

April 2013



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## European Mediation Training for Practitioners of Justice

LOCATION: Brussels, Belgium  
DATE: August 19-31, 2013

Limited number of places (first come first served)  
See more details below and on [www.emtpj.eu](http://www.emtpj.eu)



### EMTPJ 2013

After three consecutive years of success, the Association for International Arbitration (AIA) is proud to announce the fourth edition of its unique European Mediation Training for Practitioners of Justice (EMTPJ).

AIA launched the EMTPJ project in 2010, with the support of the European Commission and in collaboration with the HUB University of Brussels and Warwick University. It presents an opportunity for participants from around the world to get together and become trained and specialised as a mediator specializing in cross-border disputes under Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters.

Participants can be experienced mediators (e.g. with over 10 years of experience) or beginners who want to follow an intensive 2 week training program to become a mediator specialized in civil and commercial cross-border matters.

EMTPJ is recognized by the Belgian Federal Mediation Commission, as well as by a large number of other regulative bodies and mediation providers in and beyond Europe.

The training is a 100-hour course comprising 11 days of intensive training and one assessment day at the end of the program. The training is conducted in English and the maximum number of attendees is limited to 30 people. The program is divided in two parts. One part focuses mainly on theoretical issues and aims to introduce participants to the second part of the course, which provides intensive practical training.

Course alumni highly recommend this course to all legal practitioners. One of the former participants in EMPTJ said that in only two intensive weeks he acquired all the necessary knowledge to start up a mediation practice. He also described the trainers as "exceptionally qualified and experienced multinational persons that pose wide background and knowledge on the matter of mediation and can turn theory into practical training".

For more details and for all questions regarding the possibility to attend EMTPJ course or only a part of it, please contact: [administration@arbitration-adr.org](mailto:administration@arbitration-adr.org).

To get more information about EMTPJ program, schedule and lecturers, and to register for the course, please visit the website [www.emtpj.eu](http://www.emtpj.eu)

## Delegation from AIA Visits the Willem C. Vis Moot Court Competition

23-28<sup>th</sup> March, 2013, Vienna, Austria

From 23-28<sup>th</sup> of March, a delegation from the Association for International Arbitration visited Vienna during the 20<sup>th</sup> Annual Willem C. Vis Moot Court Competition. Paul Frankenstein and Yaroslava Sorokhtey, former competitors in the competition who now work at the AIA, participated as arbitrators.

The Willem C. Vis Moot Competition is a huge event in the world of international commercial arbitration and trade law. Students and practitioners from all over the world gather in Vienna to compete and present in the mock hearings that simulate real arbitral proceedings. The Moot aims to show in practice how arbitration works. The mock problem is distributed among the students in advance – it raises procedural issues as well as issues on merits. The procedural part of the dispute this year was governed by the rules of the Chinese European Arbitration Chamber ("CEAC Rules") and merits of the case were governed by the Vienna Convention on International Sales of Goods ("CISG"). The main issues of this year's problem were admissibility of the witness statement made by a witness who couldn't appear for cross-examination, CISG reservations made by the fictional state of Mediterraneo, as well as traditional contractual disputes. Students had to file Memorandum for Claimant (similar to a Statement of Claim in a real proceeding) in December 2012. After receiving a copy of another university's Claimant's memo, they had prepare a Memorandum for Respondent (similar to a Statement of Defense) in January 2013. After the exchange of memoranda, all the teams that submitted memos met in Vienna in March 2013 for four rounds of oral hearings, where teams represent both Claimant and Respondent.

There is also a "sister moot" - the Vis Moot (East) takes place in Hong Kong, approximately two weeks prior to the Vienna moot. While it uses the same problem as the Moot that takes place in Vienna, it is a separate competition with separate winners. It is important to mention that the same students cannot participate in the oral rounds in both Vienna and in Hong Kong, and that universities are prohibited from submitting the same memoranda for prizes in both competitions.

This year almost 300 teams from 67 countries and 290 Universities participated in the competition. Members of the AIA not only participated in Moot as arbitrators, but also attended a conference, organized by ICC Young Arbitrators Forum on the topic "YOUNG APPROACHES TO ARBITRATION" and a debate "Barista's Choice: Universal Blend vs. Single Estate" organized by ICDR Young & International moderated by J. Brian Casey (Bay Street Chambers, Toronto) and Dr. Patricia Shaughnessy ( Department of Law, Stockholm University, Stockholm).

It was a pleasure for the members of Association for International Arbitration to be a part of such a huge event in the field of International Commercial Arbitration. Many thanks to Professor Eric Bergsten - the founder of the Willem C. Vis Moot Court Competition who agreed to contribute and to give an interview to our newsletter. Together with Vrije Universiteit Brussels (VUB), the AIA has established a post-graduate program in International Business Arbitration. This program focuses not only on commercial arbitration, but also mediation and investment arbitration. Students who are interested in more information about this program can visit <http://www.vub.ac.be/iPAVUB/Postgraduaten/IBA.html>

### The Winners of the 20<sup>th</sup> Annual Vis Moot:

*Frédéric Eisemann Award, Team Orals:* City University of Hong Kong

*Pieter Sanders Award, Best Memorandum for Claimant:* University of Belgrade & University of Munich (tie)

*Werner Melis Award, Best Memorandum for Respondent:* National University of Singapore

*Martin Domke Award, Best Individual Oralist:* Kristen Holman, University of Ottawa

### The Winners of the 10<sup>th</sup> Annual Vis (East):

*David Hunter Award, Team Orals:* University of Canberra

*Eric Bergsten Award, Best Memorandum for Claimant:* University of Basel

*Fali Nariman Award, Best Memorandum for Respondent:* Albert-Ludwigs-Universität Freiburg

*Neil Kaplan Award, Best Individual Oralist:* Jakob Steiner, University of Basel

*Pan-Asian Award, Top Asian Team That Did Not Make It In The Top 16:* The West Bengal National University of Juridical Sciences

*Spirit of The Moot Award:* Pravin Gandhi College of Law

## AIA Participates in International Arbitration Conference in Tbilisi



On Monday, April 1, 2013 the Business Association of Georgia (BAG) and the European Arbitration Chamber held a conference on "The Role of Arbitration in East European Countries and

the Implementation of International Arbitration Conventions within the European Council Member Countries." Johan Billiet, the President of Association for International Arbitration and the Head of the International Arbitration Court under the European Arbitration Chamber had the floor at the opening of the conference and shared his experience in arbitration with the participants. He later gave a lecture about mediation and arbitration practice in Europe. The conference took place at Sheraton Metechi Palace Hotel in Tbilisi. Among the other speakers at the conference were Tea Tsulukiani, Minister of Justice of Georgia, Alexander Baramidze, Deputy Minister of Justice of Georgia, Giorgi Chirakadze, President of BAG, and Genady Pampukha, President of the European Arbitration Chamber, Many Georgian MPs, as well as representatives from BAG member companies, and Georgian and foreign businessmen attended the conference.

## Interview: Professor Eric Bergsten at the 20<sup>th</sup> Annual Vis Moot Competition

by Olivia Staines

Last month, the Association for International Arbitration went to both Vienna and Hong Kong to experience the prestigious Vis International Arbitration moot competitions first hand. The Moots aim to promote the study of international commercial law



and arbitration for resolution of international business disputes.

This year, the Vienna moot was particularly impressive. The event attracted more than 2000 participants and the competition, as we discovered, was of extremely high quality. It soon became clear that it was anyone's game. In light of this, we conducted an interview with director Eric Bergsten, Professor Emeritus of Pace University School of Law and a former Secretary of the United Nations Commission on International Trade Law (UNCITRAL) who shared his thoughts on what the Vis moot is all about.

The Vienna moot has grown at an incredible rate over the past few Years and now consists of approximately 300 teams from across the globe. How does it feel to have inspired so many young arbitrators to become involved in mooting? Did you ever envisage it becoming so big?

I certainly did not envisage it to grow the way it has when we first began. It was probably after about ten years that I realized that there was no natural limitation on the number of teams that might wish to participate. It is clear that not all of the students who come to the Moot are interested in becoming lawyers in the field of international arbitration or even international commercial law. The number of teams would be much smaller if that was the case.

It is difficult to describe how it feels to have created a Moot that has had the impact that the Vis Moot has had. There is pride, of course. There is also a certain amount of amazement and bewilderment at the development.

During the opening ceremony you introduced us to the new managerial team who will take the reins from next year. How do you see the Vienna moot progressing in the future? What goals would you like to see realized?

I would expect that there would be no major changes in the Moot for the next few years. The new team will have to become even more familiar with the operation of the Moot than they already are before they begin to make substantial changes. It is difficult to forecast beyond that. The biggest current problem is that we are running out of space for the arguments. Of course, that has happened before and more space became available.

There were never any goals for the Moot other than to have it be the best experience possible for the students. The other developments came on their own. It would be presumptuous of me at this stage of matters to have any goals for my successors.

You have emphasized the fact that the moot competition isn't about 'winning'. It offers participants the opportunity to come together and build relations. This is a really good attitude to promulgate. In addition, it has also been suggested that students should come together to provide advantages for those less fortunate. How do you think this could be made possible?

I would not expect that the students would be able to do much for other law students who don't have the facilities to participate in the Moot or who don't have the same level of resources available to them. It is largely a question of finances. In the past we had not made any special efforts to raise funds for them to participate. There were some efforts made by others associated with the Moot, but so far they have not been of great help. It may be that this will be one of the efforts of the new leadership. We shall see.

What advice would you give to potential young arbitrators who show an interest in pursuing a career in the field but may lack the confidence to moot?

It takes less confidence to moot than it does to prepare arguments for a real arbitration. There is little to lose in the

Moot. There is much more to lose in the actual practice of arbitration or any other legal activity. I have been told by a number of coaches and professors that they have seen the students gain confidence in themselves and in their ability to make a coherent oral argument during the six months of practice before the oral arguments begin. The Vis Moot is a good place to begin a career in arbitration.

## Book Review: Class Arbitration in the European Union

By Paul Frankenstein



*Class Arbitration in the European Union*, a new book from Maklu Publishing and edited by Philippe Billiet in association with the AIA, is an intriguing book that, as the title suggests, looks at the issues surrounding class arbitration in the context of the European Union. The potential for European-based class arbitration has been a topic of tremendous interest to academics and scholars of arbitration since the 2003 US Supreme Court decision *Green Tree Financial Corp. v. Bazzle* 539 U.S. 444 (2003),

which, as a practical matter, greatly expanded the practice of class arbitration domestically within the United States.

Recent trends in certain European jurisdictions suggest that the European legal community may be becoming more receptive to the idea of class-action, or at least collective redress, procedures and rules. At least 14 different EU members provide for some form of collective redress, and several more are weighing the matter. For example, the Netherlands enacted a law allowing for court-supervised settlement of mass claims.

Conversely, however, the pendulum has been swinging the other way in the United States, with a number of US Supreme Court decisions, chief among them *Stolt-Nielsen v. AnimalFeeds* 130 S.Ct. 1758 (2010), putting clear and narrow limits on class arbitration in the United States.

It is against this background that *Class Arbitration in the European Union* has been released. Covering eleven of the twenty-seven countries in the EU, this book, which is the first book to be released on this topic, consists primarily of country-by-country reviews that cover most of the major members of the EU.

The chapter on Portugal opens with the comment that "it is well known that class actions and arbitration are two realities that do not combine in the European Union. At least, not yet..." This is a theme that repeats itself throughout the book. The chapter on France observes that "...as long as the class action is continued to be considered as a foreign legal concept, class action arbitration will not be admitted in France." The Danish chapter states that the "concept of 'class arbitration' is not known in Danish law." Many of the other chapters have similar statements.

Given this, the usual structure of each chapter tends towards a description of what, if any, procedures exist for class or collective claims in that country; this is followed by a description of the regulatory structure for arbitra-



tion in that country; an analysis of how the two bodies of law may interact is undertaken; and the chapters generally conclude with a few thoughts on how arbitration of mass or class claims may evolve in the future in that particular country.

This intriguing book would be a worthwhile read for any lawyer interested in the intersection between class procedures and arbitration in Europe.

To order the book, please visit the publisher's website at: <http://www.maklu.be/MakluEnGarant/en/BookDetails.aspx?ID=9789046604908>

## Party Autonomy in Action: What are its Limitations and Effects in Practice?

by Olivia Staines & Paul Frankenstein

It is often taken as axiomatic that party autonomy is a bedrock principle of arbitration: the parties have the free will to elect arbitration by adopting an arbitration agreement to settle their dispute rather than proceeding with litigation. Party autonomy is not only "the guiding principle" of arbitral procedure, as Redfern and Hunter put it, but it also allows the parties to pick and apply the substantive law they choose.

But what does this mean in practice? A recent court case from the Seventh Circuit in the United States illustrates how party autonomy shapes the arbitration process and the end result.

In *Johnson Controls v. Edman Controls* \_\_ F.3d \_\_, 2013 WL 1098411 (7th Cir. Mar. 18, 2013), Johnson Controls, the respondent and loser of an arbitration brought by Edman Controls, attempted to vacate the arbitral award.

The facts of the case, as found by the arbitrator, were fairly straightforward: Johnson and Edman entered into an agreement that gave Edman the exclusive right to distribute Johnson's products in Panama. However, a few years after the agreement was executed, Johnson decided to sell its own products in Panama directly. Edman subsequently invoked the arbitration clause, and the arbitrator found in favour of Edman on three of four counts.

Johnson attempted to avoid the outcome by challenging the award in US District Court. It lost in District Court and appealed to the Seventh Circuit, based in Chicago. Two of the attacks that it launched on the award have particular relevance here: first, Johnson alleged that the arbitrator exceeded his authority by disregarding the parties' choice of substantive law; second, Johnson alleged that the fee award, which had been set by the District Court (the record is silent on whether or not the arbitrator had made an underlying finding on fees and costs) failed to use the statutory "lodestar" approach to fees.

The Seventh Circuit briefly reviewed the facts and background of the case, and made the observation that the arbitrator did not, in fact, disregard the choice of substantive law of the parties, instead actually enforcing it; even if the arbitrator had made "gross errors", or even arrived at conclusions that were "incorrect or even whacky", the award would not be overturned or annulled. This respect and concern for the integrity of the arbitral process is ultimately grounded in respect for party autonomy.

In one sense, Johnson's attacks on the award are an attack on the principle that the party can choose to avoid litigation entirely and resolve dispute privately. The Seventh Circuit noted this obliquely by stating that Johnson was trying "for a second bite at the apple"—but instead of in front

of an arbitrator selected by the parties, this second bite was through the machinery of the state court system.

Johnson's attempt to overturn the award of fees and costs by the district court was dismissed by the Seventh Circuit with explicit reference to the contractual ordering of the provision. Johnson argued that because statutory fee-shifting regimes are subject to a "lodestar" analysis, this fee-shifting, which was part of the original arbitration agreement, should be held to the same standard. The Seventh Circuit demolished this argument by noting that "ex ante private ordering" of attorney's fees is not only inherently and fundamentally different than statutory fee-shifting, the parties' own agreement to shift fees in this case trumps any statutorily required reasonableness analysis. Or, in other words, party autonomy overrides statutory concerns.

However, given the strong deference to the will of the parties demonstrated here, where are the limits of the principle?

It is generally accepted that there are five key limitations to the principle of party autonomy in international arbitration procedures. (K. Steele, 'Limitations to Party Autonomy in International Commercial Arbitration Proceedings' pages 9 -26)

The first limitation is that an arbitral tribunal generally has no power to determine a third person to participate or intervene in the dispute as a party in any way.

The second limitation refers to due process. The UNCITRAL Model Law clarifies that 'parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'. The vast majority of national arbitration laws and institutional arbitration rules, not to mention the New York Convention, contain similar language upholding the equal treatment of the parties and their right to be heard. These are fundamental, mandatory rules. Fundamentally, parties cannot contract to unfair proceedings.

The third limitation is that of public policy. In the case of *Parson and Whittmore Overseas v Société générale de l'industrie du Papier* (1974) 508 F 2d 969, it was held that infringement of public policy under the New York Convention should be accepted as a ground to overturn an award 'only where enforcement [of the award] would violate the forum state's most basic notions of morality and justice'. However, Steele advocates that a distinction should be made between a State's domestic and international public policy and that only the latter has the power to affect the validity or enforceability of international arbitral awards. In addition, most case law has held that the public policy exception naturally sets a very high bar as to what constitutes a "most basic notion of morality and justice."

The fourth limitation consists of mandatory rules under national law. It has been said that their function is to protect the social-economic interest of a state and thus, should be applied when a certain contractual relationship has substantial relevance to such rules in respect of formation, performance, or enforcement of the contract.

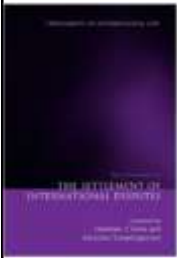
Finally, the fifth limitation which Steele affirms is that of arbitrability. This is the capacity of a dispute to be resolved by arbitration. In this case, different national legal systems have different perspectives when it comes to arbitrability. However, the case of *Mitsubishi v Soler Chrysler-Plymouth* (1985) 473 US 614 held that national courts should take a transnational approach in enforcing international arbitral awards, in respect to 'international comity', the 'capacities of foreign

and transnational tribunals' and an 'international commercial system for predictability in the resolution of disputes'.

In conclusion, party autonomy, while fundamental to arbitration, is not completely untrammelled. However, so far as party autonomy operates within the very broad guidelines set out above, it remains the underlying bedrock principle of modern arbitration.

## Book Review: Basic Documents on the Settlement of International Disputes

by Yaroslava Sorokhтей



The Book "Basic Documents on the Settlement of International Disputes", compiled by Christian J Tams and Antonios Tzanakopoulos was printed in 2012 by HART Publishing. It is a unique digest that incorporates all the specialized legal documents and basic texts that one might need when engaging in international dispute settlement. This book is both useful and practical in that it helps practitioners and students alike to

find relevant sources quickly, thereby saving time spent on research. The book provides a chronological table of legal documents and is divided into two parts – a general part and specific topics in international disputes.

The General Part includes fundamental documents such as: the Jay Treaty, the Treaty of Washington, the 1907 Hague Convention on Pacific Settlement, the UN Charter, General Act and different General Assembly Resolutions Addressing Issues of Dispute Settlement. It also comprises documents related to diplomacy, the International Court of Justice and the Permanent Court of Arbitration.

The second part of the book is divided into 8 subchapters. These cover human rights, law of the World Trade Organization, Investment and Regional integration, the law of the sea, environment, disarmament and arms control and non-proliferation. Finally, the last subchapter examines the aftermath of crisis. Accordingly, this book highlights the diverse set of techniques and dispute resolution methods available.

Overall, this is a recommended resource especially for those who could do with a through, structured and concise handbook of the fundamental texts. The book is great for practitioners of justice, lawmakers, students or those who simply show interest in international dispute settlement.

For more information about this book, as well as where to purchase, please visit HART Publishing website:

<http://www.hartpub.co.uk/books/details.asp?isbn=9781849463034>

## Book Review: 'Institutional Arbitration: Article by Article Commentary'

by Olivia Staines



'Institutional Arbitration: Article by Article Commentary,' edited by Rolf A. Schütze, provides users of institutional arbitration with a comprehensive explanation of the arbitral rules of 12 key arbitral institutions, as well as the UNICITRAL and ICSID rules.

Institutional arbitration is becoming increasingly popular today. However, there are few books out there that really get to grips with the current rules that

govern arbitration institutions and guide the reader through the various provisions. In light of this, this book's commentary is particularly impressive.

The commentary is written by nineteen experienced practitioners in international arbitration from all over the world. It provides deep and varied insight into subtle distinctions between the rules and the differences in the wording of the various articles. In addition, a massive advantage that this book offers is timeliness. It incorporates and discusses all the latest amendments to the ICC, SIAC and Swiss Rules.

The 2012 volume is divided into nine chapters. The first is an introduction to institutional arbitration. This is subdivided into four sections. Section one begins by defining institutional arbitration. It scrutinises the organization of arbitral proceedings and the appointment of the arbitral tribunal. It then moves on to examine questions such as: procedural rules, applicable law, evidence, costs and fees and liability.

Section two inspects the arbitration agreement. This section looks at the principle of arbitrability, contents of the arbitration agreement and proposes an ideal model arbitration agreement for institutional arbitration.

Section three contemplates the legal relationship between the involved persons and the institution. This section is of particular interest because it looks at German law and the Rome 1 Regulation. Finally, Section four considers specific abbreviations and acronyms.

The following eight chapters present and analyse the following rules in turn:

- + AAA (American Arbitration Association)
- + CIETAC (China International Economic and Trade Arbitration)
- + DIAC (Dubai International Arbitration Centre)
- + DIS (German Institution of Arbitration)
- + ICC (International Court of Arbitration)
- + ICSID (International Centre for Settlement of Investment Disputes)
- + KLRCA (Kuala Lumpur Regional Centre for Arbitration)
- + LCIA (The London Court of International Arbitration)
- + MKAS (Moscow International Commercial Arbitration Court)
- + SCC (Stockholm Chamber of Commerce Arbitration)
- + SIAC (Singapore International Arbitration Centre)
- + Vienna and Swiss rules

In summation, 'Institutional Arbitration: Article by Article Commentary' is a digestible read which gives a well-structured and straightforward approach to clarifying the interpretation of the aforementioned rules. The fact that it does not cover all the institutions out there should not be seen in a negative light as this would be a mammoth task. The strength of this book lies in its focus on having up-to-date information available on the main institutions. It would be worthwhile to make room for it on your bookshelf whether you are an academic, practitioner or work in connection with institutional arbitration. Ultimately, it will provide parties and their counsels with a strong basis on which to base their choice of institution. This book makes a good companion when sizing up the fundamental institutions in the arbitration arena.

## Book Review: Czech Yearbook of International Law - 2012: Public Policy and Ordre Public

by Yaroslava Sorokhtey



The Czech Yearbook of International Law - 2012: 'Public Policy and Ordre Public' is edited by Alexander J. Bělohávek and Naděžda Rozehnalová and published by Juris Publishing. It offers a comprehensive approach to the topic of public policy and *ordre public*. Fundamentally, the Yearbook illustrates that public policy is not simply restricted to international private law but has wider-ranging influence, impacting on cross-border court decisions and arbitral awards. The authors emphasize that it is important to distinguish between public policy at international and national levels. The last chapter is dedicated to debating this issue.

Essentially, the book consists of a collection of articles written by influential practitioners of justice in East Europe and CIS Countries. These include: Libor Klímeck, Ilona Jančářová & Vojtěch, Veronika Burketová, Ihar Martynenko, Josef Mrázek, Natalia Viktorova, Alexander J Bělohávek, Oleksandr Merezhko, Ostřanský Josef and Filip Černý.

Consequently, a variety of different and contentious issues are raised. In particular: procedural Instrument for Public Order Enforcement in the EU's Area of Freedom and Trans boundary Impact Assessment.

In summation, this publication is a collection of essays written by leading experts in international arbitration from legal practice. A variety of different and contentious issues are raised. In particular: procedural Instrument for Public Order Enforcement in the EU's Area of Freedom and Transboundary Impact Assessment. It would be an asset to anyone interested in international arbitration, especially young practitioners and students willing to know more about its practical aspects.

For further information about the book and where to purchase it, please visit the website of Juris Publishing:

[http://www.jurispub.com/cart.php?m=product\\_detail&p=10413](http://www.jurispub.com/cart.php?m=product_detail&p=10413)

## Book Review: Czech and Central European Yearbook of Arbitration - 2012: Party Autonomy versus Autonomy of Arbitrators

by Olivia Staines

The Czech (and Central European) Yearbook of Arbitration 2012, subtitled 'Party Autonomy versus Autonomy of Arbitrators Volume II', edited by Belohavek and Rozehnalova, contemplates the various and conflicting shades of autonomy that exist along the spectrum of arbitration.

Fundamentally, party autonomy is a crucial instrument in the arbitration process because it ensures that parties have the freedom to choose the manner in which they wish the dispute to be resolved. Conversely, arbitrator autonomy confirms the authority and discretion of the arbitrators in

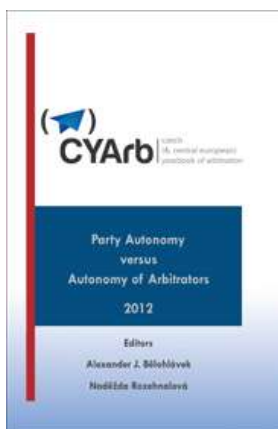
deciding the outcome of the process.

Accordingly, the book is divided into four main sections. The first is a compilation of thirteen articles spanning issues from waiver of Annulment Action in Arbitration to the liability of Arbitrators. The second comprises analysis of case-law from national courts throughout Eastern Europe dealing with Arbitration and case-law of arbitral tribunals from the Czech Republic. The third consists of three critical book reviews and the fourth provides an analysis of news and reports.

Volume II sets the scene with an examination of the extent to which the doctrine of autonomy of the arbitration agreement is implemented in international commercial arbitration.

Through the analysis of both arbitration awards and judicial case-law, it is argued that the doctrine is tentative in character and ought not to be invoked too casually. In order to safeguard it, the author advocates a cautious approach by establishing procedural limitations and revitalizing the principle of arbitrability.

The string of articles which follows tackle questions such as whether the European model for consumer protection autonomy in B2C arbitration is efficient enough and whether demonstrative exhibits in international arbitration are used effectively.



One particularly thought-provoking article considers and compares court decisions on arbitrator liability in various different jurisdictions within Europe, Canada and the US.

Subsequently, an interesting issue raised is the role equity plays in the arbitration process. This enquiry is tackled in the last article of Volume II which contemplates the principle of *ex aequo et bono*. Various arbitration laws have defined this principle as the 'resolution of disputes following

equitable principles'. However, this definition has been deemed problematic because delineating the scope of equity is, in itself, a cumbersome challenge. The authors make a worthy attempt at clarification on this front and document various opinions published on the topic.

A major strength of the book lies in the fact that it scrutinizes Albanian, Polish, Romanian, Czech and Slovakian Case-law with an eye towards the conflict between party autonomy and the powers of arbitral tribunal. In light of this, it provides a thorough and diverse assessment of arbitration approaches in Eastern Europe.

In conclusion, 'Party Autonomy versus Autonomy of Arbitrators' is a recommended read for practitioners who are interested in the development of arbitration law in Eastern Europe. The book offers stimulating commentary and academic insight into the theory behind the practice of arbitration in that area. Consequently, it propounds a platform for revision and practical reform.

To purchase this book please visit the Jurispub website:

[http://www.jurispub.com/cart.php?m=product\\_detail&p=10409](http://www.jurispub.com/cart.php?m=product_detail&p=10409)



# The Fate of Consumer Disputes Following the Regulation and Directive on ODR and ADR

by Yaroslava Sorokhтей

## Introduction

The importance of effective and low-cost dispute resolution between consumers and traders became crucial in the European Union with the establishment of the single market. When looking at consumer rights legislation in the EU, some fundamental questions need to be answered. Firstly, **where can a consumer's rights be protected?** Secondly, Should it depend on the kind of goods or services consumed? Thirdly, Should it depend on the jurisdiction where those goods were bought or the rights were infringed? The Regulation and Directive seek to answer these questions.

## Background

In the AIA Newsletter, of December 2011, we discussed the proposal of the EU Commission regarding ADR for Consumer disputes. As previously mentioned, on November 29, 2011, the EU Commission introduced two legislative proposals for a Directive on ADR and a Regulation on ODR for consumer disputes. At that time, the 2011 Commission Work Program identified consumer ADR as one of the **strategic Commission proposals for that year**. The legislation's goal was to strengthen consumer confidence in the Single Market. Thus, the implementation of the Regulation and Directive aim to make the use of ADR methods in resolution of consumer disputes across the EU possible.

In accordance with the Directive a list of ADR entities that will have the jurisdiction to handle such disputes will be provided. The Directive and Regulation were meant to cover complaints filed by consumers against traders. However they do not cover disputes between businesses.

Thus, the Directive on consumer ADR looks to fill the gaps in the coverage of ADR entities all over the EU and popularize the use of ADR entities by consumers and businesses. In addition, it seeks to ensure that ADR institutions are of high quality and in line with the Commission Recommendations.

Consequently, in June 2012, the Committee on Legal Affairs of the European Parliament (JURI) suggested possible solutions on how to improve the Commission's proposals. It stated that courts should encourage its use and provide all the necessary information to the parties. It also stated that the Directive should not apply to disputes where traders filed complaints against consumers. ADR looks to eliminate the imbalance between traders and consumers. It was also suggested that parties should try to find an amicable solution before submitting a dispute to ADR.

The definitive version of the Directive has changed considerably over time. More exceptions have been introduced in the scope of the Directive; the notion of the independent character of ADR entities has been inserted; the notion of legality has been introduced in a way that the rights of the consumer should never be deprived of legal protection; the effect of ADR proceedings on limitation and prescription periods has been introduced; there is a requirement that ADR entities exchange information; and more.

Two legal proposals were voted by the EU Parliament on the 12<sup>th</sup> March 2012

This topic is of great current interest, as on the 12<sup>th</sup> of March 2013, the EU Parliament voted for the Alternative Dispute Resolution (ADR) Directive and the Online Dispute Resolution (ODR) Regulation. The Directive is supposed to enter

into force 20 days after it is published in the EU Official Journal. All Member States within 24 months will be obliged to adjust their laws to correspond with the Directive. This means that in a short period of time, new online dispute resolution platforms will be functional, following discussion and testing of the system by different consumer organizations.

We expect that the Directive will give equal opportunities for the customers to protect their rights regardless of which goods or services are purchased and regardless of which jurisdiction they were bought in – **there won't be a need to go to a local court**. This will partly solve the problem of protection but it requires further steps to be taken – for example not every EU country has ADR institutions that cater to all types of consumer disputes.

The importance of the legislative acts

The Directive mentioned above will make it possible for any EU consumer to submit a claim against any EU-based trader, avoiding practical inconveniences. For example, in the event where a party may find itself in a dispute with a party from a different jurisdiction, they can avoid the hassle of having to argue their case in a foreign court and in a foreign language.

Accordingly, the courts will be less saturated and the resolution process of existing disputes will be considerably faster. The Directive ensures that the quality of existing and new ADR institutions is maintained.

The procedure itself

According to the Regulation, the EU Commission is also going to establish a platform called "Your Europe" which consumers can use for Online Dispute Resolution. This has the advantage of practicality on its side as the parties will not need to physically meet to solve the dispute. In addition, extra costs for transportation, the venue, accommodation and the like will be avoided.

Under the Directive, this platform will be accessible via all EU official languages and the claim will be transmitted to the ADR entity competent to resolve the dispute within 30 days from when the claim was submitted. The ADR entity should render a decision within 90 days from the day when the claim was received. An ODR advisor will be available in each Member State if requested by the parties.

The scope of the Directive on consumer ADR and Regulation on consumer ODR

Under the Directive, the consumers should be provided with a low-cost and efficient way to resolve domestic and cross-border contractual disputes in both offline and online transactions. Unfortunately, despite the Commission Recommendations 98/275/EC of March 30, 1998 and 2001/310/EC of 4 April 2001 alternative dispute resolution mechanisms have not been established correctly. This Directive should therefore establish platforms where high-quality ADR procedures are available; all Member States should handle ADR cross-border disputes effectively through ADR entities.

In accordance with Article 17(2), the Directive covers disputes between a consumer and trader, and if a Member State decides so, it also encompasses dispute resolution entities which impose solutions that are binding on the parties.

Areas to which the Directive is not applicable

This Directive is not applicable to non-economic services of general interest performed by State or on behalf of the State.



The Directive and Regulation should not apply to health-care services (Article 3 of the Directive) on the application of **patient's rights in cross-border healthcare**, as a Directive in the field of healthcare already exists.

It should be pointed out that an out-of-court procedure on an ad-hoc basis or single consumer-trader dispute is not considered as ADR dispute applicable to this Directive or Regulation.

The other kind of disputes to which this Directive is not applicable are direct negotiations between the parties, without involving ADR entity.

#### Obligations under the legislative acts

Member States are responsible for ensuring that those ADR entities to which consumer disputes are going to be referred to conform to the specific requirements on independence and impartiality in accordance with the provisions of the Directive and Regulation and those entities should also be a subject to regular evaluation of their compliance with quality and performance standards.

Each Member State is also responsible for developing specific rules for the ADR entities that are allowed to conduct dispute resolution in accordance to the mentioned legislative acts: for example, to allow the centers to decline disputes in certain circumstances, such as exceptionally complex disputes.

It is also obvious that Member States should generate publicity regarding dispute resolution with the ADR entities. That should stress that those ADR entities resolve disputes fairly, efficiently, and still provide full protection to both consumers and traders while still respecting the right to be heard. At the same time those ADR entities should be independent, impartial, and not interested in the outcome of the case.

#### Definition of the parties to the disputes

The new ADR Regulation and ODR Directive are very important steps in the development of ADR disputes in general, but it has a special impact on resolution of consumer disputes. An interesting fact is these new acts define the term **"trader," the counter-party to the consumer disputes**, very broadly. Art. 4(b) of both the ODR Regulation and the ADR Directive state that the trader **"means any natural persons or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession."** This definition is very broad and does not identify in particular what falls into its scope.

#### Conclusions

This Regulation and Directive will have a huge impact on the development of cross-border ADR and ODR dispute resolution with consumers. It is the first step for the establishment of a fair, cheap and efficient way of protecting the rights of parties. We expect that these new procedures will handle millions of consumer disputes per year, and that they will become a model for how to handle consumer disputes world-wide.

## AIA Recommends to Attend

### The German Organization MiKK is Offering New Training Seminars

Advanced Training in Cross-Border Family Mediation  
11 – 14 April and 30 May to 2 June 2013 in Berlin

More information under:

<http://www.mikk-ev.de/wp-content/uploads/Cross-Border-Family-Mediation-2013-in-Berlin.pdf>

Advanced Training

The Participation of Children and Teenagers in their Parents' Divorce Mediation

23 – 24 August 2013 in Heidelberg

<http://www.mikk-ev.de/wp-content/uploads/Children-in-mediation-2013-Heidelberg.pdf>

Mediation Training Course

210 hours in 9 modules in Berlin

160 hours basic training plus 50 hours advanced training in cross-border family mediation (this part of the course can also be booked separately!)

September 2013 – 9 November 2014

[http://www.mikk-ev.de/wp-content/uploads/english\\_mediation\\_course\\_berlin1.pdf](http://www.mikk-ev.de/wp-content/uploads/english_mediation_course_berlin1.pdf)

Please get in touch with us if you have any questions!

MiKK, [www.mikk-ev.de](http://www.mikk-ev.de), phone + 49-30-7478 7879 or +49-30-649 2935

### The 4th European Mediation Network Initiative Conference

18 - 20 April 2013 in Bratislava

The European Mediation Network Initiative (EMNI) is organizing their 4th EMNI conference in Bratislava from 18 to 20 April 2013. In cooperation with their Slovakian partners and the Association of International Arbitration. With this conference mediators have another opportunity to meet colleagues and to continue the tradition of the EMNI conferences which we have started in Helsinki and continued in Vienna, Belfast, Paris and now in Bratislava. You can find more information about the Bratislava conference on our homepage EMNI [www.mediationbratislava2013.eu](http://www.mediationbratislava2013.eu) and [www.mediationeurope.net](http://www.mediationeurope.net).

The main theme of the conference will be a phenomenon which is affecting all of us: „Mediation – as a tool which can help us to find a solution for the crisis“, and contents of planned workshops are following:

Mediation and mediation processes as a peacemaking tool (on the international level, national level, mediation and immigrants).

Mediation between multiple parties (mediation between members of EU, environmental cases, property cases, workplace cases and all other more complicated cases)

Mediation in the families (various types of media-





disputes, which cross the borders of the countries)  
 Mediation skills and processes as part of the modern leadership (in a company as well in the country)  
 Economic crisis: new market for the mediators  
 How to handle conflicts in the company and in the society  
 Teaching of mediation on law faculties, other schools (programs, ways how to teach Alternative dispute resolution, on elementary schools and high schools)  
 Positivism versus constructivism in theory and practice of ADR  
 Traditions and innovations in theory and practice of ADR  
 Cultural specifics in the area of ADR  
 Factors of effective mediation – skills, personality, talent, gender questions, experiences, age, opponents, case, environment, process

Current mediation – profession or method?  
 Mediation with its resources and tools could help and show possible solutions for the present crisis. Most mediators feel **these days that their profession is also in crisis...** The question is whether this is really true? Bratislava's Mediation Conference becomes the place where we would try to answer these questions and furthermore we would like to present the latest development in this area, new approaches, and trends, projects in the mediation in Europe and in the world. EMNI is proud to present on the conference the new program and new approaches for the upcoming months. Participants will receive first hand information about mediation in Europe, about the plans how to integrate it on the national levels as well as in European programs of Alternative Dispute Resolution, about ensuring the quality of mediation in international standards, ethical codices and other themes.

#### EMNI Award

During this 4th EMNI Conference the organization will establish the tradition of their Mediation Awards ceremony, where we reward the mediators who contributed to the development of mediation as well as for increasing the social awareness of this topic and enhancing the perspectives in the European context.

If you want to submit your proposal for a workshop or candidate for the award, please react before February 28th:

[http://www.mediationbratislava2013.eu/?a=4th emni conference&b=call for submission of the proposals for presentations](http://www.mediationbratislava2013.eu/?a=4th+emni+conference&b=call+for+submission+of+the+proposals+for+presentations)

#### Bratislava

The 4th Conference takes place Bratislava, the capital of Slovakia and the best secret of the East. Discover the city while you are here!

See you in Bratislava! follow the link:

[http://www.uianet.org/sites/default/files/evenements\\_2013/Prague form BAT\\_0.pdf](http://www.uianet.org/sites/default/files/evenements_2013/Prague_form_BAT_0.pdf)

## Mediv Conference 2013: Friedrich Glasl

21 and 22 May 2013

Domein Koningsteen, Kapelle-od-Bos, Belgium  
 Conference, discussion and seminar about conflicts ... the penultimate taboo!

With the Austrian professor Friedrich Glasl

Glasl is not only a world-famous expert on conflict, he is known above all for the concept of the 'escalation staircase' and for his books. His distinctive use of the labyrinth and his view of metanoia have turned him into an out-of-the-ordinary expert. Glasl mediates at all levels, from international politics to the living-room, and the creative path

MEDIV congres 2013

21 & 22 mei 2013

Friedrich Glasl



Congres, causerie en seminarie over conflicten ...  
 het voorlaatste taboe

that he follows here extends back into Greek antiquity.

Glasl sets the tone on the first day of the conference with a description of deep-acting methods for avoiding escalating conflicts constructively. Building further on this momentum, the afternoon is taken up with five audacious workshops. Each one presents a surprising and challenging vision for working with conflicts: an unusual legal view, intuitive feeling and creative stances, NLP tools and looking at areas of friction in terms of generational differences. Anyone who has had enough of the classic approach to conflict or is on the look-out for bold inspiration will find what they are after here! A maximum of 140 people can take part in this special event.

For anyone working in organisations or companies, there is an encounter with Glasl during a relaxed evening discussion with support from the Mediv social mediation trainers. A maximum of 30 people can take part in the discussion.

During the seminar day following the conference, Glasl will demonstrate his powerful methods and practise new skills and unfamiliar intervention techniques.

Getting entrenched positions to shift, undermining deep conflicts and laying a new basis for respect: this is Glasl's mission and his art. For this seminar day, there are places for no more than 50 participants.

For more information or to register, visit [www.mediv.be](http://www.mediv.be)

## VII Latin American Congress in Arbitration

April 23-24, 2013, Lima, Peru



AIA highly recommends participating in Latin American Congress in Arbitration to be held in Lima, Peru in April 2013, under the auspices of the Instituto Peruano de Arbitraje and the support of the Spanish Arbitration Club. The conference will focus on new and old problems in the area of Arbitration in Latin America.

For more information or to register, visit <http://www.peruarbitraje.org/>

