Association for International Arbitration
In Touch

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arbitration-adr.org

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Brainstorming on the future of Mediation in Belgium

LOCATION: Palace of Justice, Salle des Audiences Solennelles,
Plechtige Zittingszaal (Room 1.35), Place Poelaert 1
DATE: June 27th, 2013

European Mediation Training for Practitioners of Justice

LOCATION: Campus Brussel - T'Serclaes/Hermes/Erasmus Stormstraat 2
Rue de l'assaut 1000 Brussels, Belgium
DATE: August 19th-31st, 2013

Commercial Arbitration Training

LOCATION: Campus Brussel - T'Serclaes/Hermes/Erasmus Stormstraat 2
Rue de l'assaut 1000 Brussels, Belgium
DATE: August 19th-24th, 2013

For further information please visit our website: http://arbitration-adr.org/activities/

Inside this month's issue:

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.

The practical lessons of EMTPJ 2013 will be given by Paul Gibson, Philippe Billiet and Maria Francesca Francese . Paul is Australian, Philippe is Belgian. Both are members of Billiet & co. Francesca is from Italy.

Paul Gibson is one of the world's leading full-time mediators and negotiation experts. Philippe Billiet is a lawyer with main focus on European law, commercial law, distribution law, contract law and alternative dispute resolution. Maria Francesca Francese is a partner of Milex Studio legale, president of In Media. All three are EMTPJ alumni very active in mediation.

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.

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.

To get more information about EMTPJ program, schedule and lecturers, and to register for the course, please visit the website www.emtpj.eu

A First Comment on the New Draft of the Belgian Arbitration Law

At the AIA conference on the 4th of June 2010, the implementation of the UNCITRAL Model Law into the Belgian Arbitration Law had already been proposed (The UNCITRAL Model Law on International Commercial Arbitration: 25 years, Maklu 2010). The UNCITRAL rules are to become semi- institutional arbitral rules instead of the rules of a mere ad hoc arbitration. It was obvious from early on, that Belgium would have to succumb to the UNCITRAL Model Law to stay competitive with other jurisdictions.

The Belgian Minister of Justice submitted a draft bill to Parliament on the 11th of April 2013 to reform the Sixth Part of the Judicial Code concerning arbitration. The draft bill proposes the easiest solution: to abolish the existing arbitration law. Its replacement will be by an entirely new arbitration law based on the UNCITRAL Model Law.

The Belgian arbitration legislation was incorporated into the judicial code in 1972. Articles 1676 to 1723 integrated into Belgian Law are the provisions of the uniform Law annexed to the European Convention on Arbitration and signed in Strasbourg on the 20th of January 1966.

To clarify, this bill does not distinguish between domestic and international arbitration. The scope of the project is not limited to commercial arbitration either. Arbitral awards will also need to be reasoned, but it is not considered as being against international public policy if a foreign arbitral award is not reasoned.

The possibility of an interim measure ex parte by the arbitrators, as proposed by the UNCITRAL model Law, has not been retained. However, interim measures ex parte are still possible in Belgium but require the intervention of the President of the Court of first instance according to art 584 al 3 of the Judicial Code.

Other issues, like mechanism for review of fees and expenses of the arbitrators as well as exclusion of liability/immunity of the arbitrators are not covered by the draft bill. In the explanatory note references to other jurisdictions like Switzerland, Spain, Austria, Ireland, the Netherlands, France and Germany are made.

The key goal is to modernise Belgian Law and to make Belgium more attractive to International arbitrations. In opinion N° 52.657/2 (January 2013), the Belgian Administrative Court highlighted some shortcomings and proposed some amendments.

The bill also contains a number of important reforms of the current law and follows the general trend in international arbitration.

The list below contains concrete non-exhaustive examples, some of which were mentioned by the Minister of Justice in the explanatory note:

- Clarification of the conditions for objective arbitrability, just like in Switzerland and Germany, which now includes a material criterion, namely, the fact that the dispute concerns a pecuniary interest (art. 1676 §1). When starting with a new law, inserting the existing exceptions that restrict disputes in certain areas into the arbitration law is highly recommended.
- Removal of the possibility of an appeal in respect of setting-aside applications, which, due to the resulting delays, has seriously handicapped arbitration proceedings in Belgium (art. 1680 §5). However, the draft bill does not change the result of the setting-aside application. This means that where there is a case excluding an appeal when the setting aside has been allowed, only the Supreme Court is competent.
- Confirmation that the arbitration agreement does not have to be in writing, the burden of proof being on the party who alleges that an arbitration agreement exists (art. 1681).
- Confirmation that the parties may agree on the procedure for challenging an arbitrator, notably by referring specifically to an arbitral institute's rules (art. 1687 §1).
- Jurisdictional objections should be raised in the first brief, but exceptions can be allowed by the arbitral tribunal (1690 § 2). Any appeal to the court on a decision on jurisdiction is only possible together with the annulment proceedings on the merits (1690 § 3).
- Jurisdiction of the President of the Court of first instance, sitting like in summary proceedings, in circumstances such as : the replacement of an arbitrator or the challenging of an arbitrator if the parties did not agree otherwise (art 1680 §.1 and 2)
- Introduction of detailed rules for the system of interlocutory or conservatory measures ordered by the arbitral tribunal (art. 1691 to 1697).
- Explicit confirmation of the rule of equal treatment of all parties and fairness to be applied throughout the proceedings (art. 1699).
- The arbitral tribunal shall, except for claims regarding authentic documents, decide on the verification of the documents (art 1700 § 5).
- Assistance of the President of the court of first instance in obtaining evidence on request of one of the parties and approval of the arbitrators (art. 1708).
- The situation of the so called "truncated arbitral tribunal" will impose the need for the arbitral tribunal to communicate in advance to the parties when an arbitrator refuses to take part at the deliberation or the vote (art 1711 § 4).
- Rule that an arbitral award cannot be set aside, except on a number of limited grounds (art. 1717) or in certain cases, and only if it is established that the ground invoked for the setting aside has had a direct influence on the award (art. 1717 § 2, a) ii et v). The same rule applies to an order to enforce (art.1721a)ii.
- If the award can be "saved", the court before which the

claim for setting aside has been brought may decide to remit the award to the arbitral tribunal so as to allow it to eliminate the ground for the setting aside (art. 1717 § 5).

- Applications for setting aside and enforcement of the arbitral award must be brought before the Court of First Instance situated in the same district as the Court of Appeal. From now on, all these procedures will be centralized in these five courts which will allow the courts concerned to become specialized with regard to such applications (art. 1680 § 6 and 7). A prescription period of the arbitral award – 10 years after notification to the parties - has been introduced. (art. 1722)

In the explanatory memorandum, the bill's objective is clearly ambitious: it comprises not just a simple adaptation of the existing texts, but a proposal for global reform of the Belgian law on arbitration.

However to put Belgium at the forefront of international arbitration, the legislator could have considered other issues. The bill is not as ambitious as it could have been. Apart from the implementation of the UNCITRAL Model Law into the Belgian legislation, a lot of questions remain unanswered. It does not impose a duty of confidentiality on the parties involved in arbitration proceedings. Any relationship with mediation is lacking and the possibility/ conditions for arb-med and/or an med-arb are not mentioned. Consumer ADR is only partly covered and does not take the latest EU developments into consideration. Issues like the need for an emergency arbitrator are not expressly provided for in the draft. This still demonstrates the advantage of institutional arbitration over ad hoc arbitration.

Overall, the proposed amendment puts Belgium on equal footing with leading 'arbitration-friendly countries', but may not yet turn Belgium into a leading forum for arbitration. Nevertheless, the Belgian initiative should not be underestimated and the people behind it have delivered, opening the door for next steps. It should be mentioned that becoming an arbitration friendly country does not only depend on the legislation but other, additional work by local governments, is required like in Hong Kong or France, is required.

The full texts including the opinion of the Administrative court are available in Dutch and French at the http://www.dekamer.be/FLWB/PDF/53/2743/53K2743001.pdf

Exhaustion of Local Remedies and Investment Arbitration

by Dmytro Galagan

On April 8th, 2013, the Tribunal formed under the International Centre for Settlement of Investment Disputes ("ICSID") rendered an award in *Mr. Frank Charles Arif v. Republic of Moldova,* ICSID Case No. ARB/11/23 ("Award"). In this case the Tribunal considered, in particular, the requirement to exhaust local remedies for a valid treaty claim to exist.

In short, the dispute was related to the delayed or prevented opening of duty free stores. Le Bridge, a Moldavian corporation 100% owned by Mr. Arif, won the governmental tender for creation of a network of duty free shops. Subsequently, Le Bridge's competitor initiated court proceedings to invalidate Le Bridge's lease agreements with customs offices concluded as the result of the tender. Whereas the lower courts decided in favor of Le Bridge's competitor, the Supreme Court of Justice remanded the case for further proceedings. Thus, when Mr. Arif ("Claimant") alleged violations of the bilateral investment treaty between France and Moldova ("BIT"), the Republic of Moldova ("Respondent") rebutted, *inter alia*, that the dispute was not ripe for arbitration as Claimant had not exhausted available local remedies.

This article focuses on four aspects of the requirement to exhaust local remedies as addressed in *Arif v. Moldova*: (i) whether there is such general requirement; (ii) whether claims for denial of justice are an exception to the general rule; (iii) whether the requirement relates to admissibility of the claims or to the merits of the dispute; and (iv) whether the requirement to exhaust local remedies applies to claims for expropriation.

First, the Tribunal came to the conclusion that "there is no general requirement to exhaust local remedies for a treaty claim to exist" (*Award*, ¶¶ 334, 345). Whereas "Article 26 of the ICSID Convention constitutes an express waiver of the rule of exhaustion of local remedies in ICSID arbitration", the BIT also did not "provide for the exhaustion of local remedies before arbitration can commence" (*Award*, ¶ 333). Thus, the fact that court proceedings were still pending in Moldova did not preclude the Tribunal from hearing the dispute.

Second, the Tribunal noted that a claim for denial of justice is an exception to the aforementioned general rule (*Award*, ¶¶ 334, 345). The Tribunal thus confirmed that the requirement for exhaustion of local remedies "does apply to claims based on denial of justice" (*SAIPEM S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 151).

The tribunal further stated that decisions of lower courts may not amount to the denial of justice as long as "such decisions are not final and binding and can be corrected by the internal mechanisms of appeal" and "the judicial system is not tested as a whole" (*Award*, ¶ 443). Accordingly, it is only "the final product of [the State's] administration of justice which the investor cannot escape" that may lead to the breach of the fair and equitable treatment ("FET") standard via denial of justice (*Ibid*). The underlying reason is clear: the State should not be "responsible for the wrongdoings of an individual judge as long as it provides readily accessible mechanisms which are capable of neutralizing said judge" (*Ibid*) and to hold otherwise would suggest that the arbitral tribunal may act as an "appellate court" that reviews non-final decisions of the national courts.

The finding above supports existing arbitration practice that "the respondent State must be put in a position to redress the wrongdoings of its judiciary", subject to an exception in case when there is "no effective remedy" or "no reasonable prospect of success" (*Jan de Nul NV and Dredging International NV v. Egypt*, ICSID Case No.ARB/04/13, Award, ¶ 258).

Thus, the State can be held responsible for the breach of the FET standard through a denial of justice if and when the judiciary "rendered final and binding

decisions after fundamentally unfair and biased proceedings or which misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so" (*Award*, ¶ 442), "breached the standard by fundamentally unfair proceedings and outrageously wrong, final and binding decisions" (*Award*, ¶ 445).

Third, the Tribunal came to conclusion that, even if a claim for denial of justice is made, the exhaustion of local remedies should be addressed with the merits of the dispute (*Award*, ¶ 346). It is a substantive requirement rather than a matter of the claim's admissibility (*SAIPEM v. Bangladesh*, ¶ 151).

A specific example of this matter may be found in *Jan de Nul*, where the Tribunal noted that the requirement to exhaust local remedies would not bar a claim of denial of justice made on the basis of excessive delays in judicial proceedings, since "it would make no sense to insist on the exhaustion of remedies that are unavailable precisely because the issuance of an appealable decision is delayed" (*Jan de Nul*, ¶ 256). Hence, if a claim for denial of justice is made, the Tribunal would not surrender its jurisdiction due to non-exhaustion of local remedies, but rather review this issue on the merits so that to offer the investor an opportunity to present its case.

Fourth, the Tribunal distinguished a claim for denial of justice and a claim for expropriation. Whereas in the former "the conduct of the whole judicial system is relevant", in the latter "it is the individual action of an organ of the State that is decisive" (*Award*, ¶ 345). Therefore, no exhaustion of local remedies requirement "applies in principle to expropriation claims" (*Award*, ¶ 346). Again, such finding supports *SAIPEM v. Bangladesh*, ¶ 151.

To summarize, in *Arif v. Moldova* the Tribunal followed the existing arbitration practice and held that there is no general requirement to exhaust local remedies unless the claim is for denial of justice, but even in the latter case it should be addressed with the merits of the dispute unless the bilateral investment treaty requires exhaustion of local remedies as a condition of the Contracting State's consent to arbitration pursuant to Article 26 of the ICSID Convention.

Book Review: Corporate Internal Investigations: Overview of 13 Jurisdictions

by Olivia Staines

Corporate Internal Investigations edited by Spehl and Gruetzner, provides a comprehensive overview of thirteen different jurisdictions: Austria, Brazil, China, England and Wales, France, Germany, Indonesia, Italy, Mexico, Russia, Spain, Switzerland and the United States of America.

Over the years, criminal activities have come to light in numerous well established and well regarded companies. Consequently, corporate internal investigations are becoming increasingly popular for businesses in order to curtail the risk of liability and to preserve their image.

In some cases, these activities have occurred as a result of poor employee supervision, in others, managerial staffs themselves have been 'in on it' causing serious damage to the company's reputation.

By conducting internal investigations, companies can demonstrate respect for ethical principles and zero tolerance for misconduct either internally or with regard to third parties.

In light of this, the book is divided into thirteen different chapters each written by one or more practitioners. It covers twenty five fundamental questions which are answered from the perspective of the thirteen jurisdictions. They relate to: the initiation of internal investigations, the admissibility of individual measures, employee interviews and penalties, the use of information obtained through an internal investigation and the follow up after internal investigations are concluded.

The continuity of the content is exceptionally impressive considering the fact that it is written by numerous practitioners and yet manages to give the reader the impression that they are being guided through the subject matter by one, coherent author.

We highly recommend this work to practicing lawyers because of its broad and in depth analysis on the subject matter. It is well structured, easy to follow and is 'the book' to refer to when assessing corporate internal investigations on an international scale.

To purchase this book please visit the link below
http://www.beck-shop.de/Spehl-Gruetzner-Corporate-Internal-Investigations/productview.aspx?product=10282836

Time Bound Arbitration (TBA) Timely & Cost Effective Approach To Dispute Resolution In the Construction Industry And the Impact of FIDIC Evolution Towards the New Millennium

by Dr. Imad Al Jamal

Disputes and problems are part and parcel of life since inception with particular emphasis on the construction industry and its participants.

Human beings have striven to improve life and resolve disputes in a more effective and timely controlled manner which has developed over the years.

The above development resulted in the formation of the legal and other systems, as we know it today, with its official tools of legal proceedings and courts.

The idea behind Time Bound Arbitration (TBA) emanated from the existing legal system itself and its tools, whereby a readily available system of justice implementation and execution is in the waiting to deal promptly and effectively with various disputes related to civil societies and its functioning.

Normal arbitration procedures and tribunals (courts) are not set up or initiated until and unless a dispute has arisen which will result in a substantial amount of costs, time and delays involved in meeting and creating the "justice resolving mechanism system."

The above situation will lead to delayed justice which means simply denied justice with its negative impact not only on the parties involved but on the stability and development of the construction industry and society as a whole.

The major dilemma for most employers, engineers, contractors, sub-contractors and suppliers is resolving disputes arising from or during the execution of their projects in a cost effective and timely controlled manner.

Well known disputes resolving mechanisms such as legal procedures through the courts, arbitration, adjudication and other forms of disputes resolving techniques have so far failed in achieving the above goal.

The need for a swift mechanism to resolve disputes and avoid time consuming negotiations to form arbitration panels created a need for a more effective approach and READILY AVAILABLE SET-UP (Arbitral Courts) similar to the legal system (but without its lengthy and time consuming red tape approach).

The above can be achieved by forming an arbitration tribunal at the early stage of signing contracts which is in many ways similar to permanent dispute adjudication board's formation but with a time controlled mechanism for its functioning and decision making process.

Accordingly, it is proposed that all parties to the contract agree on a specific time bound mechanism during tendering stage and/or negotiation stage (prior to or alongside tender award and signing) on the appointment of an arbitrator/s representing parties to the contract which will act as an "ONGOING ARBITRATION PANEL" that will meet regularly and/or if called upon by either party/ies, (say, on a monthly basis) during construction and maintenance periods, if necessary and depending on the nature and complexity of the project in hand.

Formation of Time Bound Arbitration (TBA) tribunal must be carried out during tender stage or alongside contract/ subcontract agreement time due to the fact that negative attitudes, bad feelings and tensions do not exist at this stage (honeymoon period) which will make it easier to agree on a qualified and competent arbitrator/s in a short time and under no duress or tension that is usually experienced during construction stage.

TBA tribunal members may be chosen from institutional listings of arbitrators whether by national or international establishments and may be agreed between the parties from direct nominations in case of ADHOC arbitration.

The conditions of appointment, disqualification and replacement of arbitrators are similar to the approach in organizing normal arbitration tribunal members.

In order to safeguard the efficiency, continuity and speed of TBA functioning and decision making process; it is recommended that a standby listing of arbitrators are added to the original agreed list of arbitrators in order to overcome expected problems such as resignation, disqualification, death and any other issues that may arise during its functioning and therefore the impact on the work process and technique resolving mechanism is minimal.

Disputing parties may refer their claims to the said tribunal; say "30" days prior to its official meeting date. This will give tribunal members ample time to study and verify documents, claims and counter claims from the parties and afford an adequate opportunity to carry out site visits (if and when necessary).

The tribunal will have the responsibility and opportunity to analyze and resolve the disputes and give its firm decisions and judgment within "30" calendar days from the convening date or as may be agreed and decided by TBA tribunal, depending on the magnitude and complexity of the dispute in question.

The tribunal's decision must be firm, final and binding on the parties with no room for further recourse to litigation and/or other dispute resolution methods. The same should be clearly stated in the contract and agreed upon by the parties.

The scope of work and responsibility of the TBA tribunal must be chartered very carefully in order not to interfere with the Engineer's role and therefore it should be able to receive complaints and/or disputes after they have been subjected to the Engineer's verifications, recommendations and decisions which will enhance and support the Engineer's role and at the same time open the window of opportunity for a swift and decisive way of resolving disputes.

In comparison, the setting up of Time Bound Arbitration Tribunal (TBAT) instead of Disputes Adjudication Board (DAB) [Ref. FDIC 1996 and FDIC 1999] in order to avoid unnecessary delays and wastage of time and resources due to the VOLUNTARY NATURE of DAB whereby the parties have a decisive role in its functioning and outcome, compared to a more affirmative, compulsory and decisive approach by TBAT which should be nominated and agreed upon along with contract agreement, but with specific time limits for its functioning, decision making and implementation.

The formation and setting up of Time Bound Arbitration Tribunal (TBAT) must be carried out in the same manner and mechanism that has been adopted in the creation and implementation of standard arbitration tribunals.

The above approach will contribute towards minimizing and avoiding the snowballing nature of simple disputes and problems that arise during practical execution of the contract between the parties.

The above approach was recognized and appreciated by the fact, that, in case of failure to agree to DAB approach and its recommendations, then the parties may refer BACK TO ARBITRATION as a way out to resolve disputes, in the absence of an amicable and agreed settlement.

The social, cultural and civil background of the parties and disputes' locations, site conditions and circumstances plays a significant role in this regard.

The advantages of Time Bound Arbitration Tribunal (TBAT) may be summarized as follows:

- Continuous real time monitoring and evaluation of work development and progress during construction stage, as opposed to virtual and detailed assessment of the same after completion of works and events with its obvious implication on timely accurate assessment of the project and the resulting recommendations and decisions by the Arbitral Tribunal.
- Speedy, firm and final resolutions of disputes if and when they arise.
- Drastic reduction of the time spent on litigation and ordinary arbitration.
- Reduction of correspondence, filing, meetings, cost and time involved in following up disputes for a long time.
- Prevention of accumulation and development of minor disputes into major and complicated problems which will be hard, expensive and time consuming to resolve.
- Completion of the works with none or minimal disputed items which reflect positively on relations and harmony within the construction industry.
- Prevention and/or reduction of cash flow problems due to the withholding of large sums of money experienced during lengthy and costly

disputes.

- Relieving the judicial system from the burden, cost and time of handling contractual and specialized disputes.
- Statistics in UAE indicate that more than 70% of the disputes are related to the construction industry and therefore technical, engineering and contractual knowledge TAKES PRECEDENT in resolving such disputes and is paramount to the legal approach with its complexity, cost and time involved due to the ENGINEERING NATURE AND BACKGROUND of most disputes.
- Enhancement of confidence and relations between employers, engineers, contractors, sub-contractors and suppliers right through the whole chain of construction and supply industries.
- Knowing that disputes will be resolved promptly and efficiently, then competitive pricing and tendering will contribute towards progress and prosperity in the construction sector, real estate and other related industries by channeling finance in a more effective and constructive manner.
- No hidden costs (inflated prices) will be added in order to meet unexpected circumstances and ambiguities related to expected disputes, delays and finance of long standing disputes with its obvious impact on the economy, investment and development in general.
- The expenses and costs involved in setting up Time Bound Arbitration Tribunal (TBAT) are minor compared to the heavy costs involved in ordinary arbitration and legal proceedings where an open ended time span is experienced with its obvious time and cost implications.

Book Review: International Arbitration in Switzerland A Handbook for Practitioners, Second Edition

by Yaroslava Sorokhtey

The book "International Arbitration in Switzerland, a Handbook for Practitioners" is a great practitioners' guide to international arbitration in Switzerland. This edition of the book gives a detailed overview of each stage of arbitral proceedings, starting from the arbitration clause to be included in the contract between the parties and finishing with the drafting of the award by the tribunal and the enforcement and recognition of that award. The book is very useful because it includes all the practical aspects of arbitral proceedings in Switzerland (how to draft an enforceable arbitration clause and how to avoid the setting aside or annulment of an arbitral award) . This edition of the book includes all the changes that have been made to the Swiss Rules on International Arbitration and elaborates on how those changes have influenced arbitration in Switzerland in general. It also pays attention to the new ICC Rules and the revised UNCITRAL Rules. This guide is also very interesting because it compares the main arbitration institutions and provides their advantages and disadvantages. Whilst focusing on the latest developments in international commercial arbitration, International Arbitration in Switzerland includes sections on sports arbitration (with a focus on the Court of Arbitration for Sport in Lausanne) and on Swiss-based public international law dispute settlement mechanisms, including those of the WTO and the UNCC.

Overall, this book would be of special interest and importance to lawyers practicing international commercial arbitration all over the world and in Switzerland in particular, as well as academics and students. It provides readers with valuable insight into dispute settlement in Switzerland using international commercial arbitration mechanisms.

For further information about the book and where to purchase it, please visit the Wolters Kluwer website:

http://www.kluwerlaw.com/Catalogue/titleinfo.htm?wbc_purpose=Basic&WBCMODE=PresentationUnpublished%253FCategoryTitle%253FMode?ProdID=904113848X&name=International-Arbitration-in-Switzerland---2nd-Revised-Edition

AIA Members get a 10% discount!

Cyprus: a Mirror Image of Argentina in 2001?

by Olivia Staines

There was a time when your money was safe in a bank account. It is hard to comprehend how we have come to live in a time where people can sell their assets, deposit their money into a bank and then find that said money has 'disappeared'. Unfortunately, Governments failed to react to this situation in time. We are now paying the consequences.

Subsequently, the implementation of capital and exchange controls in Cyprus this year has brought to light some controversial legal concerns. These resound in both European and International law arenas. Fundamentally, Article 63 of the TFEU stipulates that 'all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'.

However, certain exceptions to the free movement of capital are stipulated in the Treaty. Others are established by the case law of the Court of justice. Article 65(1) (b) TFEU permits Member states to take measures if they are justified on the grounds of 'public policy' or 'public security'.

The CJEU has decided that the difficulty in identifying and blocking capital once it has entered a Member State may in principle even justify differential treatment of transactions involving foreign direct investment (see Case C-54/99, Eglise de Scientologie).

In case C-423/98, Albore, it was decided that the requirements of public security cannot justify derogations from the Treaty rules unless the principle of proportionality is observed, which means that any derogation must remain within the limits of what is suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain the pursued objective.

The action in Cyprus has also been slated on the basis of EU case law, which suggests that solely economic and financial motives of a state do not fall into either of the

aforementioned categories. This could therefore set ineffectual precedent.

In addition, Cypriot capital controls have raised eye brows regarding supposed obligations at international law under a number of bilateral investment treaties (BITs). BITs are crucial to foreign investors as they guarantee fair and equitable treatment, free transfer of payments abroad, withdrawal of money and full protection from expropriation. They can enable investors to commence arbitration proceedings directly against states.

Accordingly, a parallel can be drawn between the current situation in Cyprus and the financial crisis of Argentina in 2001. Following the crisis and subsequent collapse, Argentina passed an Emergency law in 2002 in order to restore economic and political poise. However, the backlash saw foreign investors mostly in privatized utility companies, attempting to claim under relevant BIT's. Argentina built a defense on NPM clauses and argued that the state of necessity in customary international law precluded the wrongfulness of its actions.

The case of Continental Casualty v Argentine Republic (2008) is a good illustration of both sides of the coin. On the one hand, the claimant was entitled to 2.8 million US dollars' worth of damages plus interest. On the other, this was only a fraction of the 112 million US dollars sought and all but one claim was dismissed.

The Claimant was a US insurance company that had administered a privatized worker's compensation insurance scheme in Argentina. They argued that the emergency law measures breached four provisions of the US-Argentina BIT:

(i) the requirement to observe contractual obligations; (ii) the requirement to provide compensation following an expropriation; (iii) the requirement to treat an investment fairly and equitably; (iiii) and finally, the requirement to protect the free transfer of assets.

Conversely, Argentina maintained that the measures it implemented to restrict the crisis were necessary under customary international law and "proportional to the situation". Argentina invoked Article 11 of the US-Argentina BIT that takes into account a government's duty to maintain public order.

The tribunal concluded that Article 11 of the NPM clause was not, contrary to Argentina's claim, "self-judging" or subject to an extremely deferential "good faith" standard of review.

However, "economic" crises could, in principle, impact on the "maintenance of public order" or affect a state's "essential security interests" and thus fall within the scope of the provision.

The one compromise for the claimant was connected to Argentina's restructuring of treasure bills held by Continental Casualty. The tribunal held that the measure could not be considered necessary because the economy was stabilising by that point. Argentina was thus found to have breached the Fair and Equitable Treatment standard of the BIT and forced to pay damages.

Ultimately Argentina, like Cyprus, let its public debt get out of control. However, critics are saying that the circumstances in Cyprus are much worse than those of its South American counterpart twelve years ago. The BBC published figure emphasizing that Cypriot public debt is now at 87 % of GDP, compared to 62 % of GDP in Argentina in 2001.

The biggest group of foreign investors hit by the collapse are Russian depositors, many of which are facing losses of up to forty percentages. Theoretically, they could initiate investment treaty arbitration against Cyprus on the basis of expropriation, unfair treatment and discrimination under the 1997 Russian Federation-Cyprus bilateral investment treaty.

However, in practice, this is problematic as the treaty is not legally binding because it has never been ratified. Despite this obstacle, if Russian investors are owners of corporate vehicles located in countries which have signed bilateral treaties with Russia, then they might be able to use investment treaty arbitration to be reimbursed for the amounts taken.

However, critics have argued that the EU could be liable under the Energy Charter Treaty. Article 10(1) sets out a number of basic principles for the treatment of foreign investments including the encouragement and creation of stable, equitable, favourable and transparent conditions for Investors. Article 13 confirms the principle of full compensation following expropriation and Article 26 provides the right to Arbitration.

The question is also determining the entity that can be held liable for breaches of an international investment treaty. The EU, or its Member States, given that both are separate parties to the ECT.

Currently, the first arbitration against Cyprus is in motion, with a waiting period running on a $1 billion claim arising out of the nationalization of major bank.

Only time will tell how Cypriot capital control measures will affect the increase in arbitration claims. In sum, Cyprus can learn from Latin America and take the crisis in 2001 as warning.

Book Review: Bulletin ICC Guide to National Procedures for Recognition and Enforcement of Awards under the New York Convention

by Yaroslava Sorokhtey

The new ICC Guide to National Procedures for Recognition and Enforcement of Awards under the New York Convention is a special supplement of the ICC International Court of Arbitration Bulletin (vol. 23)2012 . The first Guide was published to celebrate the 50th anniversary of the NY Convention and the second edition was republished to keep it updated.

This Bulletin overviews 79 countries and its local laws on international arbitration and conditions of the enforcement of foreign arbitral awards. It is important to mention that the second addition covers 13 additional countries.

This book is of great interest for arbitration practitioners and gives them an overview of the procedure and conditions on which foreign arbitral awards are recognized in various countries. This book focuses on national arbitration rules and laws and refusal of enforcement on the basis of article III and IV of the NY Convention. It should also be mentioned that before publication of the first and second editions of the Bulletin there

A database with similar content did not exist. This Bulletin includes an introduction, the countries' answers and an overview of those answers accompanied by several appendixes.
The answers of the countries concern: interaction of the contracting states with the NY Convention, national sources of law, limitation periods, national courts and court proceedings, evidence required, stay of enforcement, confidentiality and other issues. The information in this book will be of particular interest for parties considering recognition and enforcement of foreign arbitral awards in different countries.
Overall, the book is a great contribution to the field of arbitration and will be of great value as a comparative guide to arbitration practitioners as well as students and scholars interested in the practical aspects of the enforcement of foreign arbitral awards.
For further information about the book and where to purchase it, please visit the website of the ICC Business Bookstore: http://www.iccbooks.com/Product/ProductInfo.aspx?id=688

Financier Worldwide Presents the Apr-Jun 2013 Issue of Corporate Disputes Magazine

Financier Worldwide presents the Apr-Jun 2013 issue of Corporate Disputes magazine. AIA is pleased to have worked with Financier Worldwide on the development of the latest issue of Corporate Disputes magazine. The magazine provides insight on the latest developments in corporate and commercial disputes. Its foundation is a quarterly e-magazine that is published by Financier Worldwide, and draws on the experience and expertise of leading experts in the field to deliver insight on litigation, arbitration, mediation and other methods of dispute resolution. Yaroslava Sorokhtey of the Association for International Arbitration wrote one of the leading articles, which examined "The fate of consumer disputes following the regulation and directive on ODR and ADR". Other key articles include:

- Drafting contractual provisions for dispute resolution
- General counsel – arbitration versus other forms of dispute resolution

Financier Worldwide has provided AIA members a complementary digital version of these reports. Please click on the following links to access the report; please allow a couple of minutes for this to open up in your browser.

For further information about Corporate Disputes magazine please contact Peter Livingstone on +44 (0)121 600 5915 or via email at peter.livingstone@financierworldwide.com

AIA Attended Investment Arbitration Seminar

by Laura Lozano

On the 18th of April 2013, leading international practitioners gathered under the auspices of the "Club Español de Arbitraje" (CEA-40) and the ICDR Young & International, at Clifford Chance offices in Madrid for the First Seminar *in Investment Arbitration.*
The goal of this seminar was to enable young lawyers to hear from and engage directly with arbitrators and lawyers specializing in investment arbitration proceedings. The seminar was divided into two parts, starting with a colloquium on jurisdictional and procedural characteristics in investment arbitration and concluding with a colloquium on differentiating factors in investment arbitration regarding the merits. A wide array of issues were addressed from jurisdictional issues to compensation of damages. Attendees had the opportunity to listen to two distinguished panels, the first one composed of Eduardo Zuleta (partner at Gómez-Pinzon Zuleta, Bogotá), Diego Gosis (counsel at Gomm&Smith PA, Miami) and Alejandro López Ortiz (counsel at Hogan Lovells, Madrid) moderated by Deva Villanúa (associate at Armesto & Asociados, Madrid) and the second panel composed of Fernando Mantilla-Serrano (partner at Shearman&Sterling, Paris), Noiana Marigo (partner at Freshfields Bruckhaus Deringer, New York), and Christian Leathley (partner at Herbert Smith Freehills, London & Madrid) moderated by Alfonso Gómez-Acebo (partner at Baker& McKenzie, Madrid). Attendees were highly enthusiastic and engaged in discussion.
During the first part of the colloquium, jurisdictional and procedural characteristics of investor state arbitration were addressed. Mr. Zuleta opened the floor by introducing investor-state arbitration and explained that the main difference with commercial arbitration was the source of the arbitration itself: the element of consent. The source of investment arbitration may be found in national law and Bilateral Investment Treaties, Multilateral Investment Treaties or Free Trade Agreements. In order for an investment to find protection under investment arbitration, three elements must be proven: the very existence of investment, the legality of such investment, and a breach of any standard provided for in the source of protection. On the subject of this third element, ,Mr. Zuleta, submitted that the protection BITs grant depends on each Treatiy's unique scope and must be construed according to its own terms. Thus, nuances are extremely important and, for instance, one cannot speak about a standard most favored nation clause as it will depend on its definition ineach particular BIT. Furthermore,
The second panelist, Mr. Gosis, focused on further differences between investment arbitration and commercial arbitration, arriving at the conclusion that one of the main differences is that investment arbitration is ruled by public international law. Other interesting differences areit's the publicity of the proceedings, as well as the public interest of the awards. He also elaborated on the four jurisdictional requirements that must be met in investment arbitration: *ratione personae, ratione materiae, ratione temporis* and written consent, as contained in Art. 25 ICSID Convention.
, Mr. López Ortiz, the third speaker, covered the interesting issue of umbrella clauses. He addressed whether obligations arising under contracts between the investor and the host State can be subject or to ICSID jurisdiction as a result of so called 'umbrella clauses' contained in the treaty. The panelist reinforced the idea that each treaty and agreement should be individually analyzed. Indeed, case law is as varied as there are contracts and treaties and the resulting decisions. Whereas certain tribunals have exercised jurisdiction in contract claims, others have rejected their own jurisdiction and it is to be analyzed in each specific instance whether the combined interpretation of e treaty and the forum selection clause in the contract enable a tribunal to adjudicate a specific allegation of breach of contract.
Turning to the second colloquium, differentiating factors in investment arbitration regarding

the treaty and the forum selection clause in the contract enable a tribunal to adjudicate a specific allegation of breach of contract.

Turning to the second colloquium, differentiating factors in investment arbitration regarding the merits were developed. Among different topics, Mr. Mantilla stated the most common standards of protection in investment arbitration (fair and equitable treatment, lawful expropriation, full protection and security, national treatment, etc.). He also addressed the importance of Art. 42 ICSID Convention. On dealing with the applicable law, whereby tribunals shall decide a dispute in accordance with the law agreed by the parties and in the absence of such agreement, tribunals shall apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and rules of international law as may be applicable.

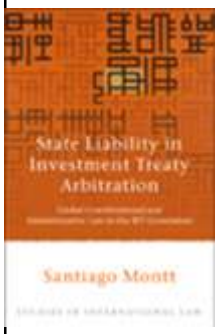
Ms. Marigo focused on economic compensations rendered in the awards. She mentioned the difficulty in providing market value estimations in expropriations, which is the most accurate measure for the quantification of damages and brought up well known examples in Latin American cases and calculation methods such as discounted cash flow and calculation by multiples. During the brief Q & A Ms. Marigo was asked to extend on claims for moral damages and pointed out that certain states are currently claiming moral damages for the negative impact of frivolous investment claims on the state's international image.

Mr. Leathley closed the colloquium by highlighting the differences between enforcement under UNCITRAL Rules and ICSID Rules and focused on the very unique annulment proceedings under Art. 52 ICSID Convention. Mr. Leathley, gave an overview of the latest statistics on number of annulment proceedings initiated, number of awards annulled and causes for annulment.

To conclude, the seminar ended with a number of open questions from the participants. All members of the panels were asked to share their thoughts while acting both as arbitrators and counsel. In a nutshell, it was a wonderful opportunity to listen to excellent practitioners and gain a broad overview of investment arbitration.

Book Review: State Liability in Investment Treaty Arbitration 2012

by Olivia Staines



State Liability in Investment Treaty Arbitration by Santiago Montt, constitutes volume 26 in the Studies in International Law Series.

In light of globalization, the international investment arena has seen a major shift over the past fifty years. Emerging economies are no longer just being sought after for natural resources and agricultural benefits. They are now the contenders in the ring who can offer significant incentives to hungry FDI's.

Bilateral Investment Treaties (BITs) govern the relationship between these two players. Primarily, their role is to protect investors. They offer the possibility of fair and equitable treatment, free transfer of payments abroad, withdrawal of money and full protection from expropriation

Today, there are over 2,800 Bilateral Investment Treaties (BITs) worldwide. However, as these come into play Montt argues that the BITs regime needs to be able to develop in order to balance concerns for state sovereignty and regulatory reform against the encouragement of international investment.

Fundamentally, this book is divided into two sections and consists of six chapters. Part one provides a framework analysis and covers chapters 1-3. Part two is an assessment of the present state of investment treaty arbitration Jurisprudence and comprises chapters 4-6.

Chapter one, sets the scene by looking at the Latin American Position on State Responsibility and the historical context of BIT arbitration. Chapter two contemplates the propagation of BITS and assesses the BIT Generation as a Virtual Network. Chapter three examines the legitimacy of the BIT generation.

This chapter is divided into three subsections. The first analyses the question of legitimacy in the context of International Investment Law. The second inspects potential sources of legitimacy. The third reflects on why an Appellate Body or an International Investment Court is not a viable option.

Chapter four gives insight into the fracas between property rights and the public interest. It also considers liability in the context of illegal and arbitrary state action. Finally, Chapters five and six, evaluate issues such as indirect expropriations and fair and equitable treatment. The volume culminates with a segment deliberating the future of BITs.

In sum, State Liability in Investment Treaty Arbitration offers a novel approach to the subject area and problems arising in this context. A major strength of this work lies in its structure. The subject matter of each chapter is broken down into manageable sections and ends with a thorough and well laid out conclusion.

The specific content is also extremely methodical and detailed. Montt excels by first laying down the historical environment and then second, by building the theoretical substance and case-law on this foundation. Crucially, he then offers those interested in this field, an interesting assessment of what the future ought to look like. We recommend this read to both academics and practitioners.

To purchase this book please visit the HART publishing website:
http://www.hartpub.co.uk/BookDetails.aspx?ISBN=9781841138565

The Member of AIA Network, CONCILIA, is the first Italian ADR Provider to be Approved by the Independent Standards Commission of the International Mediation Institute

CONCILIA (www.concilia.it and www.conflictresolution.it) is a company of professionals experienced in handling civil and commercial mediation. Founded in 1999, CONCILIA is considered one of the most well-known and respected companies in the field of alternative dispute resolution (ADR, mediation, conciliation, arbitration) on both a national and international level.

Before the company was formed, some of its members had previously been active in the ADR field for several years. CONCILIA is a company composed of academics, lawyers, accountants and experts in training and marketing. After having gained considerable experience in theory and practice in England and the United States, Concilia's experts began to work together, providing

innovative training and consultancy services in alternative dispute resolution procedures.
CONCILIA's experts are all experienced negotiators, mediators and arbitrators with a solid national and international reputation. Several hundred conciliations, mediations and arbitrations have been conducted in Italy and abroad.
Over the last ten years CONCILIA has contributed greatly by working with top professionals towards the creation of a resilient ADR system in Italy.
The professionalism of CONCILIA's experts has been chosen, for over ten years, by major groups, companies, lawyers, notaries, accountants, governments, chambers of commerce, ministries and universities.
CONCILIA is a primary (and one of the first) accredited bodies by the Italian Ministry of Justice for providing training services for professional mediators and consultancy in civil and commercial mediations.

AIA Recommends to Attend

Save the Date 29th – 30th of August 2013

MASTERING THE CHALLENGES IN INTERATIONAL ARBITRATION

SAA The Swedish Arbitration Association

This international conference is organized by the Master of Laws (LL.M) in International Commercial Arbitration at Stockholm University (ICAL program), in collaboration with the Swedish Arbitration Association (SAA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and UNCITRAL, to celebrate the tenth anniversary of the award-winning ICAL program.

Stockholm University

The Conference focuses on three themes, which address topics that raise critical challenges in international arbitration today. In the first module "Mastering Public Interests In Private Disputes: Arbitrability, Corruption And Mandatory Laws" a panel of leading experts will discuss recent developments in the arbitrability and management of disputes involving competition law, real estate, and corporate governance. Another panel will address corruption issues in arbitration. Importantly, the conference will provide a forum for discussions on conflicts between party autonomy and mandatory rules in arbitration.

The second module, "Mastering Issues Of Party Autonomy, Arbitrator Power, And The Role Of Arbitral Institutions" will address the challenges that the key players in International Arbitration may encounter in their interactions: What are the sources and the limits of the powers of arbitral institutes, tribunals, and parties? Can tribunals raise points of facts, contract provisions, or law on its own motion? Who should control the arbitrators: the institute, the parties, the court or all of them? Do arbitrators have the power to control and sanction counsel and parties for inappropriate or unethical behavior?

UNCITRAL

The Conference will close with a module devoted to some of the particularly difficult issues that may arise when arbitrating against a state or a state-controlled party. In the session entitled "Mastering Disputes Involving States Parties" experienced counsel and arbitrators will tackle some of the thorny practical issues that arise preparing and arbitrating against a state or a party owned or controlled by a state.

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

For example, what happens when there is a change in the government? Can wrongful conduct be attributed to state-owned companies? What is the scope and what are the exceptions to state immunity?

The Conference speakers will include renowned practitioners and academics of the international arbitration community from all over the globe.

Speakers include Constatine Partasides (Freshfields, London), Prof. Julian Lew (Queen Mary University, London); Doug Jones (Clayton Utz, Sydney); Tatyana Slipachuck (Sayenko Kharenko, Kiev); Teresa Cheng, (Senior Counsel of Hong Kong SAR); Annette Magnusson (Secretary General SCC, Stockholm); Chiann Bao (Secretary General HKIAC, Hong Kong); Mark Kantor (Independent arbitrator, Washington, D.C.); Prof. George A. Bermann (Director of Center for International Commercial and Investment Arbitration, Columbia Law School, New York); Robin Oldenstam (Mannheimer Swartling, Gothenburg); James Hope (Vinge, Stockholm), Johan Gernandt, (Vinge, Stockholm), Bo Nilsson (Lindhal, Stockholm), and Patricia Shaughnessy (Stockholm University, Stockholm)

The Conference will mark a decade of educating a new generation in international arbitration and launching the careers of young practitioners in this competitive field. The GAR Survey of Arbitrations LLMs confirmed this, by ranking the ICAL program as the number one LLM program from which graduates with a specialized master's degree in arbitration are recruited by dispute resolutions groups at international law firms.

Arbitrators, attorneys, in-house counsels and the worldwide extended ICAL-alumni community are welcome to join this event!

More information on the program and registration will follow. Questions on the conference and on sponsorship opportunities can be sent to ICAL@juridicum.su.se

AIA arbitration-adr.org

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 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

Save the Date! International Seminar on Fusions and Acquisitions

Lima, Peru

On the 8th and 9th of August 2013, M & A's 5th International Seminar on Fusions and Acquisitions will take place in Lima, Peru. The topic is 'New M & A tendencies in Latin America'.
Like Every year, M& A brings together a select group of lawyers, entrepreneurs and regional investors.

Those interested in attending or acting as sponsors should contact:
Dra. Magda Castillo
(peruarbitraje@gmail.com<mailto:peruarbitraje@gmail.com; phone number (00) 511-4616533, 511-4616530).

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