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SAVE THE DATE

A - Z TRAINING ON BELGIAN AND EU ARBITRATION



TOPICS INCLUDE:

Ethical rules & conduct of the arbitrator, organization & formalities of the arbitrator profession, liability risks of the arbitrator and existing insurance tools, overview of the arbitration procedure & principles, overview of arbitration terms & definitions, types & styles, arbitration costs, the arbitration clause, the request for arbitration and notifications within an arbitral procedure, constitution of the arbitration panel, the arbitrability of disputes, the arbitrator's competence and challenging the arbitrator.

In addition, arbitration & third parties, in limine litis arguments & consequences, evidence in arbitration, hearings and interim measures, expert interventions, interrelation with public tribunals and mediation/conciliation, termination of proceedings, types of awards (incl. dissenting opinions), drafting & registration of awards, selected issues in relation to the arbitral award, interpretation and correction of awards, possibility for appeal, annulment proceedings, exequatur proceedings, selected challenges of arbitrators, suggestions to develop your arbitration practice and overview of Belgian arbitration centers will be examined.

LOCATION: The Institute for European Studies (IES), Pleinlaan 5, 1050 Brussels, Belgium

DATE: 17th November 2014 – 28th November 2014

Time: Monday to Tuesday 17.00 - 20:00; Fridays: 16.00 - 19:00

LANGUAGES: English, Dutch & French

FEE:

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Why and When One Should Opt For An Emergency Arbitrator

AIA Members Feature: Victor P. Leginsky

US Supreme Court interprets local litigation requirement of the UK – Argentina BIT

Non-lawyers and their respective roles in the Arbitration process

Commentaries on Selected Model Investment Treaties

Settling Sports Disciplinary Disputes By Mediation

New Directive on Antitrust Damages Actions: Competition Law Enforcement Goes Private

The Role of Governmental and Non-governmental Organizations in the 21st Century 2014

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Why and When One Should Opt For An Emergency Arbitrator

by Tatiana Proshkina

On average, from the filing of a request for arbitration with an arbitral institution, it takes approximately three or four months to constitute a tribunal. In cases of challenges to an arbitrator, that process may take even longer. However, sometimes a party wishes to prevent the other party from disposing of disputed assets or evidence. In order to do that, the party needs to obtain urgent interim relief at the outset of a dispute before the arbitral tribunal is constituted.

Traditionally, arbitration did not provide an opportunity to obtain interim relief until an arbitral tribunal is constituted. The only option was to seek such relief at a national court. However, in some cases, parties may be unwilling to approach a court. In particular if the court is in the home jurisdiction of the other party. To address this issue, recently many arbitral institutions have adopted special provisions that provide a mechanism for obtaining urgently-needed interim relief at the very outset of proceedings.

The Arbitration Institute at the Stockholm Chamber of Commerce

From January 1, 2010, the Arbitration Institute at the Stockholm Chamber of Commerce (SCC) provides an Emergency Arbitrator service that allows parties to seek interim relief not only prior to the constitution of the arbitral tribunal, but even prior to the commencement of arbitral proceedings. The SCC Emergency Arbitrators Rules are incorporated into the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC Rules"). The Emergency Arbitrator option is in principle applicable to all SCC arbitrations, even if an arbitration agreement was concluded before January 1, 2010, unless the parties specifically agreed otherwise. However, it does not prevent a party from requesting the courts to grant interim measures.

Upon the receipt of a request for the appointment of an emergency arbitrator, the SCC Secretariat immediately notifies the other party of the application because *ex parte* requests are not allowed. The SCC Board then appoints an emergency arbitrator within 24 hours of an application. The emergency arbitrator has the same powers to issue

Commentaries on Selected Model Investment Treaties

Book Review by Olivia Staines



This work, edited by Dr Chester Brown of the University of Sydney, and published by Oxford University Press, is an epic tome which provides a highly methodical and in depth examination of Model Bilateral Investment Treaties (BITS).

Model BITS are investigated in 19 leading jurisdictions, specifically in: Austria, Canada, China, Columbia, France, Germany, Italy, Japan, The Republic of Korea, Latvia, The Netherlands, Russia, Singapore, Switzerland, The United Kingdom and the United States.

A unique feature of this publication lies in the fact that it gives focus on state practice and policy. This is provided by experts in government, academia, and private legal practice namely:

Yas Banifatemi - Shearman & Stirling LLP, Andrea Bjorklund - UC Davis School of Law, Lee Caplan - American University, Rudolf Dolzer - Institute for International Law (University of Bonn), Emmanuel Gaillard - Shearman & Stirling LLP, Norah Gallagher - Queen Mary London , Shotaro Hamamoto - Kyoto University, Shin Hi-Taek - Seoul National University, Jean Ho - National University of Singapore, Celine Levesque - University of Ottawa, Andrew Newcombe - University of Victoria, Luke Nottage - Sydney Law School, Federico Ortino - King's College, London, Martins Paporinkis - Merton College, Oxford , Vid Prisljan - Universitat Leiden, August Reinisch - Universitat Wien, Sergey Ripinsky, Jose Antonio Rivas - Georgetown, Michael Schmid - Durham University, Nico Schrijver - Leiden, Wenhua Shan - Oxford Brookes University, Jeremy Sharpe - Georgetown and Audley

interim measures as an ordinary arbitrator, i.e. he may grant any interim measure that he finds appropriate. The emergency arbitrator shall deliver the decision within five days of the appointment. It may take the form of an order or an award and must be in writing, reasoned, dated, and signed. Importantly, although that decision is binding on the parties, the subsequent arbitral tribunal is not bound by it.

As follows from the SCC Emergency Arbitrators' decisions, all have required the applicants to demonstrate that they have a prima facie case on merits. The majority of Emergency Arbitrators applied a strict standard when analysing whether the applicant has shown urgency and irreparable harm.

The costs of the emergency proceedings are paid by the party applying for the appointment of an Emergency Arbitrator upon filing the application. In a standard arbitration procedure the cost amounts to a total of EUR 18,750 (including VAT as of June 2014). According to the SCC Statistics, the SCC's emergency arbitrator procedure was used nine times between the time it was enacted in 2010 and the end of 2013.

The ICC International Court of Arbitration

The 2012 Rules of Arbitration of the International Chamber of Commerce (ICC) offer a similar Emergency Arbitrator option [Article 29 of the ICC Rules and Appendix V]. The emergency Arbitrator provisions are applicable by default to the signatories of the arbitration agreement under the ICC Rules if it was concluded after 1 January 2012 and the parties have not opted out. If an arbitration agreement was concluded before 1 January 2012, parties may still agree to the Emergency Arbitrator Provisions.

The cost of the ICC Emergency Arbitrator Proceeding is US\$ 40 000 (excluding VAT) that comprises US\$ 10,000 for ICC administrative expenses and US\$ 30,000 for the emergency arbitrator's fees and expenses. The party must submit the Proof of Payment together with the Application for Emergency Measures.

The London Court of International Arbitration

The London Court of International Arbitration (LCIA) provides for an alternative approach: expedited formation of arbitral tribunals in appropriate cases. Pursuant to Article 9, the LCIA has discretion to shorten any time limit associated with the constitution of the tribunal but it has to be persuaded of the exceptional urgency of the issue. Although such an approach was also sensible, in cases where emergency actions are required, the LCIA does not provide immediate means of obtaining it from the arbitral tribunal.

According to Article 9B of the Draft New 2014 LCIA Rules, which are expected to be promulgated shortly, the LCIA also plans to introduce an emergency arbitrator provision. This mechanism provides an alternative to the existing one to apply for the expedited formation of the tribunal (now referred to as urgent formation under Article 9A of the 2014 Draft New Rules).

The emergency arbitrator may be appointed within 3 days of receipt of the applicant's request and has 20 days to make a decision. The decision of emergency arbitrator may take the form of an order or award, but in all cases, reasons should be given. Also the decision will lapse automatically unless confirmed by the arbitral tribunal no more than 21 days after its formation. The fees and expenses of the emergency arbitrator will form part of the arbitration costs and shall be determined by the LCIA Court and paid out of the parties' deposits. Which party should ultimately bear these costs is to be decided by the arbitral tribunal.

Sheppard - Clifford Chance LLP.

Generally, each of the 18 chapters provides an introduction, historical background and context, a report of the policy and regulatory framework governing foreign investment, an analysis of internal government processes and practices relating to treaty negotiation, conclusion, ratification and record-keeping; and a detailed commentary of the state's Model BIT from beginning to end, expounding on the means in which the actual investment treaty practice of the state in question deviates from this standard in writing. Case law relevant to the states investment treaties is contemplated.

This publication is therefore recommended as guidance to counsel and arbitrators engaged in arguing and determining the proper interpretation of BITs and investment chapters in Free Trade Agreements, and to government officials and scholars engaged in BIT policy formulation and implementation.

It will undoubtedly assist legal practitioners, scholars, policy-makers and other stakeholders in the field of international investment policy, law, and arbitration.

For more information on *Commentaries on Selected Model Investment Treaties* and to purchase this book, please visit the [link](#) .

Settling Sports Disciplinary Disputes By Mediation

by Prof. Dr. Ian Blackshaw

Introductory Remarks

Alternative Dispute Resolution (ADR) has developed in the last thirty years or so because traditional methods of settling disputes through the Courts have become too expensive; too inflexible; and too dilatory.

As an '*extra-judicial*' method of dispute resolution, ADR particularly lends itself to the settlement of sports-related disputes, of which there are an increasing number, as sport is now big business, because of the special characteristics and dynamics of sport – not least where sporting deadlines are in play, which is often the case! Also, the sporting world prefers to settle sports disputes within 'the family of sport' - in other words, confidentially and without 'washing their dirty sports linen in public'. Another advantage of ADR over litigation is that the process is non-confrontational and produces a 'win-win' rather than a 'win-lose' mentality and outcome.

By far the most important body offering various forms of ADR in Sport is the Court of Arbitration for Sport (CAS), which is based in Lausanne, Switzerland and celebrated thirty years of operations in June of this year.

Mediation and Sport

Of the various forms of ADR, Mediation is particularly useful in settling amicably sports disputes, because, primarily, it gets the parties in dispute talking and negotiating with one another and facilitates the restoration and maintenance of personal, sporting and business relationships.

Mediation is also a 'without prejudice' process of dispute resolution, which allows the parties in dispute greater flexibility and openness in trying to reach an amicable settlement of their disputes. In particular, any admissions or concessions made in the course of the Mediation in an endeavour to reach a settlement will not be held against the parties if the Mediation fails and the parties finally have to resort to the Courts (see later).

As Mediation is a consensual dispute resolution process, it will only be

Other arbitral institutions

Other arbitral institutions have followed a similar approach. The latest revisions of the Rules of numerous arbitral institutions have also introduced an emergency arbitration provision. Among them are International Centre for Dispute Resolution of the American Arbitration Association (ICDR/AAA) (Art. 37), the World Intellectual Property Organization (WIPO) (Art. 49), the Swiss Chambers Arbitration Institution (SCAI) (Art. 43), the Japan Commercial Arbitration Association (JCAA) (Rule 70.7), the Singapore International Arbitration Centre (SIAC) (Art. 26), the Australian Centre for International Commercial Arbitration (ACICA) (Art. 28), the Netherlands Arbitration Institute (NAI) (Art. 22(2)) and also P.R.I.M.E. Finance (Art. 26). However, notably, the 2012 Rules of the China International Economic and Trade Arbitration Commission (CIETAC) do not provide for an Emergency Arbitrator option.

AIA MEMBERS FEATURE:

Victor P. Leginsky
United Arab Emirates



Victor P. Leginsky, has experience as an international arbitrator, Barrister and Solicitor. He works towards the development and maturation of arbitration in the MENA region. Having been appointed by the Attorney General of British Columbia, Canada, to be the Chair of the Manufactured Home Park Dispute Resolution Committee, he has over 25 years of arbitration experience behind him.

In addition, Mr. Leginsky has earned the internationally-recognized designations of Chartered Arbitrator and Fellow from the prestigious Chartered Institute of Arbitrators. Besides being a member of AIA, he is a committee member of the International Court of Arbitration (ICC) - UAE. He co-instructs with Prof. Dr. Klaus Peter Berger, a practical course in International Commercial Arbitration in Dubai. He is registered as a Barrister with the Dubai International Financial Centre (DIFC) Courts. He is a member of the International Bar Association (IBA) Arbitration Committee and the Association of International Petroleum Negotiators (AIPN). He is also a member in good standing of the Law Society of British Columbia, Canada.

What encouraged you to become a member of the AIA?

I was attracted to the AIA by the organization's strength in Europe, which is the home of international arbitration.

What is your expertise in the field of Alternative Dispute Resolution methods?

My strength in international arbitration is being a Chairperson. I am used to diplomatically working with the members of an international tribunal who are, axiomatically, from different cultures and legal systems. Perhaps being Canadian makes me naturally diplomatic, I don't know! This translates into a more efficient and decisive arbitration for the Parties as the tribunal is working together, not pulling in different directions. I also have strength in evaluative mediation, which is becoming more valued in construction and other fields.

successful where the parties in dispute are ready, able and willing to try to settle their disputes amicably. In one English case involving a rugby club dispute in which Mediation was proposed, an official of the club remarked that "if the Queen of England herself were to come and Mediate, it would not make any difference at all!" Obviously, in such a case, Mediation was bound to fail.

CAS Mediation and Disciplinary Disputes

The CAS Mediation service was introduced on 18 May, 1999. And, as Ousmane Kane, the former Senior Counsel to the CAS and, during his tenure as such, responsible for Mediation, remarked at the time:

"The International Council of Arbitration for Sport took the initiative to introduce mediation alongside arbitration. As the mediation rules encourage and protect fair play and the spirit of understanding, they are made to measure for sport."

As will be seen from the CAS Mediation Rules, CAS Mediation is generally offered for disputes falling within the purview of the CAS Ordinary Division (any sports-related dispute that is not an appeal from the decision of a Sport's Governing Body or the World Anti-Doping Agency) and does not, in general, apply to disciplinary matters, such as doping issues, match-fixing and corruption.

However, the updated CAS Rules now expressly provide that, in appropriate cases and where the parties expressly agree, it may be possible to invoke CAS Mediation for the settlement of other disciplinary disputes (see para. two of Article 1).

On the question of whether sports disciplinary disputes should be submitted to Mediation, see the recent article by Jacqueline Brown entitled, 'Mediation of Disputes in Equestrian Sports: An English Perspective', in which Brown makes the following comments:

"The reservation about mediating disciplinary matters ... perhaps stems from a perception of conflict were they to "bargain" on sanctions ... many other facets of disagreement there may be in a disciplinary case and which need to be resolved before a decision can be made on sanction. There is, for example, often disagreement upon the facts which surround the alleged offence; there may also be points of legal construction of the meaning and effect of the rules; and there may even be broader legal issues such as Human Rights or European legislation to be tackled, before a tribunal can reach its decision and consider the appropriate level of sanction."

In line with these remarks, disciplinary disputes arising under the Rules of International Sports Governing Bodies could be referred to the CAS for settlement by Mediation by an express provision in those Rules couched in the following terms:

"Any dispute, any controversy or claim arising under, out of or relating to these Disciplinary Rules and Regulations, such as their legal construction and effect, the facts of the case, and any issues arising under, for instance, Human Rights and/or European Union Legislation, but save and except any issues arising under, out of or relating to any of the sanctions for breach of these Disciplinary Rules and Regulations as prescribed hereunder, which it is hereby agreed and declared by the parties, who are subject to them, are non-negotiable in all cases, shall be submitted to mediation in accordance with the CAS Mediation Rules."

As will be seen from the above wording, Mediation of sporting sanctions for breach of disciplinary rules is expressly excluded. Bargaining on sanctions would not, it is submitted, be tolerated by Sports Governing Bodies, who jealously guard their independence in governance matters in general and the sanctioning of athletes for the commission of sporting disciplinary offences in particular.

How would you describe the development of Arbitration in the United Arab Emirates over recent years?

Two areas of development come to mind – the forced maturation of all players in arbitration in the UAE given the very high volume of cases we experienced after the global financial crisis of 2008-2009; and the receptivity of the courts here to enforce awards, both domestic and international. On the latter point, when I started arbitrating here 7 years ago, the courts were very loath to enforce awards made by us unknown people of other legal systems perhaps using the laws of England & Wales or other places. Now, the courts are very ready to enforce domestic awards and also now understand the New York Convention and international awards. However, we still lack a good national arbitration law in the UAE, which inhibits Dubai and Abu Dhabi in becoming chosen seats for international arbitration.

In your opinion, what is the strongest trend in Arbitration?

Two trends are efforts to combat the two most serious problems in international arbitration: excessive time & costs and ensuring an ethical process. These two problems can be related: if you have a corrupt process, or one that does not rein in unfair “guerilla” tactics thereby improperly tilting the balance, you are going to increase time and costs in terms of challenges and then attempts to fashion remedies in setting-aside or messy enforcement proceedings. As arbitrators we are challenged in almost every case to reduce time & costs and to rein in unfair practices.

Are you planning any future professional projects in this field?

My future projects revolve around creating robust international, usually evaluative, mediation systems to aid the energy and construction industries, and also in setting up dispute resolution centers in emerging countries and regions.

US Supreme Court interprets local litigation requirement of the UK – Argentina BIT

by Daria Levina

On the 5th of March 2014, the Supreme Court of the United States rendered its [decision](#) in a dispute between BG Group, Plc (petitioner) and the Republic of Argentina (respondent). The case concerned certain issues regarding the interpretation of the Bilateral Investment Treaty (BIT), concluded between the United Kingdom of Great Britain and Northern Ireland and Argentina in 1991.

The main issue at stake was the provision of Article 8 (1) of the BIT which provides for a local litigation requirement. In particular, Art. 8 (1) stipulates that a dispute may be submitted to arbitration if: 1) “the competent tribunal of the Contracting Party in whose territory the investment was made ... has not given its final decision” after 18 months has elapsed from the date of its submission to the tribunal. Or, 2) the competent tribunal rendered its final decision, “but the Parties are still in dispute”.

According to the facts of the case, BG Group, a petitioner, is a British consortium. It acquired a majority interest in one of eight gas companies (MetroGAS) privatized in the 1990s by the Argentinian Government. In the early 2000s Argentina suffered from a deep financial crisis that devastated its economy. In order to tackle the financial problems, the Argentinean Government adopted a package of emergency measures. They included, among others, mandatory calculation of gas tariffs in pesos (instead of doing it in the US dollars, as it had been agreed to before); the renegotiation of public service

This is a highly controversial matter and the general attitude of Sports Bodies to CAS Mediation has been somewhat lukewarm to date and summed up in a recent CAS Conference on Mediation by Howard Stupp, the Director of Legal Affairs of the IOC, as follows:

“Mediation is worthwhile when the case is susceptible of Mediation and the parties approach Mediation with an open mind.”

However, it should be noted that Mediation is a useful way of settling disputes relating to any commercial and financial fallout resulting from decisions in disciplinary cases. For example, the loss of lucrative sponsorship and endorsement contracts, particularly where the sports person concerned has been wrongly accused of being, say, a drugs cheat, for example, Dianne Modahl, the former English 800 metres runner, would probably have been better advised, a number of years ago, to try to settle her claims for compensation against the British Athletic Federation through Mediation rather than through the Courts, in which she lost at considerable personal financial expense.

To date, as far is known, no purely disciplinary case has been referred to CAS Mediation, but, in appropriate circumstances, there is no reason why such a Mediation may not be held and prove, once again, in a sporting context, to be effective and beneficial to the parties.

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Prof Dr Ian Blackshaw is an International Sports Lawyer, Academic and Author. He is also a CAS Mediator and may be contacted by e-mail at 'ian.blackshaw@orange.fr'.

New Directive on Antitrust Damages Actions: Competition Law Enforcement Goes Private

by Daria Levina

On 17th of April, 2014 the European Parliament voted in favor of the Directive on antitrust damages actions. The text of the Directive is now sent to the EU Council of Ministers and currently awaiting final approval.

The proposal for the Directive was submitted by the European Commission in June, 2013. However, the preparatory work goes back to the beginning of the 2000s as the EU was always concerned with the mechanisms of collective redress and the protection of those harmed by manipulative actions of the big market players, as well as infringements of EU antitrust rules. Indeed, the Green Paper on the topic appeared in 2005 and was followed by the White Paper in 2008 with the latter containing a proposal for the Directive. The White Paper outlined specific policy measures to protect the individuals suffering from EU antitrust infringements.

The level playing field was also being formed by certain judgments of the European Court of Justice (the ECJ) (among the leading are: C-453/99 *Courage and Crehan*, C-295/04 *Manfredi*, C-360/09 *Pfleiderer*, C-199/11 *Otis and Others*). In these decisions the ECJ consistently recognized the right of every person to claim full compensation of damages caused by any wrongful act that violated EU competition law.

From this viewpoint, the provisions of the Directive, which are aimed at safeguarding this key right seem logical and may only be supported. The main objective of the Directive is to make recourse to justice accessible for the wider public, and consumers in particular. Statistics make the root of it visible: according to recent surveys, out of all violations of EU competition law, only 25 % of them were brought to the

contracts with companies not seeking redress for their losses in courts/arbitration; and lastly the six-month stay of legal proceedings in courts commenced by aggrieved parties.

BG Group, after waiting eight months since the stay was introduced, submitted the dispute to the arbitral tribunal -which was constituted under the rules of UNCITRAL with a seat in Washington- without suing the Argentinian Government in the local courts of Argentina. BG Group claimed compensation for the violation by Argentina of the non-expropriation provision under the BIT. On its part, Argentina raised jurisdictional objections precluding the jurisdiction of the arbitral tribunal. It argued that, firstly, BG Group was not an investor in the sense of the BIT; and secondly, that there was no investment made; finally, and alternatively, the local litigation requirement was not complied with by BG Group.

The arbitral tribunal rendered an award, having upheld its jurisdiction on the ground that Argentina's appearance before the tribunal constituted a waiver of the local litigation requirement. The claim of expropriation was rejected; however, the arbitrators found the violation of the fair and equitable treatment standard and awarded BG Group compensation for it.

However, the issue was not fully resolved, and both of the parties decided to take further actions in the DC Circuit Court. BG Group was seeking the confirmation of the award under the New York Convention and the Federal Arbitration Act, while Argentina was asking the Court to vacate the award on the ground of manifest excess of powers by the arbitrators. The Circuit Court ruled in favor of BG Group, thus confirming the award. Argentina filed further appeal, and the Court of Appeals for the District of Columbia Circuit annulled the award. Finally, the case was heard by the Supreme Court of the United States.

The Supreme Court, while rendering its decision, concentrated its attention on a variety of questions. The preliminary question was the same one posed before the DC Circuit Court and the Court of Appeals; namely whether the arbitrators exceeded their powers. However, in order to answer it, the Court had to elaborate on the more fundamental issue of: what standard of review the Court should apply while analyzing the arbitral award. In turn, this required the first evaluation of whether the state court or the arbitrators should bear primary responsibility for the interpretation and application of the local litigation requirement. Furthermore, should the Court review the arbitral award in this respect *de novo* or give deference to the ruling of the arbitrators?

In answering these questions, the Court undertook an analysis of the BIT from the viewpoint of contract law. The Court reasoned that the appropriate test of interpretation should be the intent of the parties as it is widely used for construing ordinary contracts. Then, the Court drew on the analogy between a contract and a treaty and reached the conclusion that there is no difference in terms of interpretation.

The conclusion and judgment was unexpected for the continental lawyers. Even more surprising was that the Court did not even mention the Vienna Convention on the Law of Treaties, which has priority over national law and suggests different standards of interpretation. However, the main argument of the Court was that a treaty should be interpreted as an ordinary contract between sovereigns.

In the case at hand, there was no explicit provision in the BIT as to what the intent of the parties was regarding the primary responsibility for the interpretation of the local litigation requirement. As a consequence, the Court, in order to establish the intent of the parties, fell back on its previous case law and supported its reasoning with presumptions used before.

Previously, the Court in *AT & T Technologies v. Communications*

court. Mainly it is done by big companies, who are able to bear the financial and other costs of the proceedings.

Apart from that, the Directive also advances provisions which will be of particular importance for the future development of arbitration and litigation. First, the Directive introduces the notion of private enforcement, as well as tools ensuring its effectiveness. Under the Directive, private enforcement is a legal action brought by a private individual or enterprise before a national court to enforce the rights envisioned by EU competition law provisions, including the right to be compensated for the harm resulting from a violation.

The idea of the Directive is to complement public enforcement by a private one. Indeed, they do not contradict each other as the former is intended to punish the tortfeasor and prevent further violations, whilst the latter aims to provide compensation to those who sustained the losses.

Second, in fulfillment of its objectives, the Directive provides for specific measures facilitating antitrust damages claims. Among them is the easier access of the parties to the evidence, which means the right of a party to ask the court to produce the evidence needed, ensure the proportionality of disclosure orders or protect confidential information. In addition, the Directive provides for a decision of the national authority finding an infringement to constitute an automatic proof before the courts of all Member States. Then, a five-year limitation period is established, as well as conditions for its interruption/suspension. In particular, the limitation period is interrupted/suspended from the moment the competition authority started to investigate the infringement until (at least) one year since the infringement decision became final.

Third, the scope of potential compensation is clarified. In particular, the victims are entitled to be compensated for a) actual loss, b) loss of profit and c) payment of interest from the time the harm occurred until compensation is paid.

Fourth, the Directive introduces a rebuttable presumption implying that the creation of cartels cause harm. This provision, combined with the power of national courts to estimate the amount of harm, is intended to help victims in the often difficult task of proving and quantifying the harm they have suffered.

Finally, a number of provisions in the Directive concern disclosure of information and correlation between private and public enforcement. Having recognized the main rule according to which the parties are entitled to obtain the evidence based on the disclosure ordered by the court, the Directive still outlines two exceptions, namely: a) the prohibition of the disclosure of leniency statements and settlement submissions and b) the prohibition of the disclosure of certain information produced within public enforcement proceedings unless the investigation is over.

The issues discussed above are of particular importance to arbitration. As the scholars suggest, the Directive may become applicable in arbitral proceedings in two ways: directly, as the applicable substantive law, and indirectly, as the rules to be taken into account by the arbitrators in order to render the award enforceable. It should be also born in mind that the Directive, while not being applicable within the particular arbitral proceedings, may sooner or later have effect on the arbitration-related court proceedings. Then, the newly adopted Directive may indirectly influence arbitral proceedings by virtue of national courts supporting the arbitration or national courts exercising supervisory jurisdiction in setting aside or enforcing the award. One of the issues requiring further consideration is the possibility for the parties to "contract out" certain provisions of EU competition law in the arbitration agreement.

Workers (1986), *First Options of Chicago, Inc. v. Kaplan* (1995), *Howsam v. Dean Witter Reynolds, Inc.* (2002) introduced a basic distinction between the issues of arbitrability (which are of substantive nature) and issues of procedural nature. This distinction is crucial because it affects the scope of the courts scrutiny of the arbitral award. The general presumption made by the Court is that "the parties usually intend to have the court decide on issues of arbitrability", while the matters of procedural character are left for the arbitral tribunal to decide upon. In this respect, the standard of review depends on whether a procedural or substantive issue is at stake: as long as the court is concerned with a substantive issue, it reviews it *de novo*; in all other cases it gives deference to the arbitrators.

Having said that, the Court concluded that the local litigation requirement "determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all". Consequently, the provision of Article 8 (1) of the BIT is of procedural nature.

Taking into consideration all the arguments stated, the Court decided in favor of giving deference to the arbitral award and thus reversed the Court of Appeals' judgment.

However, apart from the majority decision there was also a dissenting opinion given by Chief Justice Roberts. He argued that the majority decision was inaccurate in its reasoning from the very beginning. In Judge Roberts' opinion, Article 8 (1) was to be construed not as an arbitration agreement between the investor and the host state, but rather as a unilateral offer of the host State to conclude an arbitration agreement. Indeed, while the sovereign states having negotiated the BIT came to the conclusion as to the procedure of the settlement of disputes, the same cannot be said about the investor and the host state. Hence, Article 8 (1) lays down certain conditions upon which the arbitration agreement can come to existence: this condition is in compliance with the local requirement standard. Furthermore, Judge Roberts concurred with the judgment of the Court of Appeal arguing that the standard of review should have been *de novo*. In the end, while disagreeing with the reasoning of the majority, Judge Roberts concluded that the only reasonable outcome is to "vacate the decision of the Court of Appeal".

Non-lawyers and their respective roles in the Arbitration process

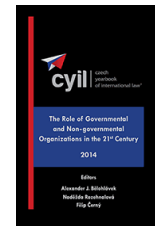
by Stephen M. Macellino Jr.

Traditionally, conflict resolution and its processes have been wed to lawyers and established justice systems of nations, states, etc. However, the very nature of Alternative Dispute Resolution involves approaching issues from a different perspective than traditional forms of dispute resolution such as litigation. In light of this notion, it is indispensable to explore the topic of how non-lawyers can be of great value in the field of Alternative Dispute Resolution, particularly arbitration.

Lawyers have had long-standing cartel over the business of dispute resolution, and there are those that feel this business belongs exclusively to lawyers. For decades this belief has been sheltered by various doctrines or laws which bound the practice of law specifically to licensed attorneys who have fulfilled educational and ethical requirements along with having been admitted to a state, national, or transnational bar. However with the rise of alternative dispute mechanisms (particularly arbitration), there is a growing school of thought that challenges this status quo and ascertains the idea of there being a substantial role for non-lawyers in the arbitration process.

The Role of Governmental and Non-governmental Organizations in the 21st Century 2014

Book review by Daria Levina



This book is edited by *Alexander J. Bělohávek*, *Naděžda Rozehnalová* and *Filip Černý*, distinguished professors of VŠB TU, Masaryk University and Charles University of the Czech Republic, and published by Juris Publishing Inc. It represents the 2014 edition of the Czech Yearbook of International Law, Volume 5. The book is devoted to the manifold aspects of the functioning of governmental and non-governmental organizations in the international arena, as well as their influence on domestic institutions.

The unique feature of this book which distinguishes it from the others is that it is comprised of contributions by Czech legal professionals and it also includes articles by specialists representing different schools of legal thought in the Slovakia, Austria and Poland. Thus, it ensures a wide variety of perspectives and depth of analysis.

The authors, all of them respected scholars and legal practitioners, address the most acute problems that modern society is currently facing, namely: enhancement of the efficient protection of human rights, prospective development of criminal law, European and international labor law, investment and commercial arbitration, dispute resolution of the spheres of sport and construction, money laundering and the effectiveness of the supra-national financial supervision, the concept of the welfare-state and its possible adjustment to the needs of today's economic and legal reality, mechanisms of the international lawmaking by non-state actors, e-democracy and cooperation with NATO.

Among the experts who provided this volume of the Czech Yearbook of International Law with their contributions, are:

Aslan Abashidze, The Process of Strengthening the Human Rights Treaty Body System; *Jaroslav Valerievich Antonov*, Legal Instruments of E-Democracy for the Development of Civil Society in International Practice; *Gabriela Augustínyová*, *Aiste Dumbyte*, The indispensable Role of Non-governmental Organizations in the Creation and Functioning of the International Criminal Court; *Helena Barancová*, Current Lawmaking of the International Labour Organization with Regard to EU Law; *Milan Bakeš*, *Michael Kohajda*, Legal Regulation of and Influence of International Institutions on Financial Markets; *Alexander J. Bělohávek*, Institutionalized Promotion and Protection of Investments in the Energy Sector; *Pavel Hamerník*, The Non-state Adjudication of Disputes by the Court of Arbitration for Sport as an Inspiring Alternative for Effective Dispute Resolution; *Marie Karfíková*, *Zdeněk Karfík*, The Role of Foundations at the Beginning of the 21st Century; *Lukás Klee*, *Ondřej Ručka*, FIDIC: Significance in the Construction Industry; *Karel Klíma*, The Phenomenon of the European Court of Human Rights' Influence on the Constitutional Systems of the Council of Europe Member States; *Libor Klímeč*,

The relatively new ADR movement and its complex relationship to traditional legal practice have created clashing viewpoints about the role of lawyers versus non-lawyers in this developing field. Alternative Dispute resolution has spawned a business that is inherently connected to state justice systems- which is the natural environment of lawyers.

Essentially, what began as a dialogue in search of legal alternatives has resulted in the development of a structured extra-legal system for resolving disputes. As a result of this development, rapidly growing literature recommends lawyers to “shed adversarial clothing, think outside the litigation box, embrace creativity, create value, and move into the twenty-first century as problem-solvers rather than as gladiators.” Considering this development, I felt it was well purposed to explore the benefits associated with considering the engagement of non-lawyers as arbitrators.

In order to gain a well rounded understanding of this topic, it is important to consider the general perspectives from both lawyers and non-lawyers concerning this particular subject. Interestingly, a proper survey was conducted that specifically dealt with the topic at hand.

The blind survey was conducted by Mr. Marziano, an active member of an alternative dispute organization located both in the United States and the United Kingdom. The process included sending out a questionnaire to numerous members of a leading alternative dispute organization in order to gain their perspectives on this matter. The chosen respondents were split down the middle to include an even number of lawyers and non-lawyers; who all have had substantial experience in the field of arbitration. According to Mr. Marziano, the collective experience of those who were chosen included participation in 1,177 arbitrations. Promising anonymity, the survey asked each person, “to share his or her views about the skills and advantages non-lawyer professionals offer in arbitration proceedings that differ from those offered by lawyers.”

Before addressing and analyzing the survey results, a moment should be taken to speak to the predicted perspectives of what the survey results would yield. Anecdotally, it was assumed that lawyers generally will argue that “Non- lawyers” are ill-equipped to deal with lawyers who better understand law. Furthermore, Non-lawyers generally are unable to argue legal precedents, and cannot successfully engage in dialogue dealing with rigorous arguments posed by lawyers.” On the other hand, non-lawyers would presumably argue that “No one understands the business better than those who explicitly work or are directly involved in that industry.”

Refreshingly, the survey results were quite mixed. Some respondents affirmed the aforementioned predictions while others held different, often opposite responses to the survey questions. For example, a former in-house lawyer responded: “It has been my experience that many non-lawyers with substantial experience in the insurance industry knew as much or more about insurance and reinsurance contracts/policies, policyholder contracts, producer contracts and even regulatory requirements than I did as an in-house lawyer.

Overall there was no shortage of responses that spoke of the benefits to appointing non-lawyers as arbitrators. There was a large variety of responses; however according to Mr. Marziano these benefits can be broken down into the following general sub-topics:

Intent of the Contract: A key issue for both parties in many of arbitrations is the intent of the meaning of a contract. Non-lawyers are less familiar with rules of construction and contract drafting, so may be more likely to interpret contracts and enforce them as they are written, without being overly distracted by extraneous and vague evidence about intentions.

European Police Office (Europol): Past, Present and Future; Oscar Krejčí, The European Union and NATO: Cooperation, Competition or Conjunction?; Davorin Lapaš, Robert Mrlić, International Non-governmental Organizations (INGOs) as Participants in the Lawmaking Process: Examples in Environmental and Space Law; Jan Lhotský, The UN Mechanisms for Human Rights Protection: Strengthening Treaty Bodies in Light of a Proposal to Create a World Court of Human Rights; Hana Marková, Nicole Grmelová, Institutional Framework of Combating Money Laundering in the European Union; Pavel Mates, Jan Šmíd, Can the Welfare State be Lean?; Daniela Nováčková, The Legal Instruments of EU Fiscal and Monetary Policy; Zdeněk Nový, The Role of the UNIDROIT in the Unification of International Commercial Law with a Specific Focus on the Principles of International Commercial Contracts; Katarzyna Sekowska-Kozłowska, The Role of Non-governmental Organizations in Individual Communication Procedures before the UN Human Rights Treaty Bodies.

Each of the 19 articles provides a historical background, the current state of international and national law (Czech, Polish, Slovakian, Austrian respectively) and makes suggestions regarding the possibilities of future development. This scenario on the one hand, makes it easy to follow the author’s line of reasoning and on the other hand, ensures the thoroughness of the analysis.

The book may be recommended to academics as well as legal practitioners, students and all those interested in the role of governmental and non-governmental organizations in the creation of international law. For more information, please visit the [link](#).

Support the Future of Mediation In Belgium (FMB) Initiative!

The FMB initiative is an initiative that aims to provide a joint communication platform to all mediation stakeholders, thereby offering them the opportunity to contribute to identifying best practices (including legal amendments) and setting out a common action plan for the enhancement and promotion of Mediation in Belgium.

To this end, Belgian mediation stakeholders gather periodically (at least twice a year) in the form of brainstorming sessions and/or working groups. The meetings are held in English, Dutch and French (without simultaneous translation).

Each session is moderated by members of the FMB working group, currently composed of Benoit SIMPELAERE, Bernard CASTELAIN, Ivan VEROUGSTRAETE, Jef MOSTINCKX, Johan BILLIET, Philippe BILLIET, Willem MEUWISSEN and Barbara GAYSE representative of the Federale Bemiddelingscommissie- Commission Fédérale de Médiation.

The Brainstorming event which was held on 27/06/2013 in the Brussels Palace of Justice, resulted in the first FMB report. The FMB meeting held on the 10th of February 2014 at the Institute for European Studies (IES), resulted in the second FMB report. Both reports are available via our [website](#).

To read the first FMB report [click here](#).

To read the second FMB report [click here](#).

The FMB project was created with the support of AIA IVZW (www.arbitration-adr.org).

For those interested in joining or sponsoring the Initiative, please send an email to the [AIA team!](#)

Feature: AIA Gold Sponsor Billiet & Co

Custom and Practice: Non-lawyer arbitrators bring to the process first hand information and knowledge of relevant customs and practices are, and a unique understanding of the business that many lawyers do not have. Some offered the view that a less adversarial approach might prevail by focusing more on industry standards, and practices. The very purpose of the arbitration clause, the intent of the parties, and the past practice was to have industry – not legal - standards used to determine the outcome.

Historical Knowledge: non- lawyers may know the historical bases for the business, unlike some attorneys who look at agreements in isolation as documents that should simply be strictly enforced as written.

Cost and Process: Non-lawyers fully understand the nature of the case and can add value in controlling the process and cost and direct arbitration back to how it was intended to work. Furthermore, Non-lawyer business people have a different, more "bottom line" orientation that could help streamline the process.

Relying Upon the Facts of the Case At Hand: An essential attribute of alternative conflict resolution is that it focuses on parties' underlying needs and interests rather than on their articulated positions. Non-lawyers who are not trained in the importance of case precedent could help focus panels on the distinct issues of each dispute with no expressed or implied reliance on prior decisions.

Judicial Procedure: Lawyers are more familiar with how to read the law, especially applicable precedents, and are more likely to render a decision that tracks with how a court would decide the case.

The underlying theme of the various materials and aforementioned survey results indicates that there is certainly room in the arbitration industry for both lawyer and non-lawyer professionals. The wide-ranging consensus being that not everyone is right for every case and not every panel may need to be populated by all lawyers or all non lawyers. As one respondent to the survey said "...a balance for much arbitration might be for lawyers to serve as umpires and non-lawyers as party-appointed arbitrator. This way our industry benefits from the experienced professional representing and evaluating the issues, while a lawyer assists in guiding the process through legal and precedent-related challenges."

Nevertheless, the aged adversarial ethic has not yet been fully dislodged, and sharing legal work with non-lawyers is neither a common nor comfortable experience for some lawyers. While ADR may offer a transformative course for lawyers who seek a more problem-solving approach to conflict, it also presents new challenges in working with non-lawyers who are actively involved as arbitrators in the business of dispute resolution. Some critics within the legal world lament the notion of non-lawyers getting on the preverbal legal bandwagon; yet non-lawyers show no signs of retreat from the developing business of ADR.

*Survey information was taken from an article published by the U.S. division of "ARIAS".



Inaugural AMATI Conference

The Future of Mediation Training
Monday 22 September 2014 9.30am - 4.30pm
International Dispute Resolution Centre

Clients look to Billiet & Co Lawyers for excellence, a creative and individual approach to solving problems, and a deep understanding of Belgian and European law.

Billiet & Co Lawyers is a member of the IPG international network of law firms and other collaboration networks. In this way they frequently assist clients in other jurisdictions, thanks to their close collaboration with local experts.

For more information: visit the [Billiet and Co website](#).

4 Day Seminar on Investment Arbitration Brussels Diplomatic Academy

VUB University, Brussels

The Brussels Diplomatic Academy has organised a 4 day Seminar on Investment Arbitration. During the course of the seminar, fundamental notions relevant to investment arbitration will be analysed and a number of major cases will be reviewed in a critical manner.

We highly recommend the event to:

- investors and diplomats involved in economic diplomacy
- government officials responsible for negotiations of investment treaties and involved in representing a state in dispute resolution proceedings
- lawyers and in-house counsel
- civil servants involved in state's investment policies.

This is an unique opportunity and therefore not to be missed!

[More information](#)



Kiev Arbitration Days 2014: Think Big!



The Ukrainian Bar Association is arranging its fourth conference entitled "KIEV ARBITRATION DAYS 2014: THINK BIG!". The event will be held on 6-7 November 2014 in Kiev, Ukraine.

The outcomes of the last year have proved that this event is extremely relevant and up-to-date. Thus, the conference provides a perfect opportunity for the leading international experts to meet with European and Ukrainian colleagues and discover Ukraine as a relatively new and promising jurisdiction.

The conference will attract plenty of leading professionals in commercial arbitration and dispute resolution from Ukraine, CIS and Europe, arbitrators, state officials and lawyers practicing in commercial arbitration.

Please follow the [LINK](#) for details.

Speakers to include

Prof. Elizabeth Stokoe (UK) – The (in)authenticity of simulated talk: Comparing role-played and actual conversation and the implications for communication training

Juanita Wijnands (NL) - Training Inter-cultural Mediation competencies: from Good to Mastery.

Irena Vanenkova (RUS), Executive Director of IMI – The IMI Mediation Training Standards Taskforce

Prof. Hal Abramson (USA) - Mediation Assessment and Training Assessors – What we need now

Amanda Bucklow (UK) – Time to Ring in Changes in Mediation Training

Dr. Paul Gibson (AUS) – Best practice in Australian Mediation Training

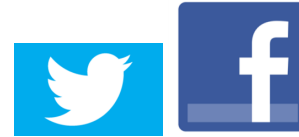
Prof. Andrew Goodman (UK) – Talking Together and Reaching Out: Ambitions for AMATI

The sessions will be recorded for AMATI members out of the jurisdiction

Fee: Amati members £275; non-members £385, to include papers, refreshments, lunch and reception. Early registration (before 21 July 2014) will attract a 10% discount.

For registration and membership: info@amati.org.uk

Click on the icon to read the **Young Arbitrators in Belgium Blog!**



Click on the icons and follow us on Linked in

