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AIA Upcoming Events

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

Location:

Vrije Universiteit Brussel, Pleinlaan 2, B-1050 Brussels, Belgium -ROOM D.2.12

Time: 10 am - 5 pm

REGISTRATION FORM AVAILABLE ONLINE NOW AT:

<http://arbitration-adr.org/activities/?p=conference&a=upcoming>

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AIA's October Conference

Contemporary Topics in Investment Arbitration
 Most Favored Nation Treatment of Substantive Rights
 &
 Investment Arbitration in China
 Brussels, Belgium
 22 October 2010

On 22 October 2010 the Association for International Arbitration (AIA) is hosting a conference on contemporary issues in investment arbitration. This year's principal topics are the effect of Most Favored Nation (MFN) clauses on parties' substantive rights and investment arbitration in China. In addition, the conference will consider various contemporary issues in investment arbitration.

In anticipation of the conference, we plan to publish a series of papers relating to these topics as well as other current issues in investment arbitration. The authors of these papers will be invited to present a short version of their work at the conference.

The conference program is as follows:

Session 1: MFN Treatment of Substantive Rights

The operation and effect of the MFN clause has recently been the subject of considerable attention in the context of jurisdictional rights. Relatively little attention, however, has been given to its operation *vis-à-vis* substantive rights. To address this gap the AIA's Investment Arbitration Group, established in 2009, has invited several leading scholars and practitioners to present their research in an interactive forum. This research will also be published in a journal that will be sent to all participating delegates.

Speakers:

- ⇒ Diego Brian Gosis, Of Counsel at the International Affairs Directorate, Procuración del Tesoro de la Nación, Government of the Republic of Argentina.
- ⇒ Professor Tony Cole, Assistant Professor of Law, Warwick Law School, University of Warwick, England.
- ⇒ Dr. Stephan Schill, LL.M (NYU), Rechtsanwalt, Attorney-at-Law (New York), Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg.
- ⇒ Thomas Henquet, Senior Jurist/Legal Counsel, International Law Division, Legal Affairs Department, Ministry of Foreign Affairs, The Netherlands.

Coffee Break

Session 2: Investment Arbitration in China

In recognition of the growing importance of Chinese investment, this panel will consider issues of relevance to international arbitration in China. This experienced panel will offer perspectives from the Government of China and those representing Chinese and foreign investors. This spectrum of views will provide a comprehensive insight into a country that is still a mystery to many lawyers.

Speakers:

- ⇒ Minister-Councilor Mme. Hong Zhao, Chinese mission to the WTO (Geneva).
- ⇒ Domenico di Pietro, Avvocato (Italy) and Solicitor (England & Wales); International Law and Arbitration Department at Chiomenti Studio Legale (Rome); Lecturer, International Arbitration, University of Rome, "Roma Tre."

Lunch Break

Session 3: Contemporary Issues in Investment Arbitration

This panel will focus on discrete issues of investment arbitration. Topics to be covered will include: disqualification of arbitrators in ICSID arbitration; parallel proceedings; precautionary measures; and the latest developments on the definition of investment.

Speakers:

- ⇒ Karel Daele, Partner at MKONO & CO Advocates in Association with Denton Wilde Sapte, Dar Es Salam, Tanzania (Counsel to the Government of Tanzania).
- ⇒ Lluís Paradell
- ⇒ Christian Leathley, LL.M. (NYU), Attorney-at-Law (New York), Solicitor (England and Wales).
- ⇒ Professor Dr. Alexandra Koutoglidou, Vrije Universiteit Brussel.

The ECT: *AES Summit Generation v. Hungary*

The Energy Charter Treaty (ECT) provides an important tool for investors facing an investment dispute in the energy sector. The Treaty includes rights for individual investors and provisions for investor-state arbitration that give investors who lack access to bilateral investment treaty protections additional means to avoid litigation with states or state entities before their domestic courts. The Treaty mirrors many of the clauses typically offered under BITs, such as protections against both indirect and direct expropriation and unreasonable and discriminatory treatment. Also, it includes guarantees of fair and equitable treatment and not less favourable treatment than that required by international law or that afforded to domestic investors. Additionally, the Treaty currently has an important number of fully ratified members and observer states.

The most recent award under the Treaty regime was granted in *AES Summit Generation v Hungary*, which was published on 23 September 2010 on the ICSID Website. Below, the basics of the case and some of the most relevant arguments of the decision are discussed.

Background

On 9 July 2007, the International Centre for Settlement of Investment Disputes (ICSID) received a request for arbitration from AES Summit Generation Limited, a company incorporated under the laws of the United Kingdom, and AES-Tieza Erömö Kft., a company incorporated under the laws of the Republic of Hungary, against the Republic of Hungary. In the request, the Claimants invoked the ICSID arbitration provision contained in Article 26 of the 1994 Energy Charter Treaty (ECT).

The arbitration arose from an alleged violation by Hungary of Articles 10(1), 10(7) and 13 of the ECT. Claimants argued that an act of the Republic of Hungary--the reintroduction in 2006 and 2007 of administrative pricing pursuant to two Price Decrees, after administrative prices had been abolished as of 1 January 2004--violated their rights under the ECT. Specifically, the alleged violations were the following: (a) breach of its obligation to provide fair and equitable treatment; (b) impairment of AES' investment by unreasonable and discriminatory measures; (c) breach of its obligation to provide national treatment; (d) breach of its obligation to provide most favoured nation treatment; (e) breach of its obligation to provide constant protection and security; and (f) expropriation.



Award

Applicable Law and Interpretation of the ECT

The Tribunal concluded that the law applicable to this proceeding was the ECT. It added that if interpretation of the ECT was required, the general rules of interpretation of the Vienna Convention, Articles 31 and 32, should be applied.

The ECT v Community Competition Law

The Tribunal explained that the Community competition law regime has a dual nature: on the one hand, it is an international law regime; on the other hand, once introduced in national legal systems, it is part of their legal regimes. In this context, it is common knowledge that in an international arbitration, national laws are to be considered as facts. Therefore, the Tribunal decided to consider the competition law regime as a fact, taking into account that a state may not invoke its domestic law as an excuse for alleged breaches of its international obligations.

The Tribunal noted that, properly understood, the dispute in the present arbitration was not about a conflict between the EC Treaty or Community competition law and the ECT. Rather, it was about the conformity or non-conformity of Hungary's acts and measures with the ECT. To explain the relation between the ECT and Community law in this case the Tribunal used the following reasoning: "it is the behaviour of the state (the introduction by Hungary of the Price Decrees) which must be analyzed in light of the ECT, to determine whether the measures, or the manner in which they were introduced, violated the Treaty. The question of whether Hungary was, may have been, or may have felt obliged under EC law to act as it did, is only an element to be considered by this Tribunal when determining the "rationality," "reasonableness," "arbitrariness" and "transparency" of the reintroduction of administrative pricing and the Price Decrees."

Obligation to Provide Fair and Equitable Treatment

Regarding this obligation, the Claimants advanced four main arguments. The Tribunal analyzed each argument and reached the following conclusions:

Contractual Obligations. The Tribunal made it clear that it only had jurisdiction over Treaty claims and could not rule on the scope of contractual obligations. However, it considered that it had the right and duty to determine whether Hungary's conduct – which included acts that could have breached contractual obligations – violated a specific Treaty obligation.

Legitimate Expectations. The Tribunal mentioned that several ICSID tribunals have supported the rule that legitimate expectations can only be created at the moment of the investment (*Duke Energy v. Ecuador*, *Tecmed v. Mexico* and *LG&E v. Argentina*). Nevertheless, the Tribunal noted that the interpretation of the "time of investment" had been quite broad. In this case, the Tribunal analyzed the "time of

investment" at three different moments: (i) when claimants' investment was decided and made in 1996; (ii) when AES Summit purchased the outstanding shares of AEZ Tisza; and (iii) when AES Tisza actually began to invest in (spend money on) the retrofit of the Tisza II Plant. The Tribunal made a facts and circumstances analysis for each time period and concluded that Claimants could not legitimately have been led by Hungary to expect that a regime of administrative pricing would not be reintroduced under any circumstance.

Stable Legal and Business Framework. The Tribunal explained that the stable conditions that the ECT mentions relate to the framework within which the investment took place, but it is not a stability clause. It stressed that a legal framework is by definition subject to change as it adapts to new circumstances day by day, and a state has the sovereign right to exercise its powers, which include legislative acts. The Tribunal mentioned that to determine the scope of the stable conditions that a state has to encourage and create is a complex task given that it will always depend on the specific circumstances that surround the investor's decision and the measures taken by the state in the public interest. In this case, the Tribunal observed that no specific commitments were made by Hungary that could limit its sovereign right to change its law (such as a stability clause) or that could legitimately have made the investor believe that no change in the law would occur.

Due Process / Arbitrariness / Transparency. The Tribunal mentioned that the heart of the case concerned the manner or methodology in or by which the Price Decrees were brought into force, with a view to assessing whether "process" failures existed that would constitute a failure to provide Claimants with fair and equitable treatment.

The Tribunal approached this question on the basis that not every process failure or imperfection will amount to a failure to provide fair and equitable treatment. The Tribunal noted that: "[t]he standard is not one of perfection. It is only when a state's acts or procedural omissions are, on the fact and in the context before the adjudicator, manifestly unfair and unreasonable (such as would shock, or at least surprise a sense of juridical propriety) that the standard can be said to have been infringed."

The Tribunal analyzed the procedural history of the Price Decrees and concluded that it did not feel that the several procedural shortcomings in Hungary's implementation of the price decrees were sufficient to constitute unfair and inequitable treatment. In summary, the Tribunal noted that "Respondent's process of introducing the Price Decrees, while sub-optimal, did not fall outside the acceptable range of legislative and regulatory behaviour. That being the case, it cannot be defined as unfair and inequitable."

Unreasonable and Discriminatory Measures

The Tribunal noted that there are two elements that must be analyzed to determine whether a state's act is unreasonable: the existence of rational policy; and the reasonableness of the act of the state in relation to that policy. Under this framework, the Tribunal explained that a rational policy is taken by a state following a logical (good sense) explanation with the aim of addressing a public interest matter. Additionally, it stressed that there needs to be an appropriate correlation between the state's public policy objective and the measures adopted to achieve it.

The Tribunal found that "it cannot be considered a reasonable measure for a state to use its governmental powers to force a private party to change or give up its contractual rights. If the state has the conviction that its contractual obligations to its investors should no longer be observed (even if it is a commercial contract, which is the case), the state would have to end such contracts and assume contractual consequences of such early termination. This does not mean that the state cannot exercise its governmental powers, including its legislative function, with the consequence that private interests – such as the investor's contractual rights – are affected. But that effect would have to be a consequence of a measure based on public policy that was not aimed only at those contractual rights. Were it to be otherwise, a state could justify the breach of commercial commitments by relying on arguments that such breach was occasioned by an act of the state performed in its public character".

Having considered the facts of the case, the majority concluded that Hungary's decision to reintroduce administrative pricing was not based on the EC Commission's investigation nor was it made with the intention of affecting Claimant's contractual rights. The Tribunal noted that Hungary's reintroduction of administrative pricing in 2006 was motivated principally by widespread concerns relating to (and it was aimed directly at reducing) excessive profits earned by generators and the burden on consumers. Then, it noted that "the Tribunal nevertheless is of the view that it is perfectly valid and rational policy objective for a government to address luxury profits. And while such price regimes may not be seen as desirable in certain quarters, this does not mean that such a policy is irrational. One need to recall recent wide-spread concerns about the profitability level of banks to understand that the so-called excessive profits may well give rise to legitimate reasons for governments to regulate or re-regulate." In summary, the Tribunal found that the Price Decrees were reasonable, proportionate and consistent with the public policy expressed by the parliament.

Finally, the Tribunal concluded that neither its low capacity fees nor its high energy fees suggested discrimination and

both were the logical result of a uniform methodology that was applied equally to all generators, based on their differing assets and operating costs structures. The Tribunal mentioned that discrimination necessarily implies that the state disproportionately benefited or harmed someone. In this case, the Tribunal found that there had been no different treatment of AES Tisza in comparison with the other generators and, thus, that it was not the subject of discriminatory treatment.

Comment

Although the number of reported cases under the ECT has been relatively limited to date, with *AES Summit Generation v Hungary* comes a growing recognition of the potential scope of the rights afforded by the Treaty. Additionally, the Tribunal's reasoning brings some clarity to the ECT provisions and sets the basis for the analysis of future disputes and cases.

Moreover, the reasoning of the Tribunal might prove helpful to some states that have to explain and justify some controversial measures in times of distress. In particular, the argument of luxury prices could open an important debate about the scope and limits of the protection of investors.

The decision is available at:

http://icsid.worldbank.org/ICSID/FrontServlet?requestTy-pe=CasesRH&actionVal=showDoc&docId=DC1730_En&caseId=C114

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Vacatur of Awards:
*Ario v. Underwriting Members of Syndicate
53 at Lloyd's*

In a recent case that dealt with the interplay of the New York Convention and the Federal Arbitration Act, the United States Court of Appeals, Third Circuit, held that Article V (1) (e) of the New York Convention incorporates domestic law vacatur standards. *Ario v. Underwriting Members of Syndicate 53 at Lloyd's* 2010 U.S. (3rd Circ. Aug. 18, 2010).

Specifically, the court applied the standards established by the Federal Arbitration Act (FAA), and refused to vacate an award given on a reinsurance contract. The case is also notable for its holding that parties cannot "opt out" of the FAA in its entirety.

Background

Two Pennsylvania insurers ("Primary Insurers") entered into several Reinsurance Treaties (a type of reinsurance contract that is valued on the basis of overall risk, as opposed to individual risk) with a London-based syndicate ("Reinsurers"). The Treaties contained two relevant provisions:

1. *Arbitration.* The parties agreed that all disputes would be submitted to binding arbitration. The arbitration would be held in Philadelphia, Pennsylvania and would be conducted in accordance with the rules and procedures of the Uniform Arbitration Act as enacted in Pennsylvania.
2. *Service of Suit Clause.* Reinsurers agreed to submit, upon request by Primary Insurers, to the jurisdiction of a court of competent jurisdiction. The parties agreed that nothing in the Treaties would limit Reinsurers' right to commence an action, remove an action, or transfer a case.

Several years later, a dispute arose. Reinsurers claimed that Primary Insurers had misrepresented the degree of risk and, as a direct result, Reinsurers had suffered major losses. As a result, they refused to pay claims owed under the Treaties. Primary Insurers, for their part, demanded arbitration to recover the amount owed.

In the subsequent arbitration, the panel considered four Reinsurance Treaties. It rescinded three of these but, in an "unreasoned award," ordered Reinsurers to pay amounts owed on the fourth.

During this time, Primary Insurers were in the midst of liquidation proceedings in the Commonwealth Court of Pennsylvania. Joseph Ario, the liquidator acting on behalf of Primary Insurers, filed a motion with the court to confirm in part, and vacate in part, the award.

After Reinsurers removed the case to the District Court for the Eastern District of Pennsylvania and filed a motion to confirm the award, Ario filed a motion to remand on the ground that, because the parties had "opted out" of the Federal Arbitration Act ("FAA") in its entirety, the federal court lacked subject matter jurisdiction. Moreover, Ario filed a motion to vacate the award. The court held that it did **have subject matter jurisdiction and, applying the FAA's vacatur rules, refused to vacate the award.** Ario appealed. [Reinsurers also moved for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure against Ario and his counsel. Discussion of Rule 11 sanctions is omitted, however, for purposes of this article.]

Outcome

First, the court had to determine whether removal was proper. This turned on whether parties may "opt out" of the FAA in its entirety. Ario maintained that, because the parties had chosen to apply the Pennsylvania Uniform Arbitration Act ("PUAA") to the dispute, they had effectively chosen state law over federal law and had therefore "opted out" of the FAA in its entirety. Accordingly, removal was improper because the federal courts lacked subject matter jurisdiction. The court viewed this logic as internally inconsistent. The FAA itself authorizes parties to choose state laws to govern their disputes. If parties could opt out of the FAA *in its entirety*, they would not be able to adopt state laws in the first place. Therefore, Ario's argument fails on its own terms.

Second, having established that removal was proper, the court had to determine which law governed vacatur of awards. In Ario's view, the proper choice was the PUAA because the parties themselves had chosen it. The court, however, held that the FAA governs vacatur for two reasons:

1. Article V(1)(e) of the New York Convention incorporates domestic law vacatur standards. The relevant domestic law here is the FAA; and
2. The parties evinced no clear intent to apply PUAA vacatur standards. The provisions in the treaties refer only to the conduct of the arbitration itself, not to judicial enforcement of awards.

Applying the FAA's vacatur standards, the court refused to vacate the award.

The full text of the case can be found at:

<http://www.cdr-news.comhttp://caselaw.findlaw.com/summary/opinion/us-3rd-circuit/2010/08/18/251421.html>



Russian Mediation Law from the perspective of the UNCITRAL Model Law on International Commercial Conciliation and European Legislation on Mediation

On July 26, 2010 the President of the Russian Federation, Dmitry Medvedev, signed the new Federal Laws 193-FZ "On Alternative Procedure of Dispute Settlement with Participation of Mediator (Mediation Procedure)" (hereinafter "Russian Mediation Law") and 194-FZ "On Amending Certain Legislative Acts of the Russian Federation in View of Adopting a Federal Law "On Alternative Procedure of Dispute Settlement with Participation of Mediator (Mediation Procedure)" which will come into force on January 1, 2011 and fill the current gap in Russian legislation. The Federal Law 194-FZ implements amendments to some articles of the Russian Civil Code, Arbitration Procedural Code, Civil Procedural Code, the Federal Law "On Arbitration Courts" and the Federal Law "On Advertising".

Within the European Union the core documents serving as guidelines for adoption of national laws on mediation by Member States are the European Code of Conduct for Mediators of 2004 (hereinafter "ECCM") and the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (hereinafter "Directive 2008/52/EC").

Russia was not unfamiliar with mediation even before the recent adoption of its Mediation Law. Thus, from 2002 article 135.1.2 of the Russian Arbitration Procedural Code already allowed the parties to resort to an intermediary in order to resolve their dispute, and many specialized organizations offered, among other things, such services. In May 2006 the Panel of Mediators in Conciliation Proceedings (hereinafter "Panel") was instituted under the aegis of the Russian Chamber of Commerce and Industry (hereinafter "Russian CCI").

Since the date of its establishment the Panel's activity has been governed by the Constitution of the Russian Federation, International Treaties of the Russian Federation, Russian Federal laws, and other applicable regulatory legal acts. The legal regulatory acts governing the activity of the Panel include the following regulations enacted by the Russian CCI: Regulation of the Panel College of Mediators for Conciliation Procedures at the Russian CCI; Rules of Mediation Procedure; and Regulation of Charges and Costs of the Panel of Mediators for Conciliation Procedures at the Russian CCI. At the end of the conciliation proceedings the parties were expected to enter into the so-called Dispute Resolution Agreement, which was regarded as a positive outcome of reconciliation achieved through a mediator.

1. Russian Mediation Law and the UNCITRAL Model Law on International Commercial Conciliation

In 2005, the working group of the Russian CCI prepared the draft Mediation Law, which was partly based on the UNCITRAL Model Law on International Commercial Conciliation (hereinafter "UNCITRAL Model Conciliation Law"). The draft was approved by the Council of Europe and introduced into the lower chamber of the Russian Parliament, where the process was suspended for more than three years. Only this year, thanks to the initiative of the Russian President, did the matter get off the ground.

It is important to mention that despite the fact that sometimes the choice between the terms "conciliation" and "mediation" serves to denote a particular style or dispute resolution practice (for example, in Switzerland, the term 'mediation' describes a process in which a neutral third party is expected to be non-evaluative and refrain from making any proposals, and where the outcome should be based on subjective interests, whereas 'conciliation' describes a more directive and evaluative process, in which the neutral expresses a non-binding opinion based on objective norms and suggests possible solutions [Michael McIlwrath and John Savage, *International Arbitration and Mediation: A Practical Guide*, (Kluwer Law International 2010) p. 173] or as pointed out by M. Scott Donahey, « [i]n mediation, the mediator's role is to assist the parties in reaching their own solution for their dispute. A conciliator acts more as an adviser, evaluating a dispute and then proposing the terms of an agreement based on the evaluation." [M. Scott Donahey, *Mediation and Conciliation in the Asia/Pacific Region: Sites, Centres and Practices*, in Doyle (ed.), *Doyle's Dispute Resolution Practice: Part of Asia-Pacific*, 85-000]) in Russia these terms are used interchangeably.

At the same time, the Russian Mediation Law changes substantially the role of a neutral third party in the proceedings so that it becomes closer to the role of a mediator rather than a conciliator in the sense of the abovementioned difference. First of all Article 11.5 expressly prohibits mediators from making any settlement proposals whereas Article 6.4 of the UNCITRAL Model Conciliation Law permits it. Second, under the Russian law, mediators cannot render any legal, consulting, or other type of assistance to the parties. On the one hand, this underlines that a mediator is a mere facilitator and the resolution of the dispute is ultimately left for the parties but on the other hand raises a lot of criticism in the Russian legal community because a number of experts doubt the need for mediator's participation in the proceedings at all. If the legal and consultancy assistance is rendered by the parties' lawyers then the lawyers themselves might find a proper solution, without any intermediary. Moreover, as the Russian Mediation Law does not require a law degree even for professional mediators then the quality of a resulting legal agreement is open to question.

2. Russian Mediation Law and European Legislation on Mediation

Although Russia is not a party to the European legislation on mediation, such as Directive 2008/52/E and ECCM, it might be useful to analyze how Russian Mediation Law fits into its framework.

2.1 Russian Mediation Law and ECCM

ECCM requires mediators to be competent and knowledgeable in the process of mediation. They must be properly trained and continuously updated in their education and practice in mediation skills. Russian Mediation Law does not contain similar qualification criteria for mediators. In order to act as a mediator it is enough to have merely full legal capacity and a clean record. The requirements for the one to act as a professional mediator include: be at least 25 year old; have any higher education; attend special training courses for the mediators, arranged according to the program approved, as prescribed by the Government of the Russian Federation.

Although Russian Mediation Law obliges the mediator to disclose the circumstances that may affect his/her independence and impartiality, it does not list any of such circumstances, nor does it contain any criteria that might help to identify when the mentioned circumstances arise. ECCM as distinct from Russian Mediation Law facilitates identification of situations of possible bias by enumerating the circumstances that must be disclosed by a mediator: any personal or business relationship with one or more of the parties; any financial or other interest, direct or indirect, in the outcome of the mediation; the mediator, or a member of his firm, having acted in any capacity other than mediator for one or more of the parties. The duty of mediator is to disclose those circumstances throughout the process of mediation and he may continue to act as mediator if the parties explicitly consent and if he is certain of being able to carry out the mediation in full independence. Russian Mediation Law also mentions cases when the mediator is interested (directly or indirectly) in the outcome of the mediation, including situations when the mediator has any personal relationship with one of the parties. However, Russian Mediation Law does not relate such circumstance with situations that **might affect mediator's independence and impartiality and must be disclosed**. It merely prohibits the mediator in the mentioned situation to act in that capacity instead.

As ECCM Russian Mediation Law contains provisions regarding mediators' remuneration. The mediators in Russia may

render their services for remuneration or free of charge. The default provision provides for equal apportion of mediation costs between the parties. However, in Russian Mediation Law, unlike in ECCM, consent of the parties to the proposed **mediator's remuneration is not a prerequisite for conducting mediation**.

The Russian Mediation Law has provisions similar to the ones of the ECCM obliging the mediator to keep confidential all information arising out of or in connection with the mediation. Additionally Russian Law expressly prohibits mediators to make any public statements regarding subject matter of the dispute, unless the parties agreed to that.

2.2 Russian Mediation Law and Directive 2008/52/EC

Article 4 of the Directive 2008/52/EC recommends that Member States encourage the development of voluntary codes of conduct for mediators. Russian Mediation Law has no provisions for the licensing of professional mediators. Accordingly, in order to establish the standards and rules for **professional mediators' activity and control compliance** with the requirements of the mentioned standards and rules, the law encourages the creation of self-regulated organizations of mediators. Such organizations may be established by professional mediators and/or organizations that provide mediation services, and they must have at least 100 professional mediators and/or 20 organizations providing mediation services. Some experts find it alarming that Russian Mediation Law does not specify detailed procedures or principles of mediation proceedings, but leaves it to the discretion of the parties and organizations providing mediation services. As a result, there are no unified standards and **rules for professional mediators' activity**. The development of such standards and rules is left to the self-regulated organizations.

Article 6 of the Directive 2008/52/EC requires states to ensure enforceability of the content of a resulting mediation agreement. In accordance with Russian Mediation Law, the parties may resort to mediation either before or after a dispute is submitted to a court or arbitral tribunal. The enforceability of the agreement depends on when mediation proceedings were initiated. If mediation takes place after referral of the case to litigation or arbitration the agreement resulting from it can be confirmed by a court or arbitral tribunal as a settlement agreement and a compulsory execution order can be issued; otherwise the resulting agreement is considered a simple civil contract. The status of the resulting agreement as a simple civil contract has been criticized as an inefficient solution. It might seem that there is no point in concluding a new civil contract if the dispute arose

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Contact Details; Educational Background; Professional Background; and Areas of Expertise



from the breach of the initial civil contract and failure to fulfill initial obligations. The Mediation Law does not have any additional legal instruments that ensure the enforcement of a civil contract resulting from mediation proceedings.

As recommended by the Article 7 of the Directive 2008/52/EC, Russian Mediation law prohibits the parties themselves, the mediators, organizations providing mediation services and anyone present at the mediation proceedings from disclosing information arising out of or in connection with mediation proceedings in the course of litigation or arbitration at later stages.

Article 8 of the Directive 2008/52/EC encourages the States to ensure that parties resorting to mediation will not be prevented from initiating judicial or arbitral proceedings subsequently due to the expiration of the limitation period during the mediation process. According to Russian Mediation Law the commencement of mediation will interrupt the limitation period.

Conclusion

Russia adopted the new Mediation Law in the hope that it would assist the traditional court system, which is no longer able to examine and resolve an ever increasing number of cases in an efficient manner. However, as the level of legal culture in Russia is still quite low, it is debatable whether the society is ready to resort to mediation at all. In any event, no conclusions can be drawn until we see how the Law works in practice. For that purpose, we need to wait at least several years.

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