoria-Andreu, among others), the book aims to examine how arbitration follows and adjusts to current changes in the international economic field. The nowadays globalized world creates international disputes that frequently arise in quite complicated sectors, such as international investment, imports and exports, etc. The book consists of three Parts. Part I deals with specificities of International Commercial Arbitration, Part II with arbitration in the field of Investment Arbitration and Part III discusses the general features of alternative types of dispute resolution.

Convention, the arbitration practice versus the tax administration conflict and the notion of transnational law. The second part of the book is devoted to international investment arbitration. The articles focus on the concept of investment according to the arbitral jurisprudence, the implications of foreign investors towards specific human rights violations, the annulment process under the ICSID arbitration mechanisms and the investment arbitration in the context of the new global legal policy. At the last part, the authors examine how alternative dispute mechanisms can become the XXI century's precursors to dispute resolution. The articles focus mainly on international commercial and business, labor and family disputes, while the authors also examine the incorporation of the economic procedure to the Civil, Administrative and Labor Procedure in Cuba.

Further information about purchasing this book is available at the website of the "Association Andrés Bello des juristes Franco-Latino-Américains": www.andresbello.org.

New People in AIA Team

Striving to constantly improve the quality of its activities and develop the professionalism, AIA is engaging more and more new people in its work. Starting from February 2011 Dilyara Nigmatullina joined the AIA Team.

In 2004 Dilyara Nigmatullina majored in Philology, English Language and Literature at Kazan State University, Russia (cum laude). In 2008 she received a Specialist degree in International Trade law from Moscow State Institute of International Relations (cum laude). In 2009-2010 Dilyara followed the International Commercial Arbitration program at Stockholm University and obtained LL.M degree. She was a member of the Stockholm University team at the Willem C. Vis International Commercial Arbitration Moot 2009-2010. In 2007 - 2009 she was employed as a legal adviser in the law firm, Andersen Business Services, Inc., specialized in registration and legal support for non-resident companies. In June 2010 Dilyara Nigmatullina interned at the Arbitration Institute of the Stockholm Chamber of Commerce. Dilyara is native Russian, fluent in English and Spanish and has an intermediate level of Swedish.

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