Association for International Arbitration

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EMTPJ 2011- An Overview

The European Mediation Training for Practitioners of Justice (EMTPJ) was successfully conducted from September 5 to 17, 2011. The EMTPJ course has been developed by the Association for International Arbitration (AIA) in cooperation with the University of Warwick and the University of Brussels (HUB). Following the laurels achieved at EMTPJ 2010 which took place at Warwick, it was inherent to arrange the second session of the mediator training program.

The EMTPJ course was an intense, informative and interesting session which ran from 9:00 to 18:00 every day excepting the Sunday (September 11, 2011). It was also a diverse gathering consisting of 17 attendees hailing from 13 different countries along with lecturers possessing multifarious mediation expertise on varied jurisdictions around the globe.

The curriculum of the course was devised in a manner to provide the adequate theoretical and practical knowledge required to impart the necessary mediation expertise. The EMTPJ course was modeled in order to increase the level of difficulty as the course progressed. The theoretical part was imparted first and the practical training which followed required utilization of the knowledge obtained from the former. Certain important topics that were considered in the EMTPJ course included: the stages in the mediation process, international mediation, theory and practice of contract law in Europe, the function of party-experts and party counsels in civil and commercial mediation, analytical study of conflict resolutions, theory and practice of EU law and mediation acts, theory and practice of negotiations, the mediation path (a detailed study), communication and emotions in mediation, and EU ethics in mediation.

On course completion, in addition to standing accredited as a mediator by the Federal Government of Belgium, the EMTPJ program provided opportunity to the students to become recognized as a mediator in 16 mediation centers spread across 12 countries which include the United Kingdom, Germany, Romania, Slovenia, Belgium, Portugal, Russia, Ukraine, the Netherlands, Spain, Egypt, and China.

An assessment was conducted on the final day which was representative of the lessons imparted through the course of EMTPJ.

Further, certain extra-curricular activities including visits to landmark locations, museums and day trips were organized for the benefit of the participants. The EMTPJ program was aimed at creating an amicable learning atmosphere and has indeed acted as an opportunity for building contacts and strengthening ties between mediation practitioners from diverse backgrounds.

One of the students being asked what he/she would like to say to others thinking about attending this course in the future, answered that "EMTPJ is a powerful learning experience for mediators. It combines the elements of philosophy, theory and practice of conflict resolution and mediation within the framework of cross-border commercial and civil mediation in Europe. It is unique because it just does this."

Another student opined for the same question that "If they are like me; aiming to be an administrative law judge, but also want to do new, unexplored and open-for-development things they should come here(EMTPJ Course). I can ensure that they'll have a wider view."

We from AIA thank for the cooperation and commitment of the students which combined with the efforts invested by the lecturers has fuelled EMTPJ 2011. We commit to improvise and progress in mediator training in the future EMTPJ courses.

Status and impact of Implementation of the EU Mediation Directive in Member States

by Anand Ayyappan Udayakumar

The EU Mediation Directive 2008/52/EC (the 'Directive') was passed on May 21, 2008 and is aimed at encouraging the usage of mediation, regulating the mediation procedure and harmonization of the mediation principles to create a common standard across the Member States, in order to facilitate the resolution of cross-border disputes with ease.

Before May 21, 2011 the Member States had been mandated to provide the European Commission with the necessary notification exhibiting compliance to the EU Directive. 17 Member States had the necessary rules in place and have provided notification to the European Commission. It is notable that Denmark stands exempted from the ambit of the EU Directive and is not required to implement it. But, 9 Member States did not abide by this mandate and transpose the Directive as required. As per the latest resolution of European Commission of 13 September, 2011 the majority of Member States with the exception of the Czech Republic, Austria, Finland and Sweden have provided the required notification.

Varied regulatory approaches have been resorted to by the Member States. Some of them are a little behind in the implementation while others are not only compliant, but are in fact ahead of the Directive's requirements.

The implementation of the EU Directive cannot be done with ease and varied complications specific to each Member State which inhibit the implementation of the vital provisions of the EU Directive are inherent. Certain Member States such as Italy, Greece, Malta, Poland and Romania have had provisions on mediation law which are partially compliant with the EU Directive, even prior to its passage.

The following is an analysis of implementation of vital provisions of the EU Directive in the Member States:

⇒ The Requirement of Confidentiality

The EU Directive mandates the requirement of confidentiality of mediators and those involved in the administration of the mediation process. This provision was already present in certain Member States' domestic legislation, for instance: in Bulgaria, France and Poland the mediator stands immune and can refuse to testify about a mediated dispute; in Italy the confidentiality stipulations are more rigorous, while the Swedish mediation rules state that confidentiality is not automatic and a special agreement to that effect is required between the parties.

A more coherent approach is required in relation to confidentiality as there is variance existent between Member States. In addition, it is inferable that under the EU Directive confidentiality in mediation does not extend to the parties, third parties and experts as provided for under the Belgian Mediation laws. The failure to extend the duty of confidentiality beyond the mediator and those involved in the administration of mediation may restrict the applicability of the duty of confidentiality and may serve contrary to the interests of the parties.

⇒ Enforcement of Mediation Settlement Agreements

Article 6 of the EU Directive observes the requirement for providing mediation settlement agreements, the same authority as judicial decisions. This is achieved by either submitting the settlement agreement to the court or by having the agreement notarized. While some Member States have opted to the former method of enforcement, there is yet again variance in the manner of enforcement adopted. For instance, in Greece and Slovenia, the law provides that a mediation settlement agreement may be enforced by the courts, in the Netherlands and Germany such agreements can be rendered enforceable as notarial acts, and in other Member States including Austria, the mediation settlement agreements can be enforced as notarial acts, in spite of the absence of a national legislation to that effect. The EU Directive primarily aims at providing mediation settlement agreements the same power as judgments and the manner of enforcement stands irrelevant in this context.

⇒ Limitation and Prescription Periods

The EU Directive under Article 8 ensures that as a result of mediation, the right to seek judicial recourse is not inhibited. The period of limitation stands suspended from the instant of initiation until termination of the mediation proceedings. The majority of the Member States seem to have exhibited acceptance to this provision, though the way of the provision's implementation varies from State to State.

⇒ Recourse to Mediation

Article 5 of the EU Directive mandates Member States to make mediation compulsory or subject to certain incentives or sanctions, whether before or after judicial proceedings have started, provided that this does not interrupt the parties from exercising their right of access to the courts. Certain Member States have gone further than the required extent in ensuring recourse to mediation by providing financial incentives and stipulating mandatory mediation requirements.

Member States have adopted numerous initiatives to provide financial incentives to parties resorting to mediation. For instance, in Romania and Hungary the entire court fee paid will be reimbursed completely if the dispute between the parties is resolved by mediation, in Bulgaria the parties will receive a refund of 50% of the state fee already paid for filing the dispute in court if they successfully resolve a dispute through mediation and in Italy all mediation acts and arrangements are exempt from stamp duties and charges.

Alongside financial incentives, certain Member States have also resorted to rules making recourse to mediation compulsory. In such situations, the disputes are mandatorily required to be referred to mediation prior to approaching the courts. An apt example is Italy which mandates recourse to mediation for certain category of disputes and is aimed at reducing the burden of case loads in the Italian courts. Though there is no specific law in the United Kingdom which mandates compulsory mediation, the current judicial trend evidences the possibility as expressed by the Court of Appeal in Rolf V. De Guerin ([2011]EWCA Civ 78) which states that "Parties should respond favorably to offers to mediate or settle and their conduct in this respect can be taken into account in awarding costs."

Despite exceeding the limit prescribed by the EU Directive, certain Member States have been able to nurture mediation as a cost-effective and a quick extrajudicial resolution of disputes through process tailored to

the needs of the parties. However, the desired manner of encouraging implementation of the EU Directive by member states is to promote mediation as a viable, low-cost and quicker alternative form of justice rather than a compulsory aspect of judicial procedure.

Member States providing financial incentives while their legal system exhibits an interest to the development and utilization of mediation have achieved better results in promoting recourse to mediation.

⇒ Criteria for becoming a mediator

The EU Directive in Article 4 stipulates the necessity for Member States to ensure the quality of mediation. Certain Member States such as Romania, Lithuania, Italy, France, Bulgaria, Belgium, Portugal and Austria detail the varied criteria required to be satisfied by an individual in order to qualify as a mediator. Most of these Member States including Slovenia and Malta require the mediator to attend training sessions in order to stand eligible. However, countries such as Sweden, Czech Republic, Poland and Germany do not provide mediator eligibility criteria or requirements to be satisfied.

The duration and format of training which is required for mediators is variable between EU Member States. For instance, Bulgaria stipulates 60 hours of training of which practical is to account for 30 hours; Italy mandates 32 hours of lessons in certain specific topics of which 16 hours of practice and 4 hours for assessment is requisite, in addition to 8 hours of lessons on substantive law issues; Portugal distinguishes the training required for public mediators which is 90 to 200 hours and for private mediators the duration is 40 hours; Romania stipulates 80 hours inclusive of both theory and practical training; Belgium requires 60 hours of general theoretical training and 30 hours of practical specialized training; Czech Republic does not detail the training required, however there are certain organizations which provide training in the range of 100 hours followed by an examination and issuance of a certificate.

Training courses for mediators aid to a large extent in ensuring the quality of mediation and are also resorted to by individuals interested in becoming mediators even in the absence of a national legislation specifying training sessions as a mediator eligibility criteria, as such sessions provide adequate exposure for improvisation in mediation.

Vitality of the EU Directive

The implementation of the EU Directive stands integral to facilitate further advancements in diverse sections by the Member States. The European Commission's action plan for implementing the Stockholm Programme (The Stockholm Programme is a five year plan with guidelines for justice and home affairs of the Member States of the European Union for the years 2010 through 2015) anticipates a communication on the implementation of the EU Directive in 2013. Further, a legislative proposal on Alternative Dispute Resolution has been included in European Commission's Work Programme for 2011.

Member States varying Degree of compliance with the EU Directive

It is inferable that the Member States exhibit varying levels of compliance with the EU Mediation Directive. The difficulty in complete abidance to the EU Directive is owing to the fact that the Member States' mediation legislation is required to be in consonance and accommodative to the legal system existent in a particular Member State. This results in the creation of novel provisions which take into consideration the EU Directive and the national legal framework.

The manner of implementation adopted to comply with the Directive also widely differs. But, it is yet again reiterated that immaterial of the means, the end result achieved is of utmost relevance, which is the implementation of the EU Directive in itself.

Conclusion

While majority of the Member States have complied with the EU Mediation Directive, there are certain countries which have not provided notification exhibiting its compliance as requested by the European Commission and this acts as an impediment to achieving a common mediation standard as intended.

The impact of implementation of the EU Directive has been positive, aiding in the creation of a better justice system and Member States stand benefitted as mediation as a method of dispute resolution has proven to be more effective and advantageous than resorting to courts. Though the Directive addresses majority aspects pertaining to mediation at the cross-border level, it fails to contemplate certain essential facets such as:

⇒ Extending the duty of confidentiality beyond the mediator and those involved in administration of mediation,

⇒ Detailing the common criteria required for qualifying as a mediator; and

⇒ Making recourse to mediation compulsory which contradicts the purpose mediation wishes to serve.

Russian Constitutional Court rules on the arbitrability of real estate disputes and other fundamental issues concerning the competence of arbitral tribunals

by Natalia Gaidaenko Schaer

On 26 May 2011 the Constitutional Court of the Russian Federation issued a ruling on international arbitration in answer to an inquiry of the Supreme Commercial Court, which had requested the Constitutional Court to verify whether or not

⇒ Article 11, Para.1 of the Civil Code of the Russian Federation;

⇒ Article 28 of the Federal Law "On State Registration of Rights to Immovable Property and Transactions Therewith";

⇒ Article 33, Para.1 and Article 51 of the Federal

Law “On Mortgage” ;

⇒ Federal Law “On International Commercial Arbitration in the Russian Federation”; and

⇒ Federal Law “On Arbitral Tribunals in the Russian Federation”

are contrary to the Russian Constitution. The matter put before the Constitutional Court concerned the legitimacy of both international and domestic arbitration. In its ruling the Constitutional Court confirmed very clearly that arbitration as a private dispute resolution mechanism is in full compliance with the Russian Constitution. The ruling further contains important considerations on the nature and role of commercial arbitration. It also specifically states that disputes related to Russian real estate can be settled by arbitration. Russian commercial courts had maintained so far that real estate disputes, which Russian law refers to the exclusive jurisdiction of Russian courts, cannot be submitted to arbitration.

Position of the Supreme Commercial Court of the Russian Federation

The Supreme Commercial Court claimed that the laws under dispute contain some provisions which assimilate arbitral tribunals to State courts and their rulings to judicial acts. At the same time, it is not clear from said laws whether:

⇒ arbitral tribunals can settle disputes related to real estate and, more particularly, issue enforceable awards operating transfer of title and/or order the state registration of such title and/or amendments to records kept by the Unified State Register of Rights to Real Estate and Transactions Therewith, or the foreclosure of mortgaged property;

⇒ arbitral tribunals are competent to consider disputes affecting the rights and interests of third parties, i.e. persons who are not party to the arbitration clause or arbitration agreement.

According to the Supreme Commercial Court this lack of clarity leads to the inconsistent application of the law and therefore violates the constitutional principle guaranteeing the stability of the conditions for the conduct of commercial activity and other constitutional guarantees and is contrary to public interest.

Federal Law “On International Commercial Arbitration in the Russian Federation” (based on the UNCITRAL Model Law) and Federal Law “On Arbitral Tribunals in the Russian Federation” does not contain any provision excluding real estate disputes from arbitration, whereas procedural law grants commercial courts exclusive jurisdiction over commercial real estate disputes.

The opponents of arbitration argue mainly from the standpoint of public interest. Public interest is not understood restrictively as “serious departures from fundamental notions of procedural justice” (public policy), but is deemed to include any matters involving public authorities. This comprises real estate and corporate transactions whenever such transactions require registration by a government authority. Other arguments refer to fundamental principles of Russian law and the impartiality and independence of judges (although recent cases suggest that the judges’ independence and neutrality is not immune to considerations for the interests of the State). By its inquiry the Supreme Commercial Court endeavored to enlist the support of the Constitutional Court for its policy of curtailing the role of international arbitration for dispute resolution in Russia and enhancing the State’s control over the activity of international and domestic arbitral tribunals. It is certainly true that many important transactions in the Russian economy use arbitration clauses precisely in order to exclude the jurisdiction of Russian courts, in particular if the transactions are complex and/or concern important interests.

For several years the opponents of the arbitrability of real estate disputes explained their position in the official monthly journal of the Supreme Commercial Court. They argued that real estate disputes fall under the exclusive jurisdiction of the State courts at the place of the immovable property because there is an inseparable physical connection between the real estate object and the State. Exclusive jurisdiction means that the forum cannot be changed by agreement of the parties. Therefore, disputes related to real estate situated on the Russian territory can be decided exclusively by Russian courts, excluding foreign courts and arbitral tribunals. If the dispute is not arbitrable, an arbitration award must either be set aside or its enforcement refused. Based on the combined interpretation of the provisions of several Russian laws the State courts came to the conclusion that disputes related to the title (property) to real estate cannot be considered purely contractual disputes since they include a public law component. In practice the State commercial courts apply the following five theses while deciding on the recognition of rights to real estate:

⇒ Title (property) to real estate can be recognized exclusively by State courts of the Russian Federation (exclusive jurisdiction);

⇒ Transactions related to real estate can be referred to arbitral tribunals within the Russian Federation, but not to foreign arbitration institutions or ad hoc tribunals;

⇒ Arbitral awards regarding the performance of obligations under transactions with real estate are performed by the parties either voluntarily or compulsorily, in the latter case only based on a writ of execution issued by the State court;

⇒ Arbitral awards on title to real estate (property disputes) are not subject to enforcement and can be set aside;

⇒ Third parties whose rights are affected by an arbitral award issued on real estate matters can contest the award in the State court. The award is set aside if it is proven that the rights of the third party have been violated.

Position of the Constitutional Court

The Constitutional Court came to the conclusion that there was no uncertainty in the law regarding the possibility to submit civil law (contractual) disputes (including those related to real estate) to an arbitral tribunal for resolution.

The Constitutional Court did not express an opinion on the general compliance of the laws on international commercial arbitration and domestic arbitral tribunals with the Constitution. It reviewed only the latter law as to its compliance with the Constitution in relation to the arbitrability of real estate disputes (Article 1, Para.2).

The Constitution guarantees the protection of the rights and freedoms of the citizen by the State, including by the courts (guarantee of access to the courts), and entitles everyone to protect his rights and freedoms by all means not prohibited by the law (Article 45 of the Russian Constitution).

International commercial arbitration, domestic arbitration (either institutional or ad hoc) are dispute resolution methods universally recognized by the contemporary legal society; these methods arise from the discretionary principle of civil law and civil procedure - freedom of contract, autonomy of the will of the participants of trade and other commercial activities.

The right of the interested parties to select an alternative form of dispute resolution to protect their rights such as arbitration instead of suing at the competent State court (ordinary court - so-called courts of general jurisdiction - or commercial court) cannot be considered a violation of the constitutional guarantees, but on the contrary grants additional possibilities for dispute resolution. The principle of fair trial proclaimed by Article 46 of the Constitution applies to both judicial proceedings and arbitral proceedings.

When the parties agree to refer their dispute to arbitration, their right to judicial defense is, in particular, ensured by the possibility to file a claim with the State court to set the arbitral award aside in the cases and for the reasons defined by law or international treaty and/or to apply to the State court for a writ of execution (exequatur) for enforcement of the award.

Civil law (contractual) disputes (including those related to real estate) can be referred to arbitration. Disputes arising out of administrative or other public relationships as well as cases considered under special proceedings do not have the characteristics of civil law disputes and are therefore not arbitrable.

Disputes can be considered related to public policy and therefore excluded from the competence of arbitral tribunals because of the specific features of the relationship giving rise to the dispute and/or the parties to the dispute (e.g. State authorities). Whether the dispute relates to movable or immovable property is not relevant. The legal requirement regarding mandatory state registration of rights to real estate has no relation to the parties to the dispute, nor to the legal relationship which gave rise to the dispute, its sole purpose being the maintenance of proper public records on title. The mandatory registration of rights to real estate does not affect the content of the civil right, nor does it limit the freedom of contracts, the autonomy of will and the autonomy of the parties in property matters and can therefore not be considered as precluding the parties from referring real estate disputes to arbitration.

The same applies concerning the provision of the Commercial Procedure Code (Article 248) on exclusive jurisdiction of commercial courts over disputes related to real estate on the territory of Russian Federation. This provision's sole purpose is to delimit the jurisdiction of different countries regarding disputes involving foreign persons, and the provision does not preclude the parties from using alternative forms of dispute resolution complying with the general principles of the law (fair trial, etc.).

Protection of rights by arbitration is not identical to the judicial protection granted by State courts, nor can arbitral tribunals be assimilated to State courts. State courts have judicial authority as one of the branches of government and form the court system of the Russian Federation. Their jurisdiction is defined by the law and not by the agreement of the parties.

Resolution of disputes by arbitration is an alternative form for the defense of rights. This does not mean that arbitration proceedings are judicial proceedings, nor confer to such proceedings legal effects apart from those inherent to the nature of arbitral proceedings: the award is issued by the arbitral tribunal in its own name (and not in the name of the Russian Federation), is binding on the parties only and must be implemented by the parties voluntarily; the enforcement of the award is beyond the authority of the arbitral tribunal and is the task of the State courts and law enforcement authorities.

Whenever the award issued by the arbitral tribunal affects the rights and obligations of parties who did not participate in the proceedings, such third parties can use the same remedies as those available against judgments of the State courts, i.e. they can apply to the State court for protection of their rights, or appeal the ruling of the State court granting the exequatur for enforcement of the arbitral award.

The Constitutional Court reserves the right of the federal legislator to define, based on the necessity to maintain the proper balance between private and public interests, the categories of disputes which can be referred to arbitral tribunals taking into account such factors as the social relevance of the dispute, the evolution of commerce and trade and of the social and economic system as a whole, the need to strengthen the legal foundations of the market economy, legal culture and other factors. However, changes of legislation cannot lead to a sudden decrease of the present level of guarantees granted to participants of trade by existing legislation concerning the possibility to use arbitration to defend their rights and interests in order to maintain the stability and dynamism of trade and the predictability of dispute resolution.

Conclusion

The general reaction of specialists to the Ruling of the Constitutional Court is positive: the participants of the recent conference on Arbitration and Mediation in CIS countries held in Saint Petersburg on 23-24 June 2011, for instance, welcomed the Ruling of 26 May 2011 as a victory of common sense. At the same time it did not go unnoticed that the Constitutional Court left the legislator the liberty to define the competence of arbitral tribunals and to restrict the categories of disputes which can be settled by arbitration. Taking into account the present tendency of the legislator to enhance control over private initiative and independent activity and its general distrust of arbitral tribunals (potentially enhanced by recent arbitral awards against state-controlled companies), the danger of future restrictions is real. This being said, the Constitutional Court defined the principles on which future restrictions should be based and expressed the opinion that such

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restrictions should not affect the existing possibility of business to have recourse to private dispute resolution methods, nor be sudden or unpredictable. In this context it is further interesting to note the State's interest in alternative dispute resolution such as mediation even if such interest may partly be motivated by the fact that courts start encountering difficulties with the ever growing number of often petty disputes.

Sovereign Debt Restructuring and International Investment Agreements

by Ricardo Molano

In a recent Note, United Nations Conference on Trade and Development (UNCTAD) examined the extent to which international investment agreements (IIAs) may affect the ability of States to implement sovereign debt restructuring (SDR) when a debtor nation has defaulted or is close to default on its debt. Next, some of the most relevant ideas of the Note will be explained.

Background

Government borrowing through sovereign bonds is a long-established feature of the world economy. However, numerous defaults and restructurings of the 1990s, Argentina's debt restructuring after its crisis in 2001, as well as the recent global financial and economic crisis have all emphasized that governments may need some freedom to maneuver when sovereign debt restructuring is necessary. In particular, the IIA claims against Argentina prompted questions about the extent to which IIAs provide the appropriate forum for dispute resolution and grant governments the policy space to restructure sovereign debt in a comprehensive, just and efficient manner.

International Investment Agreement Claims

An IIA claim is conceivable only if an indebted government has an IIA in place with the home country of the bondholder. This means that the potential for IIA claims depends inter alia on how many IIAs the host country has in place. However, it is important to bear in mind that bonds may frequently change hands in the secondary market, and also be structured through intermediate holding companies, providing opportunities for "treaty shopping" in order for an interested bondholder to obtain protection of an available IIA.

Tensions between SDRs and IIAs' substantive provisions

Where public debt obligations are covered by specific IIA, there is a scope for a discussion on whether a particular public debt restructuring has violated certain IIA obligations. Next, the possible grounds for finding a breach of IIA provisions are explained:

National treatment. A national treatment claim can occur when domestic bondholders receive better terms during a restructuring than do foreign bondholders. However, economists have repeatedly held that there can be good reasons to discriminate between domestic and foreign bondholders. Giving priority to servicing domestic debt may be necessary so as to revive a domestic financial system, provide liquidity and manage risk during a recovery. In any event, these considerations may or may not affect a tribunal's deliberation of whether domestic and foreign bondholders are "in like circumstances".

Expropriation. Sovereign debt restructuring or default could be seen as constituting an expropriation, and more specifically, an indirect expropriation. The latter refers to situations where the title to the investment or its physical integrity are not affected, but its value is destroyed or greatly diminished. An outright default without any additional steps by a government will completely destroy the value of the outstanding bonds, while a debt restructuring is likely to diminish their value considerably.

Fair and Equitable Treatment. The content of the FET obligation is often interpreted as inter alia protecting investors' legitimate expectations, guaranteeing freedom from harassment and coercion, and incorporating fundamental principles of due process. A restructuring could be viewed as undermining the State's contractual promises and the associated legal framework, thereby destroying investors' legitimate expectations. Furthermore, exchanges could trigger allegations that the process lacks transparency and it is coercive.

Umbrella clauses. Under an umbrella clause a host country typically assumes the responsibility to respect other obligations it has entered into with regard to the covered investments. Given that a bond establishes a contractual relationship between the borrower (host government) and the lender (investor), a default or an imposed restructuring might be seen as the host State's breach of its contractual obligation to pay the face value of the bond and interest.

Special IIA provisions on sovereign debt restructuring

Some recent IIAs contain new guidelines for the interaction between SDR and the IIA concerned, usually in the form of a special provision or annex on public debt. Although specific language varies across treaties, they often prohibit claims relating to a "negotiated debt restructuring", unless an investor contends that the term of the restructuring violates national treatment or most favored-nation treatment obligations. Such treaties usually define "negotiated restructuring", as a restructuring where 75% of the bondholders have consented to a change in payment terms. These provisions can be seen as a step in the right direction given that the contracting parties recognize that debt restructuring is a special case. The Note concludes that the best way to finish the clashes between IIAs and SDRs would be to remove sovereign debt from the coverage of IIAs.

Comment

It goes without discussion that IIAs and SDRs may overlap and that there is a window for endless economic and legal discussions and unnecessary litigation. In addition, there is no single forum for nations to address issues related to debt. Instead, different jurisdictions apply different policies to sovereign debt restructurings, with international investment agreements being one of them.

It is in the countries' interest to consider proactively different scenarios where it is possible to prevent outcomes that could hurt their financial stability and respect in the best way possible the rights of bondholders. Therefore, it is important to ensure that IIAs do no prevent debtor nations from negotiating debt restructurings in a manner that facilitates economic recovery and development and, at the same time, it is necessary to guarantee that bondholders will not be treated unreasonably.

As a matter of policy, developed countries and emerging economies should find the right system that allows a proper balance when times of distress occur. This would provide legitimacy to the dispute-settlement

system agreed by the participating countries and may prove to be a more reasonable system with a better understanding of underlying political and economic concerns.

UNCTAD Note is available at http://www.unctad.org/en/docs/webdiaepcb2011d3_en.pdf

Book Review-Substantive Law in Investment Treaty Arbitration: The unsettled relationship between International Law and Municipal Law

by Anand Ayyappan Udayakumar

This book has been authored by Monique Sasson and is published by Kluwer Law International. The primary focus of this text is to attend to the dilemma existent between application of municipal and international law in the context of investment treaty arbitration. The text iterates that there is no specific code which enunciates the substantive rules of applicability of the apt law by investment arbitral tribunals, providing opportunity for confusion in either complete application or exclusion of the municipal and international law. While international law does not stand competent to exclude municipal law completely, an absolute renvoi to municipal law runs afoul of the principle that international law governs the characterization of an internationally wrongful act.

Further, the author argues that international investment law requires a more detailed consideration of the role of municipal law than many arbitral tribunals have implemented to date. The book provides an intense systematic approach to the interplay of municipal and international law in investment disputes. The role of municipal law is analyzed in providing the substance for concepts such as contracts, property rights, and shareholders' rights, which are relevant in the international investment treaty context but are unregulated under international law.

The initial introduction aims at addressing the unsettled relationship between international and municipal Law. An ICJ Judgment stands cited as an example to evaluate the degree of applicability of the appropriate law to differing situations. The possible categories of interactions between international and municipal law have also been dealt with extensively.

The important facets dealt within the text include the following:

⇒ Assessing the role of municipal law in state attribution under international law;

⇒ The notion of 'investment' and an analysis of the possible categories that can fall within its ambit with reference to municipal law;

⇒ Investor's nationality and the role of municipal law, and its incidence to diplomatic protection;

⇒ The concept of property, defining property and its usage under international and municipal law;

⇒ Shareholders' rights and investigation of their liabilities when the actions of the company result in the breach of an international obligation;

⇒ Claims under a contract in comparison to treaty claims;

⇒ Evaluating umbrella clauses and adjudging when a breach of contract may become a breach of treaty.

The book is aimed at an intense study on the topics which have been mentioned. In doing so, the author has taken the effort to include details of varied applicable legislations from different countries, reference has been made to certain international conventions and treaties when appropriate and a large number of judgments and awards from diverse fora and tribunals have been included in evaluating the fluctuating relationship existent between international and municipal law.

The author finally concludes by examining with further sophistication into the unsettled relationship between international and municipal law in reference to important interactions in an investment treaty context.

The appendix consists of international investment conventions and treaties of significant relevance, to the topic under consideration.

This book is available for purchase at: http://www.kluwerlaw.com/Catalogue/titleinfo.htm?ProdID=9041132236

AIA Members receive a 10% Discount on this book.

Book review – Arbitration

by He Xinyan

Anthony Willy authored his first book on Arbitration when Arbitration Act 1996 was enacted in New Zealand, which immediately became an indispensable handbook for both students and legal practitioners. The 2010 version of *Arbitration* has been extensively revised and presents a thorough examination of the topic and the text of the Arbitration Act 1996.

The text provides both theoretical legal analysis and practical guidance in relation to all essential features of arbitration in New Zealand. Each chapter concentrates on a certain topic within arbitration, succeeding at the same time in its simple and comprehensible interpretation. Generally speaking, the book can be divided into two parts where the first part explains the relevant arbitration case law in New Zealand providing at the same time commentary on the Arbitration Act 1996 whereas the second part gives guidance to current and potential arbitration practitioners including arbitrators, advocates, lawyers and students.

The book starts with the analysis of the impact of 1996 Arbitration Act on arbitration practice both domestically and internationally. Further on it describes the development of the arbitrators' status since the act's enactment and the changes in the role of courts after proliferation of the use of arbitration. Special attention is paid to the Arbitration Act's scope of application. Additionally, the author discusses, among others, such aspects of arbitration as hearings, construction of arbitration agreements, stay of arbitral proceedings, appointment and removal of arbitrators and their obligations, the power of arbitrators to grant interim measures and practical matters regarding writing and enforcement of an award.

Yet another useful feature of the book is its nine appendices, which provide a one-stop shop for readers as these are copies of the relevant rules and sample agreements (*Arbitration Act 1996; Schedule 4 of the High Court Rules; Notice of Default; Sample Arbitration Agreement; Sample Award; Enforcing the Award; AMINZ Code of Ethics; AMINZ Arbitration Appeal Rules and UNCITRAL Arbitration Rules*). Overall, users will surely significantly benefit from reading Anthony Willy's new book, which can be regarded as a landmark manual in the arbitration arena.

Report on the Annual International ADR Conference, Batumi, September 21-22, 2011

by Dilyara Nigmatullina

The Annual International Conference from the cycle of "Arbitration and Mediation in Central and Eastern Europe and Some Asian countries" was held in Batumi, Georgia on September 21-22, 2011. The conference organized by the Chamber of Commerce and Industry of Republic of Adjara (Georgia) and Polish Society for Arbitration and Mediation (Poland) and hosted by the Batumi University focused on the role of ADR in resolving international private law disputes involving parties from the South Caucasus countries (Armenia, Azerbaijan and Georgia). The event attracted ADR academics and practitioners from Poland, Ukraine, Kazakhstan, Azerbaijan, Russia, Turkey, Armenia, Lithuania and Georgia.

Within the two intensive conference days the speakers and the audience addressed and discussed recent developments in mediation and arbitration in their respective countries, ADR institutions in the Caucasus region, involvement of South Caucasus countries into ICSID cases, the role of national courts in arbitral proceedings, Polish-Georgian commercial arbitration, the use of the internet as a means of advancement of arbitration and mediation in Europe and Asia, ad hoc and institutional arbitration involving parties from the South Caucasus and a settlement in civil mediation. Additionally, a representative of the Georgian Ministry of Justice made an overview of a new program promoting mediation to resolve juvenile cases.

Besides ensuring content-rich presentations and debates, the organizers succeeded in arranging a number of cultural activities such as a visit to the recently opened Batumi's House of Justice and an excursion to the outskirts of Batumi – the Gonio fortress and Sarpi, which was highly appreciated by the conference attendees.

On behalf of the conference participants I would like to thank the organizers for bringing together ADR professionals and creating an atmosphere which fostered discussions of problematic issues related to the development and usage of ADR in the countries of the region as well as finding and outlining best solutions in dealing with them.

European Commission supports CEDR programme to build consistency of mediation training in Europe

The Centre for Effective Dispute Resolution (CEDR), with the support of the European Commission, is running the Master Skills Mediation Training Program to build a consistently high quality of standard in commercial mediation training provision across the EU. This is to complement the measures being undertaken to implement the EU Mediation Directive (2008/52/EC); to use mediation to resolve business disputes as an alternative to costly litigation, and seeks to enhance and assist the on-going development of knowledge, uptake and use of mediation across Europe.

The project will run until spring 2012 and will look at enhancing the ability and skill of mediation trainers in 10 different countries across the European Union.

CEDR, known internationally for its leading mediation skills accreditation course is being supported by the European Commission to deliver three-day training courses in 10 EU member states or accession countries where trainers will receive advanced training skills training. To this end CEDR is considering all requests from local Alternative Dispute Resolution (ADR) organisations who wish to work with CEDR and benefit from the advanced training.

The programme complements the International ADR Trainers Network, a forum established by CEDR for sharing ideas about current mediation practice, innovations in ADR training delivery and developing practice standards for ADR trainers worldwide. CEDR hopes that its new partners in Europe will join the network for regular exchanges about practices globally and to learn from each other to foster better and more consistent international training standards.

James South, Director of Training at CEDR, said "*As mediation develops across the EU, it is crucial that the training of me-*

diators is of the highest quality to ensure that those mediating commercial disputes do the very best job for disputants. With over 20 years of experience in training mediators we are delighted to be supported by the European Commission to help bring our knowledge and methodology to provide the most effective training for mediators in developing ADR jurisdictions."

Organisations wishing to qualify for this programme, must be:

- ⇒ from an EU member state or accession country
- ⇒ focused on commercial mediation and ADR
- ⇒ active in training in ADR in their local jurisdiction
- ⇒ able to offer support for the delivery of the training including;

  i) up to 8 ADR trainers as participants;

  Ii) logistical support;

  Iii) refreshments and the training venue; at no cost. The requirements for the training are; a plenary room big enough to host the full group and two trainers and one smaller room which can accommodate 6 people.

Those ADR organisations interested in taking up the free 3-day Train-the-Trainer course from CEDR should email dkershen@cedr.com with a short background of your organisation and its activities. Note this training is limited to one training per country and is limited to 10 countries only. In the spirit of collaboration we would encourage a number of training organisations from each country to participate jointly.

For further information please contact: Daniel Kershen, CEDR Foundation Project Co-ordinator - Dkershen@cedr.com or (+44) 207-536-6072.

Scottish Arbitration Centre unveils Arbitral Appointments Committee and its new website

The Scottish Arbitration Centre has unveiled its independent Arbitral Appointments Committee, and its new website. The Committee consists of:

- ⇒ David Carrick, Senior Vice President, Hill International, Edinburgh. David is a Chartered Arbitrator with vast international experience.
- ⇒ Teresa Cheng, Senior Counsel, Des Voeux Chambers, Hong Kong. Teresa is a Chartered Arbitrator, Vice President of the International Chamber of Commerce (ICC) International Court of Arbitration and a past President of the Chartered Institute of Arbitrators.
- ⇒ Vincent Connor, Head of Asia Pacific, Pinsent Masons, Hong Kong. Vincent is hugely experienced in the field of arbitration in Scotland, and internationally.
- ⇒ Thomas Halket, Partner, Halket Weitz, New York.

  Tom is a Chartered Arbitrator and an Adjunct Professor of Law at the Fordham University School of Law. He has particular expertise in intellectual property law. He is also 2nd Vice President of the St Andrew's Society of the State of New York.
- ⇒ Kaj Hobér, Mannheimer Swartling, Stockholm. A vastly experienced arbitrator, Kaj is a Professor of International Law at the Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP) at the University of Dundee.
- ⇒ Elie Kleiman, Partner, Freshfields, Paris. Elie is an experienced arbitrator, and has acted for parties in international arbitrations under all of the major institutional procedures. He advises across a broad range of commercial sectors.
- ⇒ Lindy Patterson QC, Dundas and Wilson, Edinburgh. Lindy is a solicitor advocate specialising in construction law and is an experienced arbitrator.

Speaking at an awareness raising event for the Centre in the Scottish Parliament, Brandon Malone, Chairman of the Centre said:

"The credibility of an arbitral institution depends upon the quality of the arbitrators that it appoints. The Scottish Arbitration Centre has drawn on the huge international goodwill that Scotland enjoys, to assemble an independent arbitral appointments committee with global awareness and impeccable credentials.

Commercial organisations can rest assured that when they ask the Centre to appoint an arbitrator, they will get the most suitable arbitrator for the job.

Along with the commercial advantages of arbitration which include confidentiality, pragmatism, and restricted appeal procedure, this is another strong reason for Scottish and international businesses to use Scottish arbitration."

At the same event, Roseanna Cunningham MSP, Minister for Community Safety and Legal Affairs, said:

"Scotland has made significant strides in the last couple of years in the world of arbitration. The Arbitration (Scotland) Act 2010 has been hailed as a world-beating piece of legislation which represents the best of modern arbitral practice. Our manifesto commitment in 2007 was to establish an arbitration centre and this was achieved earlier this year in conjunction with the Law Society of Scotland, the Faculty of Advocates, the Royal Institution of Chartered Surveyors and the Chartered Institute of Arbitrators. We want to make Scotland a good place to do business and where individuals and companies can be sure that any dispute will be handled in a cost effective manner and will end in a just outcome without unnecessary delay or unnecessary expense."

The Centre's new website has further details on the Arbitral Appointments Committee, and information on Scottish arbitration (www.scottisharbitrationcentre.org).