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Inside this month's issue:

AIA Upcoming Events

- Conference on The UNCITRAL Model Law on International Commercial Arbitration: 25 years organized by the Association for International Arbitration in Brussels, Belgium. June 4, 2010.

  -Location: HUB University of Brussels Auditorium, Time: 9:30am-4pm -135 EUR for members, 182 EUR for non-members (book included)

  REGISTRATION AVAILABLE ONLINE NOW at www.arbitration-adr.org

- Conference on The Most Favored Nation Treatment of Substantive Rights organized by the Association for International Arbitration in Brussels, Belgium. October 22, 2010

For further information on conferences organized by the Association for International Arbitration in Brussels, Belgium, please visit our web site

http://www.arbitration-adr.org

"What the UN is to the World, we are to the UN":
An Interview with Mr. Johnston Barkat, the Head of the UN Ombudsman and Mediation Services

Mediation, one of the oldest forms of conflict resolution, has been adopted into the daily operations of the most extensive and important international organizations in the world, the United Nations. Acting on a proposal made by the Secretary General and recommendations of a panel of experts, the "Panel on the Redesign of the UN system of administration of justice" the General Assembly set forth a new internal justice system that emphasized resolving labor disputes through informal means. As part of the new system, a Mediation Service was established and integrated with the Office of the Ombudsman. Since July 2009, when the new system became operational, the UN Ombudsman and Mediation Services has become a supportive strength to the UN—from its internal operations to its peace-keeping missions abroad—thus taking the field of mediation to a new level.

"What the UN is to the world, we are to the UN," said the head of the office, Mr. Johnston Barkat in a recent interview with AIA. Mr. Barkat is a highly experienced mediator and regarded scholar of conflict resolution from the United States. He has conducted substantial research on social psychology, exploring the reasons why and when people choose to collaborate. To him, such a plethora of knowledge and experience is essential to be a successful mediator. "Knowing how to mediate is not enough, a good mediator really has to know *why mediation works.*" This is essential for mediators in the UN, who must take into consideration complex cross-cultural and political issues in the disputes they face. From mediating in local villages to large bureaucracies, the cornerstone of a well-developed justice system should be informal resolution.

The UN's mediation services are frequently sought amidst peace-keeping missions where the intense environment is more prone to conflict. In some instances the site

may be considered quasi-military, with UN employees working under tough physical conditions and in close proximity with one another. In order to better manage these locations, the UN has set up regional offices closely situated to the various peace keeping missions. These regional offices mediate in very delicate environments. "These staff members are where the rubber meets the road for the United Nations," said Mr. Barkat. Therefore, the mediators that assist them must not only be properly trained in mediation but have a unique understanding of both the political situation and the nuances of the cultures involved in the dispute.

In mediation timing is very important. The problem is that with limited resources the UN's mediation services cannot be everywhere at once. In the past, UN ombudsmen, who are also trained in mediation, have been sent to peacekeeping locations. "At one of our recent missions, there was an issue that had been festering for months between several different parties, and our mediators basically met in a room with them for over 5 hours, and they emerged with an agreement." Without a proper dispute resolution outlet, the parties then become more and more intractable in the conflict.

To solve this, an innovative strategy is being developed that utilizes a pool of "on-call mediators." These individuals will comprise a joint pool of regional mediators who will then be shared by several important international organizations, such as the UN, the World Bank, and the Inter-American Development Bank. This will not only expedite the mediation process, but allow practitioners with certain skills sets, language capacities, and backgrounds to work in area where they may mediate the highest volume of disputes at the quickest pace. This will prove a daunting task for on-call mediators, where their job may necessitate an extensive knowledge of the multifarious rules and regulations of the Bretton Woods Organizations in order to settle a dispute.

But, while the UN mediators may work in exceptional circumstances that require specialized knowledge, their function is essentially the same as other practitioners. "My basic philosophy is that conflict carries many of the same elements and commonalities regardless of where it occurs. It's hard to say that a good mediator in one context would not be successful in another." The types of disputes that the UN Ombudsman and Mediation Services deals with are essentially similar to other organizations, such as issues related to wage, professional development, management, etc. Mr. Barkat acknowledged this, believing that if properly taught, mediation is applicable far and wide.

The UN Ombudsman and Mediation Services is a giant leap for the field of mediation. Mr. Barkat expresses that it is important to understand that while mediation is increasingly used by the legal profession, mediation, historically began in indigenous societies where the mediators were the local elders or patriarch/matriarch of a certain clan, family or village. These individuals simply understood the proper techniques to untangle the web of conflict and build trust. " We need to be mindful that these types of people remain part of the forefront of mediation.

To ensure the field of mediation grows and develops as an actual *alternative* form of dispute resolution, mediation trainings must be improved. Courses should prepare individuals to manage the dynamism and improvisation that arises during mediation while taking into account various cultural contexts. "There are a lot of mediation programs where people are simply trained to follow the steps to a dance." What makes mediation so different, and essentially so promising, is that it is able to adapt to all types of conflict situations. If mediators are simply taught routines, then mediators that encounter the unexpected may react inappropriately. But, if a mediator is well-trained substantively, academically, practically and theoretically, then a mediator can be versatile in the types of ways they apply mediation.

The concept of offering mediation in the UN—an organization that in essence offers its own mediation—the UN Ombudsman and Mediation Services propagates a message to the global community that we may all learn to better manage conflict in our lives. Whether mediating at the UN regional office in Khartoum between peacekeepers or a suburb of New York between spouses, mediators must understanding how to break down a problem to its core elements. With proper education and practice this methodology can be applied at all levels: "Mediators have trained elementary school children to perform wonderful mediations on the school ground. There is no reason we can't teach similarly trained adults to be more effective mediators in their own villages and their own tribes without imposing a western model upon them." From playgrounds to peacekeeping missions, mediation works.

The UN Ombudsman and Mediation Services currently has offices in New York, Santiago, Bangkok, Vienna, Geneva, Nairobi, Kinshasa, and Khartoum.

The institute for Collaborative Engagement is currently conducting an international survey of the use of mediation throughout the world. Please take the time to fill out the research questionnaire designed for this purpose and available at: www.collaborative-engagement.org/ceprogramsRes_wmp.php

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Mediation and Arbitration in Brazil: A Brief Oveview

By Leonardo Souza Lanzini, ABDO, ABDO & DINIZ, Advogados Associados

A survey conducted in the mediation and arbitration bodies in Brazil shows that without a doubt, the largest number of lawsuits brought refers to collections. The same survey also reveals another fact: the sector that has sought arbitration bodies is the business owner of receivables and has struggled with delinquencies that have grown dramatically in the last decade.

But, how exactly does the arbitration and mediation law in Brazil work? Who should seek it? And most important, why did it become so popular?

The Institute of arbitration has been known for decades for its patriotic duty, treated by both the Brazilian Civil Code (CC) and the Brazilian Code of Civil Procedure (CPC). However, although Brazilian legislation prior to Law No. 9307/96 authorizing people who can hire the use of arbitration for disputes concerning rights available, some requirements have proven almost insurmountable obstacles to the development of the practice.

The legislation gave legitimacy to arbitrations (CC, art. 1037 to 1048, CPC, arts. 1072 to 1102) according to conformation: a) compromise between the parties (CPC, art. 1073) b) the ability of these parties (CPC , art. 1072), c) proceedings relating to property rights available (CPC, art. 1702), d) feasibility of the referees, with the permission of the parties, judge in equity out of forms and rules of law (CCP Art. 1075, IV) the need for court approval of award (CPC, arts. 1096 and 1098 to 1102); f) implement the arbitration award approved sentencing court (CPC, art. 584, III), g) Executive report arbitration delivered abroad, provided that the same had been approved by a competent court abroad and subsequently approved by the Superior Justice Court of Brazil (STJ). Moreover, the law required the court's approval of the award. From the perspective of the arbitrators and the courts, the reports could not enjoy the right to give final efficacy similar to a court order (hence only when approved by the competent judge would it be granted the power cogent adjudicative authority). Consequently, this lack of coactivity in the judicial decision of the arbitrator prevented the implementation of the awards as well as the imposition of coercive measures or measures (CPC, art. 1086, I and II).

The question on an international level is even more complicated. For an award given abroad to be capable of approval by the Superior Justice Court, it already has to have been approved by a judicial court located in the arbitration. Additionally, although approval by the STJ but did not involve the formal verification of aspects pertaining to arbitration, the court ruled that the counterparts were abroad (without considering the merits of the decision, unless this would violate national sovereignty, morality and public). For example, there was a need to check the quotes on the shares that had been made under the provisions of procedural law in Brazil (among other patriotic legal requirements). Therefore, the most important obstacle to the development of arbitration in Brazil was for the most part fixed by this new law.

Law No. 9307/96 introduced important changes in the structure previously used in Brazil. Among them is this comment: The parties able to contract may execute the clause providing for the submission to arbitration, available for duty, usually in the case of disputes arising from contractual relations. If the arbitration clause the parties have agreed to are the rules of an arbitral institution or specialized entity, the arbitration shall be instituted and conducted according to these rules. If this has not occurred, the part that wants to institute the arbitration shall call the other to agree with the terms of the arbitration.

The arbitration will necessarily inform the qualification of the parties and the arbitrators (or institution that has been delegated the details of referees), that the matter will be the subject of arbitration, and the place of which will be given the award (the legislation no longer referred to arbitration). In addition, the arbitration may stipulate the deadline for the delivery of the decision (otherwise it will be six months), and authorization for the arbitrator (or tribunal) judge in equity under the positive Brazilian law or other country, the general principles of law, customs and usages or practices of international trade, or on the basis of rules applicable to the arbitration. Parties may also agree on the responsibility for the fees of the arbitrators and the costs of the arbitration.

Unlike the past legislation, if a party is summoned to agree to the terms of the arbitration agreement but does not fulfill their obligation, the aggrieved party may convene to the court by special procedure. If the party still does not appear or appears only to refuse to agree on the terms of the arbitration, the judge will pronounce a sentence that if appropriate, shall be equivalent to the arbitration agreement. In this case, the arbitration shall proceed normally outside the Judiciary.

The award is final and shall not be subject to court approval when the conviction is considered enforceable. There is no recourse to the judiciary on the merits of the decision, but only in relation to formal aspects of the award (which will be invalid if it does not meet the requirements of the Act itself, arbitration or mediation).

The award rendered abroad shall be subject only to approval of the Supreme Court which will decide if it impedes the national public policy or if the object of the dispute is in fact not capable of settlement by arbitration in Brazil. The citation that informs the new law will not be considered an offense against the

national public service by the party located in Brazil along the lines of the arbitration agreement (which comes out in the arbitration clause and arbitration) or the procedural law of the country where the arbitration took place (admittedly, even the postal service with confirmation of receipt. It is to be provided timely to the right of defense.)

As has been shown, arbitration represents, as amended by the new law, a revolution in the field of dispute resolution outside the courts. It will be an important tool to facilitate the development of international trade practices, but also extremely relevant in the local demands as well. This is because arbitration begins to be used effectively in matters involving economics, entrepreneurship, trade unions and families in general, thus allowing the orbit of rights available to increase.

ADR and Sport

By Professor Ian Blackshaw

Sport is now big business and an industry in its own right: worth more than 3% of world trade. In the European Union, the sports industry accounts for more than 2% of the combined GNP of the 27 Member States. So, there is much to play for both on and off the field of play.

Not surprisingly, sports disputes are on the increase; and so the question arises: how best to resolve them? Traditionally, through the Courts; or the modern way, by *extra-judicial* means? That is, by ADR (Alternative Dispute Resolution). As the sports world is a relatively small one, those involved in disputes prefer not to wash their dirty sports linen in public, but to settle their disputes within the family of sport. In other words, within their own sports bodies and through their own private systems/mechanisms of justice.

One such body is the Court of Arbitration for Sport (CAS), based in Lausanne in Switzerland, which was set up by the International Olympic Committee (IOC) and has been operating for 25 years. During this time, the CAS has dealt with a wide range of sports-related disputes and, in the process, has built up a useful body of sports law ('*lex sportiva*').

The CAS not only offers Arbitration, but also Mediation, which is proving to be a popular and effective way of settling sports disputes, given its flexibility, speed, inexpensiveness, confidentiality and also its 'without prejudice' character and non-binding nature until a Settlement Agreement is signed by the parties. This Agreement is a contract and can be enforced like any other kind of contract through the Courts. Generally speaking, Mediation, in those cases where it is appropriate to attempt it, has a success rate of 85%. But, in any case, the parties must be willing to find an amicable settlement to their dispute, otherwise Mediation will not be successful. In one sporting dispute, one of the parties declared that "*If the Queen of England herself were to come and mediate, it would make no difference at all*!" Needless to say, the attempt at Mediation failed!

The CAS also offers non-binding Advisory Opinions on sports law issues. These are similar to Expert Determinations in the commercial world, which, of course, are binding on the parties.

As the CAS is an international arbitral body, operating under Swiss Law, its Awards can be enforced under the provisions of the New York Convention of 10 June 1958 in those countries that are members of this Convention. Otherwise, a lengthy and costly process of '*exequatur*' must be followed in order to get the Award legally recognised.

CAS Awards can be legally challenged in the Swiss Federal Tribunal but only in limited circumstances under Article 190 (2) of the Swiss Federal Code on Private International Law Statute of 18 December 1987. One such ground is that the rules of natural justice, in particular the right to a fair hearing, have not been observed. Another is on the question of the jurisdiction of the CAS in a particular dispute.

The legal status of the CAS has also been the subject of challenges in the Swiss Federal Tribunal, and in a recent one concerning the independence of the CAS in view of its association with and partial funding by the IOC, the Swiss Federal Tribunal held that the CAS offered all the guarantees of independence and impartiality to be regarded as a real court of arbitration, even where the IOC was a party in its proceedings. See the Judgement of 27 May 2003 of the First Civil Division of the Swiss Federal Tribunal in the case of *A.& B. v. International Olympic Committee and International Ski Federation* (4P.267/2002; 4P.268/2002; 4P.269/2002; and 4P.270/2002).

Professor Ian Blackshaw is an International Sports Lawyer, Member of the CAS and Fellow of the International Sports Law Centre of the prestigious TMC Asser Instituut in The Hague, The Netherlands. He is also the author of a recent **Book on** '*Sport, Mediation and Arbitration*' **published by the** TMC Asser Press in 2009. He may be contacted by e-mail at **'ian.blackshaw@orange.fr'.**

Provisional Measures: Back to the Standard of Irreparable Harm

Provisional measures have become one of the most discussed issues in international investment arbitration. The availability of provisional measures can have a significant impact on the dispute, especially when issues relating to the protection of assets and evidence arise during the proceedings. As a result, there is an important question to be an-

swered: which circumstances would justify provisional measures to be recommended and what standard –if there is any– could guide Tribunals when making a decision thereof. This query has been addressed in a recent decision* under the International Centre for Settlement of Investment Disputes (ICSID).

Background

In 2008, *Cemex Caracas Investments B.V.* and *Cemex Caracas II Investment B.V.*, companies incorporated in the Netherlands, filed a request for arbitration against the *Bolivarian Republic of Venezuela* at ICSID. The main dispute relates to the nationalization of Cemex Venezuela (Venezuela's largest and premier cement company) and the supposed breach of the BIT between the Netherlands and Venezuela signed in 1991 and in force since 1993. Moreover, the Claimants requested provisional measures. They were concerned about Venezuela's effort to seize three cement carriers (Vessels) whose legal rights were transferred to Sunbulk Shipping (a Cemex Subsidiary) by Cemex Venezuela before Cemex Caracas's investment in Cemex Venezuela was expropriated.

Consequently, the Claimants requested from the Tribunal: (i) An order requiring Venezuela to immediately cease any further efforts to seize the former assets of Cemex Venezulea, including the Vessels; (ii) An order that Venezuela cease any litigation, in any jurisdiction, having as its object the seizure of the Vessels or any money equivalent thereof; (iii) An order that Venezuela cease all efforts to enlist the assistance of other governments in seizing the Vessels or any bond or security thereof; and (iv) An order enjoining Venezuela from taking any action further prejudicing, aggravating the dispute before the Tribunal, or rendering the dispute more difficult of solution.

Discussion and Decisions

Article 47 of the ICSID Convention and the Irreparable Harm Standard

The Authority of Tribunals to recommend provisional measures is governed by Article 47 of the ICSID Convention and Arbitration Rule 39. However, ICSID Tribunals normally have considered that their legal authority should also take into account the case law of the International Court of Justice (ICJ) on this regard. The ICJ has included the concepts of "*irreparable prejudice*" and "*urgent necessity*" in its decisions. Thus, ICSID Tribunals traditionally have taken the same approach and will only grant provisional measures if they are found to be *necessary, urgent* and required in order to avoid *irreparable harm or prejudice*.

Some cases backed this conclusion. The Tribunal cited them: "*in Plama v. Bulgaria, the Tribunal stated that provisional measures must be necessary to "avoid the occurrence of irreparable harm or damage". In Phoenix v. Czech Republic, the Tribunal referred to "the action of a party capable of causing or of threatening to cause irreparable prejudice to the rights involved". In Occidental v. Ecuador, the Tribunal decided that "the circumstances under which provisional measures are required under Article 47 of the ICSID Convention are those in which the measures are necessary to preserve a party's right and when the need is urgent in order to avoid irreparable harm".*"

However, the Tribunal referred to two cases which seem to have taken a different approach. In *Burlington v. Ecuador*, it was stressed that "*[u]nlike Occidental, this case is not one of only 'more damages' (…). The risk here is the destruction of an ongoing investment and its revenue-producing potential which benefits both the investor and the State.*". In *Parenco v. Ecuador*, it was recognized that provisional measures "*will not be necessary when a party can be adequately compensated by an award of damages if it successfully vindicates its rights when the case is finally decided*". But it apprehended that the Claimant would suffer "*extensive seizure of its oil production or other assets,*" and that its "*business would be crippled, if not destroyed*". In both cases, Tribunals ordered the establishment of an escrow account, where the funds which were the subject of the dispute could be held, pending the final award.

In the Tribunal's opinion, the standards retained in the latter cases did not differ in substance from the standard of "irreparable damage" generally used. The Tribunal explained that the ICJ, when applying the test of "irreparable prejudice", had made a distinction between two different kinds of actions. On the one hand, actions which should be restrained, because their effects, though capable of financial compensation, were such that compensation could not fully remedy the damage suffered. This has been done in particular when the health or life of people and sometimes their properties were in jeopardy. On the other hand, actions which might well prove to have infringed a right and caused harm would be sufficient to award damages without taking provisional measures. Therefore, The Tribunal stressed that the same distinction could be drawn from an analysis of ICSID case law, both in cases where tribunals used the criteria of irreparable damage and in cases where they had recourse to other criteria.

The Tribunal considered that in previous cases, when considering government actions which may well prove to have infringed a right and caused harm, ICSID Tribunals made a distinction between two kinds of situations. One, concern that constitutes the investment. According to the Tribusituations where the alleged prejudice could be readily compensated by awarding damages and, second, situations where there was a serious risk of destruction of a going nal, provisional measures were denied in the first category of situations because of the absence of an "irreparable harm". But provisional measures were granted on the second category of situations, the tribunals using other standards –although they could have based their decisions on the fact that, the destruction of the ongoing concern that constituted the investment, would have created an "irreparable harm".

In conclusion, the Tribunal considered that the generally accepted standard of "*irreparable harm*" should be retained as a criterion for the

"necessity" required by Article 47 of the ICSID Convention. In the present case, the Tribunal concluded that the alleged harm was not *"irreparable"* and there was neither necessity, nor urgency to grant the requested provisional measures. The Tribunal observed that the request for provisional measures was based on the fact that Venezuela's effort to seize the Vessels or other former assets would *"increase the Claimant's damages"* to be awarded by the Tribunal. Therefore, such a loss could be readily compensated by a damages award.

Non-Aggravation Measures as Ancillary Measures

The decision addressed another important question: when, in the opinion of a Tribunal, there is no urgency or necessity to adopt provisional measures directed at the preservation of the rights of the parties, is it possible for them to recommend measures in order to avoid the aggravation of extension of the dispute? The Tribunal in its analysis noted that this question had been recently examined by the International Court of Justice in the *Pulp Mills* case (*Argentina v. Uruguay*).

In the analysis, the Tribunal cited some of the Court's considerations: *"[t]he Court recalled that it has on several occasions issued provisional measures directing the parties not to take any actions which could aggravate or extend the dispute or render more difficult its settlement." It also observed that "in those cases, provisional measures other than measures directing the parties not to take actions to aggravate or extend the dispute or render more difficult its settlement were also indicated." Then, the Court noted that: "it has not found that at present there is an imminent risk of irreparable prejudice to the rights of the dispute." In the absence of provisional measures indicated on that basis, the Court decided that it had no power to indicate provisional measures relating to the aggravation or extension of the dispute."* In this context, the Tribunal concluded that there was no reason to take a different position for ICSID cases.

The Tribunal stressed that Article 47 of the ICSID Convention gave ICSID Tribunals power to recommend measures directed at the preservation of the rights of the parties. On this legal basis, ICSID Tribunals may recommend measures in order to avoid the aggravation or extension of the dispute. However, the Tribunal concluded that *"non-aggravation measures are ancillary measures which cannot be recommended in the absence of measures of a purely protective or preservative kind."*

Comment

The Tribunal's analysis unifies ICSID's case law which had used diverse formulas in previous decisions about provisional measures. In summary, the Tribunal focuses on the concepts of "irreparable damage or harm" and "necessity" as the bedrock of provisional measures. As a result, this decision brings Tribunals to the same line of interpretation and provides them with tools to make the risk assessment when provisional measures are on the table.

The Tribunal also defines the nature of "non-aggravation" measures and makes its decision consistent with the position taken by the ICJ. The principle of "non-aggravation" cannot stand alone and needs to be recommended jointly with protective or preservative measures to meet the requirements of urgency and necessity in Article 47 of the ICSID Convention.

*The decision is available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1430_En&caseId=C420

Call for Debate on the Reform of the Belgian Arbitration Law

It can be argued that art. 1702 (2) of the Belgian Judicial Code (BJC) should be abolished because it gives parties to international arbitration proceedings conducted on Belgian soil the false impression that Belgian courts have jurisdiction to review the merits of an arbitral award. This confusion is unjustified because art. 1703 (2) BJC does not mention anything **concerning the parties' rights to an appellate court** procedure, notwithstanding their discretion to insert in their arbitration agreement a provision for an appellate arbitral procedure.

What is the purpose of filing arbitral awards with the Belgian judiciary?

The Belgian Arbitration Act of 4 July 1972 amended by the Act of 19 May 1998 and contained within the articles 1676-1723 of the Belgian Judicial Code (BJC) is overdue for revision, especially art. 1702 (2) BJC. It states that: "*The chairman of the arbitral tribunal shall file the original copy of the award with the office of the civil court, and shall notify the parties of this filing*." This article has created more confusion than it adds value to parties wishing to conduct arbitration proceedings in Belgium.

First of all, the danger exists that it could be interpreted as giving Belgian courts the general means to penetrate the arbitrators' exclusive jurisdiction contained within the arbitration agreement to rule on substantive law issues. This is especially the case when art. 1702 (2) BJC is read together with art. 1702bis (5) BJC that states: "*When the same arbitrators cannot be reunited, the request for interpretation or correction of the award shall be submitted to the civil court*". In other words, this provision leaves room for Belgian civil courts to assume jurisdiction to make corrections and clarifications to obvious and clear mistakes made by arbitrators in ruling on substantive law issues.

If not carefully applied, it could open a Pandora's box. Second, the duty of notifying Belgian civil courts of the existence of the arbitral award under art. 1702 (2) BJC might wrongfully be interpreted as a prerequisite for enforcement, notwithstanding the fact that art. 1710 (1) BJC implicitly imposes the same obligation on the party bringing enforcement proceedings.

Do Belgian courts have jurisdiction to review the merits of an arbitral awards

De lege lata, Belgian courts do not have the jurisdiction to judicially review the merits of an arbitral award. Although art. 1703 (2) BCJ states that "*An appeal can only be made against an arbitral award if the parties have provided for that possibility in the arbitration agreement*", the appeal mentioned in this provision relates to an appellate arbitral procedure, not a appellate court procedure.

Although it is conceded that a judicial review of the merits of arbitral awards could further the protection of parties to adhesion contracts who have little bargaining power to alter clauses that force them into mandatory arbitration, most national arbitration laws do not provide for such a court review or 'second look' for the simple reason that such a protective measure is too burdensome on the swiftness of arbitration itself.

England and Wales, however, does accept a court's review of the merits of an arbitral award, but leaves it to the discretion of the parties to deviate from it. Section 69 of the Arbitration Act contains the default rule that parties to an arbitration agreement can apply to an English court to rule on points of law already decided in the arbitral award, unless the parties clearly and unambiguously derogate from it in their arbitration agreement. Stating in the arbitration clause that an award will be "*final and binding upon the parties*" is not considered to be sufficiently clear to exclude the applicability of s. 69 Arbitration Act. This provision has the ultimate goal of protecting the institution of common law by enabling a party to raise questions in front of court about the way the arbitral tribunal has decided on the merits of the dispute. In other words, s. 69 Arbitration Act protects a public interest in priority over the interest of the party in whose favour the arbitral award has been rendered. In the US, similar court review procedures have been attempted as well, but they have somewhat failed. The 'manifest disregard of the law'-rule that US courts might invoke at the stage of enforcement of an arbitral award does not include a court's jurisdiction to review the –even gross- mistakes that have been made by an arbitrator in applying substantive law.

One wonders, however, whether court review is in fact necessary at all, especially where many sources of protection already exist for parties with less bargaining parties. First of all, an arbitrator is obliged to apply the national substantive law chosen by the parties. If not, the arbitrator could be liable for damages for acting without authority and the award could be set aside due to lack of the arbitrator's jurisdiction to rule outside the scope of the arbitration agreement. Second, to the extent that the application of the parties' chosen law contravenes with the mandatory law of the country of enforcement, the arbitrators are morally, but not legally, obliged to let the latter prevail to make sure that whatever award they render will be enforceable. If they do not, the award will be unenforceable in Belgium according to art. V (2) (b) NYC or art. 1723 (2) BJC. Third, arbitrators are also morally obliged to apply the mandatory subject matter arbitrability provisions of the law of the country in which enforcement is most likely to be sought. If not, enforcement will be refused on the grounds of art. V (2) (a) NYC or art. 1723 BJC.

It only becomes problematic where the parties have chosen a particular national substantive law to govern their disputes, but the arbitrators fail to apply the elective default rules of that law correctly, e.g. general contract law. To install a system of judicial review for all arbitral awards just to correct minor mishaps in an arbitrator's interpretation of elective national substantive law seems reactionary.

Is the duty of notification a prerequisite for enforcement of a Belgian arbitral award?

It is debated whether or not art. 1702 (2) BJC and the duty it imposes on the presiding arbitrator to notify the Belgian civil court is mandatory. One could argue that the notification of the existence and content of the arbitral award to the Belgian civil court is necessary for the winning party to enforce the award upon the losing party. In normal circumstances, where both parties accept the outcome of the arbitration, the losing party will simply execute the orders made in the award in favour of the winning party without even filing an enforcement claim in front of a Belgian court. However, where the losing party is reluctant to perform its obligations under the award, it will be necessary for the winning party to bring an enforcement claim under art. 1710 (1) BJC that states that: "*The award can be enforced only if it has been declared enforceable by the president of the Civil Court at the request of an interested party; the party against which the enforcement is requested cannot, at this stage of the proceedings, claim to be heard*". In order for a court to make an assessment whether or not to enforce an award or to decline it for public policy reasons, it relies upon the information it receives from the parties. In that perspective, the duty of notification in art. 1702(2) BCJ appears to state no more than what is common sense, namely that the party claiming for enforcement also brings forward the documentation proving its case, including the arbitral award itself. And it is art. 1701 (5) BJC that contains a list of all the information that an award should contain: "*inter alia : (a) the names and domiciles of the arbitrators; (b) the names and domiciles of the parties; (c) the object of the dispute; (d) the date on which it is rendered; (e) the seat of the arbitration and the place where the award is rendered*." Art. 1702 (2) BCJ does not seem to add anything to the information obligations of the party wishing to enforce an award under art. 1710 BJC or requesting a correction of a mistake in the award under art. 1702bis (5) BJC.

For the purpose of reducing redundant legislation and to avoid confusion amongst parties wanting to arbitrate in Bel-

gium, it is therefore submitted that art. 1702 (2) of the Belgian Judicial Code should be abolished.

In order to further explore the issues related to Belgian arbitration law reform, the AIA will be conducting a conference on June 4th at KUB called "The UNCITRAL Model Law on Commercial Arbitration: 25 Years." The conference will measure the unification that the model law has achieved in various different countries. AIA president, Johan Billiet, will be presenting a paper titled "The Reform of Belgian Arbitration Law and the Model Law." In his talk, he will explore contemporary problems with Belgian arbitration and propose ways to amend it, allowing less room for ambiguity and increasing its jurisdictional competition. Registration for the conference and a list of speakers is available on our website: www.arbitration-adr.org

Book Review of « International Arbitration and Mediation: A Practical Guide »

The new publication by Kluwer Law International titled, "International Arbitration and Mediation: A Practical Guide," by Michael McIlwrath and John Savage was recently released by Kluwer Law International as a resource for those who require guidance on the uses, difficulties, and specific procedures of international alternative dispute resolution. The book is structured to first outline the entire international dispute resolution process, from the contractual agreement and the dispute settlement proceeding to the final enforcement. It then explores how parties may go about negotiating an international dispute resolution agreement. It wisely informs that like any commercial deal, parties should approach dispute resolution contracts in order to compromise the best possible deal.

It proceeds to discuss how parties should act when a dispute actually arises such as in collecting evidence, determining the procedural law of the place of arbitration, and other routine methodologies. The book presents a comprehensive look into how an international commercial dispute appears from the perspective of the parties. It does so from a very rational standpoint, approaching the topic of "International Settlement Negotiation and Mediation" by treating parties as utility optimizers that are seeking personal gains and therefore must be assisted by a third party. Still, they note that often the best settlements have been reached by the parties alone through mediation and therefore, it is a very important aspect of international business.

Throughout the book there are small boxed sections titled "Not that this ever really happens" where the reader is given a practical example of the chapter's subject matter. The examples shed light on the relevant themes and apply the discussion to real life. For example, in "unfairly blaming culture for bad behavior" it demonstrates how practitioners can sometimes explain away different negotiation styles through superficial judgments based on cultural differences, and the "the new co-arbitrator" presents a case exemplifying the rapid dynamics of alternative dispute resolution proceedings where potential conflicts of interests may force the arbitral arrangement (procedures, number and identity of arbitrators) to shift. The book also provides a chapter on investment treaty arbitration under ICSID and a template of model answers to requests for arbitration that further enhances the practical knowledge of arbitral proceedings.

While the book seeks to extensively inform readers of the benefits of alternative dispute resolution, it asserts that it is wrong to assume that it will be an optimal recourse for all commercial disputes. It supports that the information it provides will give readers a better understanding of the benefits from arbitration and mediation, yet it also teaches how to be critical of the improper construction of ADR clauses that make such processes unjustifiable. Being educated on the various dispute settlement processes will allow business people and legal practitioners to foster greater international commercial cooperation. To do so, the book sensibly recognizes that risk—a fundamental aspect of business—should not be avoided but rather accepted as a potential opportunity for negotiated improvements.

All Kluwer books may be purchased at www.kluwerlaw.com

6th International Conference of the European Forum for Restorative Justice

The 6th International Conference of the European Forum for Restorative Justice will take place from 17 until 19 June 2010 in Bilbao (Spain). As this conference marks the 10th anniversary of the Forum this is an ideal opportunity to look back at restorative justice practices developed so far and to look forward to new practices, possibilities and opportunities. The conference will cover three main themes: 1) The work of practitioners (mediators and facilitators), 2) Cooperation with legal practitioners, 3) Conferencing. More information and the full programme of the conference can be found at this link:

www.euforumrj.org/Activities/conferences.htm

If you would like to receive more information on this conference you can contact Karolien Mariën at karolien@euforumrj.org