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AIA Upcoming Events

The Association for International Arbitration is proud to invite you to its upcoming conferences on

The Introduction of Class Actions in Belgium

The program will include lectures regarding the political, legal and ethical context of class actions, reactions from the market and the interferences with alternative forms of dispute resolution.

Location: Brussels (exact location to be confirmed)

Date: Friday, 25 March 2011

To reserve a place or for further information please contact

Philippe Billiet at events@arbitration-adr.org

and

Dispute Resolution in the Aviation Sector

Location: Brussels

Date: 10 June, 2011

For further information on conferences organized by AIA please visit our website www.arbitration-adr.org

AIA presents
the European Mediation Training for Practitioners of
Justice 2011



Due to the last year's success, AIA is proud to announce that the second EMTPJ course will take place from 5th to 17th September 2011 in Brussels, Belgium. The detailed EMTPJ program approved by numerous Mediation Centers inside and beyond Europe consists of two parts: Practical Training and Theoretical Discussion and Analysis. The former part includes such courses as Introduction to Mediation Principles; Essential Skills for the Effective Mediator; People, Process and Management Skills, whereas the latter comprises the Stages in the Mediation Process; Analytical Study of Conflict Resolutions; Theory and Practice of EU Law and Mediation Acts; EU Ethics on Mediation; Theory and Practice of Negotiations; International Mediation; the Function of Party-experts and Party-counsel in Civil and Commercial Mediation; Theory and Practice of Contract Law in Europe and Interventions in Specific Situations.

For additional information and the registration form please visit:
www.emtpj.eu

Mediation as a Tool of International Criminal Justice?

by David Bryden

The role of Mediation in civil, commercial, and family matters is generally accepted. Some countries have even made tentative forays into introducing it into the field of criminal law (see for example the Belgian law of 22 June 2005, introducing Mediation into the Belgian Criminal Code, or Italian attempts to involve Mediation in juvenile offences). In general, the consensus stands that Mediation should only be applied to non-violent or minimal violence cases: the world has rarely witnessed a murderer sitting round the mediator's table with a victim's family.

Why, then, is this article suggesting the use of Mediation in international criminal law, surely one of the most emotive areas of modern legal practice? Using Mediation as part of the punitive process could reasonably be described as 'highly debatable' – accusations of mass murder are seldom remedied by reasoned discussion. There is, however, another angle to be considered: that of victim participation.

The issue of victim participation has long proved divisive to the international legal community. What rights do victims have? Should they be allowed to become involved in the trial of a war criminal? Should they have the right to dedicated legal representation at the trial, a lawyer whose role is simply discovering the truth behind atrocities? Or should their position simply be that of the victim within national criminal systems – a background character who sits in the shadows awaiting the final revolution of the wheels of justice?

In an attempt to improve the truth finding and post-conflict reconciliation aspects of international criminal justice, the use of Truth and Reconciliation Commissions (TRCs) has long been sanctioned – see for the example those utilised in post-Apartheid South Africa, or in Kosovo. These bodies have one key function – to try and provide a narrative of the events that occurred. It is universally felt that post-conflict resolution can only begin when victimised sections of the population understand exactly why atrocities occurred, and occasionally precisely who is to blame. Trials at an international level are seldom effective fora for revealing details at such an intimate level.

There are, unfortunately, drawbacks to the use of TRCs. Why should an accused become involved? What is his incentive? In South Africa, immunities were controversially granted to those who testified at the TRC. As a result, many who confessed to extreme examples of violent and racially motivated crimes were allowed to go free, to universal disapprobation. Other TRCs since have been at a loss to establish a system which reveals the truth of dark areas of recent history, while providing a system which adequately punishes some of humanity's most violent criminals.

Given the above, how can it possibly be suggested that Mediation could have a role to play in the process? Clearly, in its present form, the suggestion would be unfeasible. However, with a few modifications, I would suggest that the process could be a useful tool in victim participation in international criminal justice.

Certain key questions would have to be addressed: who would participate, and at what stage in the process; what

sort of 'mediated agreement' could actually be reached? What, when it comes right down to it, would be the point?

My suggestion would be to introduce Mediation as a minor or more individualised form of TRC. The idea would be to use it at the end of the trial process to allow victims the chance to interact with those responsible for the offences committed. (In a suitably controlled and secured environment). It would be impracticable for this to happen on an individual basis, except under special circumstances – those crimes prosecuted under the Statute of the International Criminal Court seldom number victims in units of less than hundreds – but perhaps a small number of community or religious leaders could be elected to represent the particular group involved in individual crimes. As an aside, using lawyers as victim representatives would likely prove impracticable, and would simply lead to accusations of an attempt to distance justice from the people. As an incentive, the (convicted) criminals could be offered minor sentence reductions, in return for agreeing to meet those whom they had harmed.

To return to a previous question, what would be the point of using Mediation in this way? The answer is simple: Mediation is recognised as an effective way of encouraging parties in conflict to sit down in a neutral environment, and allow them the opportunity to gain an insight into their opponent's perspective. If used in this context, victims would be allowed the chance to meet and confront those who harmed them, while offenders would be forced to confront the reality of the crimes they committed.

Naturally, there are a number of flaws in the system I am proposing, but I submit that, given time and opportunity, it could be an extremely effective weapon in the armoury of international criminal justice. In a process which involves years of trial time, and millions of pounds of expenditure, there should be mechanisms in place to help the victims gain some degree of closure.

Book Review – Liber Amicorum Bernardo Cremades

Liber Amicorum, or *Friends' Book* of Bernardo Cremades, is best described by its editors Miguel Ángel Fernández-Ballesteros and David Arias as an 'affectionate tribute' to an excellent Spanish legal practitioner, Bernardo Cremades, whose work and commitment to arbitration contributed significantly both to the development of the field on the international level, and to the increasing recognition of arbitration in Spain. This book of honor comprises selected topics from both commercial and investment arbitration fields.

The book compiles a wide range of articles regarding commercial arbitration, written by various European, Latin-American and Asian legal practitioners in English, Spanish and French. Bernardo Cremades, who participated in more than 200 arbitrations either as counsel, co-arbitrator or president of the arbitral tribunal, published numerous books and articles, and was and is active member of several international professional associations,



gives a broad scale of opportunities to authors to relate to his professional pursuit. Some articles of *Liber Amicorum* put a special focus on investment arbitration (*ICSID Versus Non-ICSID Investment Treaty Arbitration* by Piero Bernardini; *State Intervention in the Financial Crisis and International Investment Arbitration* by Norbert Horn; *When is an "Investment" an "Investment"?*- *Formalities of Approval and Limitations on Their Application* by Robert Hunter), and corruption (*Fraud and Corruption in International Arbitration* by Carolyn B. Lamm, Hansel T. Pham and Rahim Moloo; *How Should International Arbitrators Tackle Corruption Issues?* by Dr. Mohamed Abdel Raouf), while others deal with such general matters as ethical, institutional and practical issues (*Clearer Ethics Guidelines and Comparative Standards for Arbitrators* by José Carlos Fernández Rozas; *Arbitration and Mediation Combined. The Independence and Impartiality of Arbitrators* by Jesús Almoquera; *Deliberation and Drafting Awards in International Arbitration* by José María Alonso).

Bernardo Cremades' prominence is also shown by the numerous appreciations he has been decorated with, such as the Verdienstkreuz of the German Republic, the distinction of Chevalier de l'Ordre National du Mérite of the French Republic, and the medal of the Arabian Association for International Arbitration given to the Ideal Arbitrator in Euro-Arab Arbitration. Moreover, he is considered to be a distinguished expert in Latin America, who influenced significantly the development of arbitration in the region. The worldwide recognition of Bernardo Cremades' activities is reflected in the content of the book. The articles of the *Liber Amicorum* Bernardo Cremades can not only be aligned by theoretical topics, but they can also be sorted out according to geographic criterion. The reader therefore might obtain a deeper insight into distinctive issues in Europe (*The Right of Foreign Investors to Access the Domestic Spanish Markets* by Otto Sandrock; *The Principles of International Arbitration Practice in France* by Carmen Nunez-Lagos; *Arbitration and Anti Suit Injunctions in the Case Law of the European Court of Justice* by Fernando Pombo), Latin-America (*A New Approach to International Investment Agreements [IIAS] in Brazil* by Arnoldo Wald; *Polygamy of Treaties in Arbitration – A Latin American and Mercosul Perspective* by Adriana Braghetta; *Notes on Amiable Compositors under Argentine Law* by Fernando Aguilar and Roque J. Caivano) and Arabic countries of the Middle-East (*Jurisdiction of Arbitral Tribunals in Islamic Law [Shari'a]* by Omar Aljazy; *The New Law on Arbitration in Syria* by Jacques El-Hakim; *The Entitlement of the State and Public Entities to Arbitrate under Lebanese Law* by Ghaleb S. Mahmasani).

An 'affectionate tribute' however would not be complete without dedicating an article to this distinguished expert of arbitration. The essay titled *Bernardo Cremades' Contribution to the Development of Arbitration Law in Latin America* written by Gonzalo Biggs highlights the most important actions of Cremades with respect to Latin American countries. Quoting the author 'Due to the impossibility of accessing the totality of Professor Cremades academic and professional contributions', the article is 'limited to his interventions as speaker in three separate forums, two of his writings and decisions as member of five international arbitration tribunals.' Thus, the reader might become familiar with the forum interventions of Madrid 1982, Guatemala 1987 and Santia-

go 1998, with writings about the Calvo Doctrine, the contract and treaty claims and choice of forums in foreign investment disputes, and with the arbitral awards in ICSID cases Lanco, Waste Management, Autopista, Lucchetti and Fraport.

This colorful selection of essays gives an overview of the wide range of fields in arbitration where Bernardo Cremades has made a significant impact. The *Liber Amicorum* is recommended to all 'amici', or 'friends' of international arbitration and also, to all the friends and admirers of Bernardo Cremades.

The first edition of the book was published in June 2010 and may be purchased for 145€ at www.kluwerlaw.com The members of AIA receive 10% discount.

Matter of Brady v. the Williams Capital Group, L.P.

by Eugene S. Becker and Stephen H. Marcus

In a case of first impression for New York, the New York Court of Appeals in *Matter of Brady v. The Williams Capital Group, L.P.*, 14 NY3d 459, 2010 NY Lexis 49 (2010) unanimously held that where an employer-employee arbitration agreement provides that the employer and employee share the fees and costs of the arbitrator, there would first have to be a court hearing to determine the employee's ability to pay the expenses.

In January 1999, Williams, an investment bank and broker-dealer of debt and equity securities, hired petitioner Lorraine Brady to sell fixed income securities. Brady was required to execute a Uniform Application for Securities Industry Registration or Transfer ("Form U-4") in order to become registered with the National Association of Securities Dealers ("NASD"). Accordingly, Brady, a "registered" salesperson of fixed income securities, was subject to NASD rules. Under NASD Rule 10201 (b) "[a] claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute is not required to be arbitrated. Such a claim may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose."

In 2000, Williams promulgated an employee manual that all of its employees, including petitioner, were required to sign as a condition of continued employment. Incorporated within the employment manual was a "Mutual Agreement to Arbitrate Claims" under which Williams and each of its employees agreed (1) that all disputes were to be arbitrated; and (2) to equally share the fees and costs of the arbitrator. At the time the Arbitration Agreement was entered into, its "equal share" provision was consistent with American Arbitration Association ("AAA") rules and provided that parties to an AAA arbitration would share the cost of the arbitrator's fee. The Agreement included the following provision:

"The Company and I agree that, except as provided in this Agreement, any arbitration shall be in accordance with the then-current Model Employment Arbitration Pro-

cedures of the [AAA] before an arbitrator who is licensed to practice law in the state in which the arbitration is convened (the Arbitrator'). The arbitration shall take place in or near the city in which I am or was last employed by the Company" (emphasis added).

In February 2005, Williams terminated Brady's employment. During each of her five years in Williams' employ, Brady earned \$ 100,000 or more. Specifically, she earned \$ 100,000 in 1999, \$ 137,500 in 2000, \$ 324,000 in 2001, \$ 356,000 in 2002, \$ 405,000 in 2003 and \$ 204,691 in 2004.

In December 2005, Brady filed a Demand for Arbitration with AAA, seeking money damages against Williams. Brady claimed that Williams terminated her employment based on her race and/or sex in violation of Title VII of the Civil Rights Act of 1964. At the time Brady filed the Demand, the AAA rules, which were amended in 2002, required employers to pay all arbitration expenses and the arbitrator's compensation.

Approximately two weeks later, AAA, by letter, notified the parties of its determination that the dispute arose from an "Employer Promulgated Plan," and that the arbitration would be conducted consistent with AAA's National Rules for the Resolution of Employment Disputes. For example, under National Rule 1,

"[t]he parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by [AAA] or under its National Rules for the Resolution of Employment Disputes. If a party establishes that an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules."

In March 2006, AAA, in accordance with its "employer-pays" rule, sent Williams an invoice/statement for \$ 42,300, which represented the entire advance payment for the arbitrator's compensation. Citing the Arbitration Agreement, Williams refused to pay the entire amount of the arbitrator's compensation, and demanded that Brady pay half in accordance with the Arbitration Agreement. Brady refused to make any payment.

Subsequently, the AAA, citing its rules, advised the parties that petitioner's position was accurate. After numerous attempts to secure full payment of the arbitrator's fee from Williams, the AAA cancelled the arbitration on or about October 5, 2006.

Brady commenced a proceeding seeking to compel Williams to pay the arbitrator's fee or to compel AAA to enter a default judgment against Williams for failing to do so. The court dismissed the petition in its entirety, holding that the parties' arbitration agreement, rather than the AAA rules, governed. In addition, the court, citing petitioner's earnings while she was employed by Williams, rejected the argument that requiring petitioner to pay half of the arbitrator's compensation (\$ 21,150) was prohibitively expensive.

In a 3-2 decision, the intermediate appellate court reversed and directed Williams to pay the entire arbitration fee

"subject later to reallocation of those costs by the arbitrator." Although the majority agreed with the trial court that the AAA rules did not supercede the Arbitration Agreement, they held that the "equal share" provision of the Agreement was unenforceable as against public policy. In so holding, the majority found that petitioner met her burden of establishing that the arbitration fees and costs were so high as to discourage her from vindicating her state and federal statutory rights in the arbitral forum. Finally, the majority, noting that the State favors arbitration, concluded it was proper to sever the "equal share" provision rather than void the entire agreement.

According to the dissenting Justices, because petitioner "failed to present any facts bearing on . . . the extent of her financial resources and the extent to which the costs . . . she would incur [--] if the ['equal share'] provision were enforced [--] would exceed the costs she would incur if she litigated her claims in court," she was not entitled to a ruling that the "equal share" provision was unenforceable on public policy grounds. Alternatively, the dissenters argued that even if the provision is unenforceable, the proper remedy was to disregard, not modify, the Arbitration Agreement.

The Court of Appeals modified the order of the Appellate Division and remitted it to the trial court for a hearing concerning petitioner's financial ability.

The Court of Appeals reasoned that the "case by case" approach of the federal courts dealing with sharing of arbitration costs struck the proper balance between the competing public policies of favoring arbitration, and affording a litigant the ability to vindicate her right. The Court of Appeals looked to Gilmer v. Interstate / Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647 (1991), Green Tree Financial Corp - Ala. v. Randolph, 531 U.S. 79, 121 S. Ct. 513 (2000), and Bradford v. Rockwell Semiconductor Sys. Inc., 238 F3d 549 (4th Cir. 2001). In Gilmer the U.S. Supreme Court held that plaintiff's age discrimination claim could be resolved by arbitration forum where required by contract. In Green Tree Financial the U.S. Supreme Court adopted a case-by-case approach. The party seeking to invalidate an arbitration agreement on the grounds that arbitration would be prohibitively expensive has the burden of showing the likelihood of incurring costs that would deter the party from arbitrating the claim. Bradford involved a fee splitting provision similar to the provision at issue in Brady. The issue in Bradford was whether the fee splitting provision which required the employee to share the arbitration costs rendered the agreement unenforceable. The Fourth Circuit held that the fee-splitting provisions enforceability should be resolved on a case-by-case basis and focus on the claimant's ability to pay.

Accordingly, the Court of Appeals held that in this context, the issue of a litigant's financial ability is to be resolved on a case-by-case basis and that the inquiry should at minimum consider the following questions: (1) whether the litigant can pay the arbitration fees and costs; (2) what is the expected cost differential between arbitration and litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum.

The Court of Appeals then concluded:

Because we are remitting this matter for a hearing, we do not decide what the remedy should be if the "equal share" provision is found enforceable. If that happens, Supreme Court [trial court] should decide, in the first instance, whether to sever the clause and enforce the rest of the Arbitration Agreement, or to offer petitioner a choice between accepting the "equal share" provision or bringing a lawsuit in court.

Failure to Disclose Arbitrators-Counsel Relationship Led to Award's Annulment in Hungary

'Do you lack 29.000.000 Euros to build a shopping mall? Here is the solution!' One could have read this announcement in various Hungarian newsletters approximately a year ago. The generous proposal however did not derive from a bored millionaire willing to support beginners in the real estate sector; in fact, it was an ironical call from a Hungarian building trade company that went bankrupt due to an arbitration award.

BVM Épelem Building Trade Ltd. (BVM) entered into a legal dispute almost ten years ago with Global Center LLC. (Global), subsidiary of the Ablon Group Building Trade Ltd. (Ablon), that is considered to be one of the most successful entities in Central-Eastern Europe in the real estate sector. The argument started in respect of a joint ownership case: according to Global, BVM had obstructed the process of splitting the ownership on the land that it had sold to Global, and it would have been 'risky, even dangerous' for Ablon to engage itself in the construction of an outlet center on joint territory. Referring to BVM's breach of contract and acting in accordance with an arbitration clause, Ablon brought the case to the Permanent Arbitration Court of the Hungarian Chamber of Commerce and Industry.

BVM indicated in its Answer that it was entitled to interrupt the process of splitting the ownership. Global also could have started the construction without any difficulties since all owners had approved it. In addition, according to BVM, Global had not started the project even after the adjustment of ownership problems in 2006, because the company had never had the financial resources to do so. They relied on an interview given in 'Resource' real estate magazine by Ablon's director general, claiming that the firm was forced to inhibit two projects due to lack of financial resources. However, the director did not mention the real estate in question.

The ironical announcement 'Do you lack 29.000.000 Euros to build a shopping mall? Here is the solution!' was published after the arbitration award: BVM was obliged to pay nearly 29.000.000 Euros. The arbitrators received approximately 377.000 Euros fee for their services, whereas the court itself charged 52.000 Euros of administrative costs.

With regards to the publication, numerous Hungarian medium-sized firms contacted BVM to share their similar experiences. Nevertheless, BVM did not hesitate to seek legal solutions. Even in the course of the arbitral proceedings, the company challenged the arbitrators at the Metropolitan Court of Budapest as it had been informed about the connection among two members of the arbitration panel (including the President) and the legal representative of Ablon: they were all fellow professors at the same depart-

ment of the Law Faculty of ELTE University of Budapest. The Metropolitan Court in fact declined the challenge, stating that the relation between colleagues does not constitute legal basis for disclosure.

BVM's further step was to file the request for the award's annulment with the Supreme Court of Hungary. On October 12, 2010, The Supreme Court annulled the award despite the subsequent judgment of the Metropolitan Court, stating that the relationship between the arbitrators and the legal representative of Ablon should have been disclosed indeed. The Supreme Court however did not comment on the content of the award and stated that no legal error was found in it, other than the administrative one mentioned above.

BVM's director general said that the award's annulment would help the company to stop the liquidation process it was in. The Supreme Court did not address Global's assignment of its damages claim to Bright Site LLC, an affiliate of Ablon, which had not been involved in the case. According to the basic principles of Hungarian law, an award does not apply to third parties if they have not participated in the original proceedings. As a result, the outcome is still uncertain due to Bright Site's unclear legal position in the case. As the Chief Executive of Ablon stated, an application will be lodged with the Supreme Court for clarification.

Interview with the Institute of Arbitration

The Institute of Arbitration is a neutral and independent non-governmental organization that has three main purposes: first of all it serves as a link for commercial agents from different States because quite often the diversity of legal systems impedes the free circulation of goods, services and products; second, it centralizes all types of dispute resolution mechanisms in one place and third, it applies an easy and simple procedure, thus avoiding unnecessary delays and preventing third parties' participation.

Not so long ago AIA had a pleasure of interviewing Didier Le Fevere, the Secretary General of the Institute of Arbitration, who kindly agreed to answer some questions regarding the Institute's activities.

AIA: How did you come up with the idea to establish the Institute of Arbitration? When did it happen and what were the underlying circumstances? What was the role of your personal and professional background?

DLF: I came up with the idea to establish the Institute of Arbitration after having a dispute with my boss that happened approximately 20 years ago. Since I am not a lawyer, but economist, I had to explain the situation to my lawyer and then he asked me to write down all my thoughts. I made a 7 pages document and sent it to him. When I received his reply I found out that he had changed only two words in my text and I realized that a lawyer, unlike a party, can not



know all the details of the dispute. As a consequence of winning my dispute I lost my job. I had to look for another one and that was the moment when I discussed the issue with several lawyers and we decided to establish together the institute in 1994. I don't know the way other institutes were established but we started with training. Our Institute of Arbitration needed good arbitrators. We taught arbitration to experts and the course was a great success. In one year we gave 300 paid courses, each of them lasted 3 days. At the same time I engaged people who visited companies and promoted arbitration. At a certain point we had too many arbitrators but no cases. I had to stop teaching. I managed to earn a lot of money with the training, but it was not what I ultimately wanted. When we started having more and more cases, my view about who can be a good arbitrator changed substantially. Sometimes I appoint an expert as an arbitrator but in majority of cases I would prefer a lawyer because an expert is not familiar with the legal issues and he/she keeps asking me for advice and it is more work for us than for him/her. Lawyers can deal with completely different types of cases and they are more flexible in this sense. The dispute, no matter how complicated it is, can be resolved by an arbitrator-lawyer. Moreover, lawyers have more authority, parties are often represented by the lawyers and thus the arbitrator and the parties' representatives can understand each other easier if they are all lawyers.

AIA: What type of cases does the Institute of Arbitration usually handle? You list on the website several Committees and each of them is dealing with a certain type of cases. Can you please address this issue?

DLF: In the beginning we had more building disputes. The problem with building disputes is that if they are referred to a national court it might take the court up to 15 years to deliver a judgment and here I am talking about the first instance only, afterwards there might be an appeal level as well. Of course construction companies are interested in dragging out the process. However, we should differentiate small building companies that are usually eager to resort to arbitration and the big ones that prefer long court proceedings. We started promoting arbitration among small and medium size building companies and later we moved to other sectors. That is how gradually many committees came into existence. If I speak about real estate disputes, they are very simple as basically they are all regarding the same issue. The building disputes are more complicated. At the moment, building disputes are still prevailing among all the cases referred to the Institute of Arbitration but we started having more cases in distribution (franchising), international trading, transport, real estate, mergers and acquisitions. The disputes have become more sophisticated. I believe that there are still many sectors that need arbitration.

AIA: If the parties choose the Institute of Arbitration for resolution of their dispute what kind of dispute resolution procedure do they usually resort to?

DLF: The Standard Dispute Rules used by the Institute of Arbitration contain all the possibilities in only one page. The Rules are short and they include all types of dispute resolution procedures. When the parties wish to resolve their dispute at the Institute of Arbitration one third of them chooses conciliation, one third opts for mini arbitration and one third gives preference to classic arbitration procedure. 10 per cent of the cases resolved through classic arbitration go to our appeal level. I think that ideally 90 per cent of disputes should go to mini arbitration, 5 per cent to conciliation and 5 per cent to classic arbitration. The current state of things is different because, in my view, we do not promote enough mini arbitration that was aimed to reduce the number of cases referred to classic arbitration. The disputes referred to conciliation fall into two main categories: technical and financial

and they constitute 10 and 90 per cent of the total number of conciliated disputes respectively. As far as the outcome is concerned more than a half of financial disputes are solved by conciliation, which cannot be said about the technical ones that almost always go to classic arbitration.

AIA: What is the prevailing nationality of the parties that submit their dispute to your Institute?

DLF: 80 per cent of disputes are between two Belgian parties. The rest of the cases involves French, German, Italian, Dutch and American parties.

AIA: As far as I know, the Institute of Arbitration offers some innovative options for dispute resolution. For example, it is possible to request mini-arbitration on-line or to appeal the final award. How do these procedures work in practice?

DLF: In Belgium it might take up to 4-7 years for a court to decide on the setting aside of the award that is why we established an appeal level. Some ten years ago in the building sector the losing party would always go to court in order to protract the enforcement of the award, especially if the amount at stake was significant. We decided to keep the appeal level within the Institute of Arbitration, because usually the main reason why the party contests the award is solely to delay its enforcement. If the losing party does not appeal the award first within the Institute it can't refer its case for judicial review. Ten per cent of the awards have been appealed so far. None of them has been set aside, though. The losing party had to pay so much for the appeal level that it did not want to go to court anymore. There is a big difference in fees for the proceedings of the first (one arbitrator) and appeal level (three arbitrators). At the first level we charge only a partial fee for registration, we study the case and inform the claimant about the amount acceptable for us. We can always ask more during the proceeding because the claimant wants to obtain an award quickly. But when we deal with the appeal, it is always initiated by the party that is angry and in many cases never wants to have a fast verdict. Therefore at the appeal level we must charge the maximum fee in advance.

Speaking about mini arbitration, we established this type of dispute resolution within our Institute of Arbitration some 6-7 years ago because we had too many cases where we did not receive any reaction from respondents. Thus, in order to save money and time we decided to shorten the classic arbitration procedure. In mini arbitration the registration of the claim, notification and appointment of the tribunal take place at the same time. If there is any reaction from a respondent the case proceeds with the classic arbitration. At the moment around 80 per cent of mini arbitration cases are requested online and from the 1st of January, 2011 it will be the only available way of initiating mini arbitration. The minimum charge for mini arbitration constitutes 100 euro.

AIA: Has there been any case where the party did not refer to the appeal level within the Institute but went to court?

DLF: Yes, there has been a case like that and it was the best day of my life. The court refused to review the case because the losing party had not used its right of appeal yet. You can not refer your case for a review by the national court if you have not exhausted all the procedures within the Institute. It is not the first time that an arbitration institute has an appeal level. For example, in Antwerp there is a special arbitration institute which deals with the disputes regarding vegetable oil and they also have an appeal level. We have to be realistic, an arbitrator is a human being and he can make mistakes. The difference between academic and business

world is that the business world would find the appeal level normal, but the academics would say that it is 'the advantage' of the arbitration just to have one level. In my view, one level is not the most important characteristic of the arbitration, the most important one is time. Many arbitration institutes of today are created by lawyers. The French politician Georges Clémenceau at the time of the First World War said that the war was too important to give it only to militaries, the army. The same is with the disputes – they are too important for a company to give them only to lawyers. Usually lawyers rely on law and they forget about facts of the case. I believe that one must have a business look at the dispute but of course with law in his mind. A good lawyer will find the means to solve the dispute in a short time and may be he will resort to conciliation or negotiations instead of litigation. If not they better choose arbitration to save time and for this reason also money.

AIA: What is the contribution of the Institute of Arbitration to the resolution of disputes in Belgium from your point of view?

DLF: If we compare the number of disputes referred to the Institute of Arbitration with the total number of disputes resolved in Belgium then, in my opinion, the Institute of Arbitration would be either on the 2nd or 1st place among other arbitration institutes of Belgium. Assuming that in total there are around 60 000 disputes in Belgium in one year, approximately 300 of them are resolved by the Institute of Arbitration.

AIA: What are the future plans of the Institute?

DLF: Apart from the projects mentioned earlier we plan to fix the seat of arbitration. Now the seat is either Brussels or the one that parties choose together. We will change it to the capital of the both parties or the claimant will have to choose between his capital and the capital of the respondent.

AIA: If the clients have any concerns or queries about the Institute's activities what is the best way of contacting the Institute?

DLF: Our website was developed in order to reduce the number of the phone calls. Whenever we receive a call the first question that we ask is whether they have already checked our website as it covers a wide range of questions and most probably the issue of concern has already been addressed there. If after visiting our website www.euro-arbitration.org you still have questions, you are welcome to call us. We mail, quite regularly, the information about arbitration in general and the Institute of Arbitration in particular. If there is a concern whether a case should be addressed to us, then the best solution is to call us. If the case is for the resolution at the Institute of Arbitration then it should be sent to us either by post or through the special online service www.lisdirect.net.

AIA: Do you see any possibilities of collaboration of your Institute with AIA?

DLF: We are interested in collaboration with AIA. I know that AIA has a worldwide network of arbitrators. As our Institute

of Arbitration has more and more international cases and we need solutions for all kinds of disputes, no matter how big or small they are we would highly appreciate the assistance of AIA in finding proper arbitrators.

SECURITY FOR COSTS: AN ACCEPTED ASPECT OF PROCEDURE IN ICSID ARBITRATION?

On November 2010, an ICSID Tribunal made a decision on the application for security for costs (in general terms, it is an order by a competent court or tribunal requiring, usually, a claimant to provide security for the costs of its counterparty in the event that its claim is ultimately unsuccessful in the arbitration proceeding) between RSM Production Corporation (Applicant) and Grenada (Respondent). In this case, **there is an interesting analysis regarding the Tribunal's jurisdiction to recommend security for costs as a provisional measure and the circumstances that justify the making of such a recommendation.**

Background

On January 2010, RMS filed a Request for Arbitration against Grenada alleging breach of the 1986 Treaty between the United States and Grenada concerning the Reciprocal Encouragement and Protection of Investment. On the same date the Tribunal was constituted Grenada filed a Request for Security for Costs to protect its rights during the first phase of the proceedings. The Security Application sought an order from the Tribunal that Claimants post US\$500.000 within 14 calendar days of the Tribunal's decision, failing which this proceeding should be suspended until such payment is made.

It is important to note that this is a new arbitration proceeding different from the one that started in 2005 and finished with the rendering of an award on 13 March 2009. The prior Award dealt with RMS's contractual rights in relation to the Agreement and declared: "... *that the Respondent [Grenada] did not breach any of its obligations towards the Claimant [RMS] under their Agreement of 4 July 1996 in failing to issue an Exploration License to the Claimant, such obligation having lapsed on 28 March 2004 and the Agreement having been lawfully terminated on 5 July 2005 so that the Respondent had thereafter no further substantive contractual obligations to RMS*". RMS applied for annulment of the Prior Award. However, RMS has declined to pay the advance on costs requested by the Centre on 13 January 2010, and those proceedings are currently suspended. IF RMS does not pay, the Ad hoc Committee may discontinue the proceedings.

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The profiles will include the following information:

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



Tribunal's Analysis and Conclusions

The Tribunal concluded that the present request gave rise to three principal questions: (a) Does the Tribunal have jurisdiction to recommend security for costs as a provisional measure? (b) If so, do the circumstances justify the making of such a recommendation? and (c) In the event it is appropriate to recommend the lodging of security for costs, is the amount sought appropriate? In the analysis, the Tribunal answered the questions about jurisdiction and circumstances.

Jurisdiction

The Tribunal started with the legal framework to determine if it had jurisdiction for the application for security costs. It started with Article 47 of the ICSID Convention: *"Except as the parties agree, the Tribunal may, if it considers that the circumstances so require, request any provisional measures which should be taken to preserve the respective rights of either party"*. Next, it considered Article 39 of the Arbitration Rules: *"(1) At any time after the institution of the proceedings a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures"*.

The Tribunal concluded that neither Article 47, nor Rule 39 specified the type of provisional measure a Tribunal may recommend. Therefore, it concluded that a measure requiring the lodging of security for costs (by no means as uncommon provisional measure) would not, as a matter of jurisdiction, appear to fall outside a tribunal's power. However, the Tribunal mentioned that this assertion was subject to one caveat: the fact that such a measure cannot be said to relate to the preservation of the applying party's rights – the preservation of which is the only limiting factor on the nature of a permissible provisional measure.

As to what right of a party may be preserved, the Tribunal believed to be correct the *Plama Tribunal's* conclusion, which concluded as follows: *"The rights to be preserved [under Article 47 and Rule 39] must relate to the requesting party's ability to have its claims considered and decided by the Arbitral Tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out"* (Emphasis added).

Next, the Tribunal stressed that to construe the rights that are to be protected or preserved under Article 47 and Rule 39 as being limited to "established" rights make no sense whatever in the context of a provisional measure for their protection. It concluded that any such measure must, by definition, precede a determination of their substantive validity.

Additionally, the Tribunal considered that a requested provisional measure must concern rights which are at issues in the dispute. However, they did not believe that there is any requirement for a provisional measure to relate to the subject matter of the dispute in the same way that the

Maffezine Tribunal seemed to see such a relationship, or lack thereof. To understand the context of this last asseveration, it is important to remember that in *Maffezine v. Kingdom of Spain*, Spain filed an application for a provisional measure, requesting the Tribunal to require the claimant to post a guarantee, bond or similar instrument in the amount of the costs expected to be incurred by Spain in the arbitration. The *Maffezine Tribunal* concluded that:

"Any preliminary measure to be ordered by an ICSID arbitral tribunal must relate to the subject matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters.

In this case, the subject matter in dispute relates to an investment in Spain by an Argentinean investor while the request for provisional measures relates to a guarantee or bond to ensure payment of additional costs and expenses should the Claimant not prevail in the case.

It is clear that there are two separate issues. The issue of provisional measure is unrelated to the facts of the dispute before the Tribunal."

In short, the Tribunal, by majority, concluded that the wording of Article 47 and Rule 39(1), properly construed, was of sufficient reach to enable an ICSID tribunal, in an appropriate case, to grant provisional measures in the nature of security for costs.

Do the Circumstances Justify such a Recommendation?

The Tribunal mentioned that it was beyond doubt that a recommendation of provisional measures was an extraordinary remedy which ought not to be granted lightly. In fact, each of the *Maffezini*, *Casado* and *Libananco* Tribunals reached this conclusion. Besides, the Tribunal mentioned that this was in line with widespread municipal precedent and jurisprudence. Further, the members of the Tribunal stressed that it was also beyond doubt that the burden to demonstrate why a tribunal should grant such an application was on the applicant (in this case Grenada).

Next, the Tribunal mentioned that in case of security for costs, Arbitrators (and courts in jurisdictions which were prepared to make such an order) would rarely think it right to grant such an application if the party from whom the security was sought appears to have sufficient assets to meet such an order, and if those assets would seem to be available for its satisfaction. Moreover, the Tribunal considered that in ICSID arbitration, it was doubtful that a showing of an absence of assets alone would provide a sufficient basis for such an order. To support this idea, the Tribunal mentioned two important arguments. First, it is far from unusual in ICSID proceedings to be faced with a Claimant that is a corporate investment vehicle, with few assets, that was created or adapted specially for the purpose of the investment (this was pointed out in the *Libananco Tribunal*). Second, it is simply not part of the ICSID dispute resolution system that an investor's claim should be heard only upon the establishment of a sufficient financial standing of the investor to meet a possible costs award (this

was pointed out in the *Libananco* Tribunal). Second, it is simply not part of the ICSID dispute resolution system that an investor's claim should be heard only upon the establishment of a sufficient financial standing of the investor to meet a possible costs award (this was noted by the *Casado* Tribunal).

The Tribunal concluded that it was difficult, in the abstract, to formulate a rule of general application against which to measure whether the making of an order for security for costs might be reasonable, but it seemed clear to the members of the Tribunal that more should be required than a simple showing of the likely inability of a claimant to pay a possible cost award. In this case, the Tribunal concluded that Grenada had failed to prove RSM's impecuniosities, or of any unwillingness on their part to pay a cost award. It also stressed that there was also no evidence to suggest that the United States' courts would not fully enforce any cost award that might be made against the Claimants by this Tribunal.

In conclusion, the Tribunal noted that Grenada had failed to meet its burden to show insufficient or unavailable assets, and denied Grenada's Security Application.

Comment

This broad language of Article 47 and Rule 39(1) has been interpreted as empowering an arbitral tribunal to grant an order for security for costs in appropriate circumstances. However, in practice such orders remain relatively uncommon, and are only justified in exceptional circumstances. In any event, security for costs is becoming an established and accepted aspect of procedure in international arbitration. This is the case of proceedings under the ICSID Convention. Additionally, Article 26 of the UNCITRAL Model Law (as revised in 2010) contains expanded provisions on the grant of interim measures by the tribunal. These include orders requiring a party to "preserve assets out of which a subsequent award may be satisfied", which appears to empower the tribunal to order security for costs.

The grant of security for costs involves a sensitive balancing exercise. On the one hand, security serves a valuable role in complementing cost-shifting rules and acts as a deterrent against spurious or frivolous claims. On the other hand, it may impose considerable practical constraints on the ability of a claimant to proceed with its legitimate claims.

In conclusion, the power to order security for costs can be extremely valuable in protecting innocent defendants, both from vexatious and unmeritorious claims and from costs incurred in the successful defense of proceedings commenced by an impecunious claimant. It is a discretionary power and, if properly exercised, should not cause any genuine claim to be stopped. In any event, the applicant should meet the burden of proof to receive the benefit of this extraordinary measure.

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Please contact us at administration@arbitration-adr.org

CALL FOR PAPERS:

Upcoming Conferences of AIA on Class Actions, Dispute Resolution in the Aviation Sector and Dispute Resolution in the Maritime Sector

Alongside with its upcoming conferences, AIA has planned to publish three books throughout the year 2011. Therefore the association is hereby sending out a call for papers regarding class actions, dispute resolution in the aviation sector and dispute resolution in the maritime sector. The expected papers shall be 10 pages long at minimum, written in English language, and shall cover one of the following topics:

Class actions

(Deadline for submission: 1st March 2011)

- ⇒ Papers on various national class action systems;
- ⇒ Papers on interrelation with arbitration;
- ⇒ Papers on interrelation with mediation;
- ⇒ Papers with critical comments on class action systems.

Dispute resolution in the aviation sector

(Deadline for submission: 1st March 2011)

- ⇒ Papers on dispute resolution in passenger rights;
- ⇒ Papers on dispute resolution in package travelling;
- ⇒ Papers on consequences of class action/collective redress mechanisms;
- ⇒ Papers with critical comments on passenger right system, package travelling system and class action system.

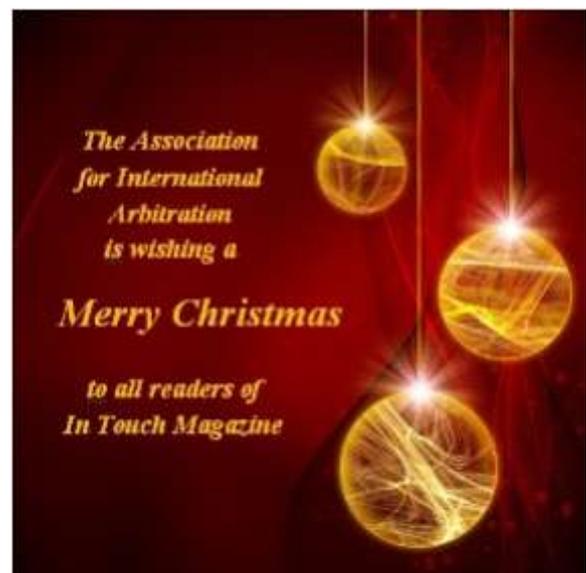
Dispute resolution in the maritime sector

Papers on dispute resolution-related topics in the maritime sector.

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