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AIA Upcoming Events

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

Intensive International Arbitration Training Program
with particular focus on India

AIA in association with the Nani Palkhiwala Arbitration Center, India will conduct the training in Chennai, Tamil Nadu, India.

The course will consist of multiple sessions which are scheduled on consecutive Saturdays for the months of March and April 2012

and

Conference on

Current issues in arbitration in CIS countries

LOCATION: Brussels, Belgium

DATE: June 21, 2012

Further information will soon be available at www.arbitration-adr.org

and

European Mediation Training For Practitioners of Justice

LOCATION: Brussels, Belgium

DATE: September 3-15, 2012

Further information will soon be available at www.emtpj.eu

Quantifying the Costs of not Using Mediation

In April, 2011 the European Parliament submitted a paper based on the final results of a study conducted by the ADR Center in the context of the project funded by the European Commission: "The Cost of Non ADR-Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation". This European Parliament paper aims at exploring and quantifying the impact that litigation has on the time and costs to the 26 Member States' judicial systems and at suggesting possible ways of making mass implementation of mediation by discussing various incentives and regulations. (see <http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf>)

The primary goal of the research is focused on answering the question: "What is the cost of not using a Two-step 'mediation then court' procedure in Europe?" To evaluate the impact of mediation, the study first uses a one step approach (where the dispute is resolved by only resorting to the courts to litigate) and compares it with the two-step approach, which focuses on mediation as an integral part of dispute resolution, failing which the disputants may resort to the courts or arbitration. The two-step approach may be mandated by law, required by court program, or by contract if one party has filed a mediation request during the pendency of the dispute.

Even though the research was done on the basis of Italy and Belgium, this study is beneficial for other EU countries as well.

The study conducts a data analysis on calculating the time needed if mediation is resorted prior to litigation. If mediation results in resolving the dispute, then the time for resorting to litigation is saved. If mediation is not successful, then some time is lost. This is a calculation of the probability or chances to arrive at a solution between the

parties. An econometric formula estimating the social benefit of the two-step approach is critical at this juncture.

Computation of time for resolving a dispute

Let us consider that the law mandates that mediation should be resorted to and upon failure of which, litigation can be tried. In such a scenario, the predicted time to come to a solution or resolve the dispute between the parties, according to the formula is:

$(\text{rate of success in case of mediation}) * (\text{time needed to do only mediation}) + (\text{rate of failure of mediation}) * (\text{time needed to conduct mediation followed by litigation})$

In applying the above provided formula the researches based on the data obtained from the World Bank in respect of Belgium. In general when mediation is successful disputes are resolved in 45 days. If after failure of mediation the dispute moves to court then its resolution is obtained within 550 days. The researchers used a baseline of 100 disputes and considered that in 75% of cases mediation was successful whereas in the other 25% mediation failed and the dispute moved to court.

Hence, if we insert the data into the above provided formula, we will have $75\% * 45 \text{ days} + 25\% * 550 \text{ days} = 171$ days for resolving the dispute. This predicted duration to resolve a dispute is comparatively far lesser than 505 days which according to the study is needed if litigation is used immediately. Further it has to be noted that it is possible that resolution of the dispute may take 550 days, but that is the situation only in 25% of the cases when mediation fails.

Computation of costs in resolving a dispute

Similar to the above computation, the source of data for calculating the probable costs of resolving the dispute is obtained from the numbers of the World Bank. Hence, the probable costs can be computed by applying the following:

$(\text{rate of success in case of mediation}) * (\text{costs of doing only mediation}) + (\text{rate of failure of mediation}) * (\text{costs to conduct mediation followed by litigation})$

In the case of Belgium, let us consider that the rate of success in case of mediation is 75%, the costs of doing only mediation is €7000, then the rate of failure of mediation is 25% and the costs of conducting mediation followed by litigation = $€7000 + €16000 = €23000$.

On application of the above stipulated data to the formula, we have $75\% * 7000 + 25\% * 23000 = €11000$, which is comparatively lesser than the costs of resolving the dispute by litigation which is €16000 according to the study. Also, it has to be noted that in 25% of the cases in which mediation fails, the possible costs to be incurred will be €23000.

Finding the break even-point or the minimum success rate

By considering that 75% of success rate is too high, the break even-point or the minimum success rate is computed by utilizing the formula:

$X * \text{cost of mediation} + (1-X) * (\text{cost of mediation and litigation}) < \text{cost of just litigation}$

Here, X stands for the rate of success in case of mediation and (1-X) stands for the rate of failure in case of mediation.

and

$Y * \text{time for mediation} + (1-Y) * (\text{time for mediation and litigation}) < \text{time for just litigation}$

Here, Y stands for the rate of success in case of mediation and (1-Y) stands for the rate of failure in case of mediation

For Belgium, on applying the World Bank data, this becomes:

$X * 7000 + (1-X) * 23000 < €16000$

$Y * 45 + (1-Y) * 550 < 505 \text{ Days}$

This yields the result that:

X (rate of success in case of mediation) > 44%. As the rate of success of using mediation is greater than 44%, then it is beneficial to resort to mediation prior to litigation.

Y (rate of success in case of mediation) > 9%. As the rate of success of using mediation is higher than 9%, then to save time, it is worth trying mediation first.

This also means that if the success rate is between 9% and 44%, then there is an average on the same time but not on costs in relation to resolving a dispute.

The above mentioned method of computation is applicable for all other countries even though the research was done only in respect of Belgium and Italy.

Final suggestions of the paper

The study finally concludes by stating that training and promotion of mediation are not adequate to increase the usage of mediation across the EU member states. The requirement to "push" or encourage usage of mediation is necessitated. The suggested incentives and regulations which will help encourage mediation are:

- force of law (mandatory law approach)
- to provide tax incentives
- reimbursement of dispute fees
- to provide incentives for judges

While the above mentioned suggestions for furthering the cause of mediation are beneficial, relatively simple ideas such as reimbursement of dispute fees or giving tax credits for successful mediation may have a big impact on encouraging the usage of mediation.

Critical observations of the study

First of all, it is a pity that the researchers did not take into consideration former econometric research about quantifying the costs of not using mediation. Already, in 2009 it has been established that calculating the costs of not using mediation is much more complex. The research of M. Gerritsen, K. Janssen, J. Poort and Weda in 2009 : "*Mediation via rechtspraak; kosten en doorlooptijden, Amsterdam: SEO Economisch onderzoek*" showed that the lower costs for mediation as a first step instead of going to the courts directly to settle the dispute are possible when there is a mutual consent between the parties to resort to mediation for resolving the dispute.

The 2009 research paper that has been published in the Netherlands shows that successful mediation leads to cost reduction of 44 % in civil cases, 48 % in administrative cases and 85 % in tax cases. However, the scenario will be different if not all the issues in dispute are solved through mediation and such issues are left for court, which increases up to 8% the cost of resolution of civil cases. When none of the issues in dispute are solved through mediation, then the costs of the proceedings will increase to about 20% in civil cases and 3% in tax cases.

By utilizing the results obtained from the European Parliament's study and from the 2009



research paper, we can arrive at another formula of significant importance.

The 'cost of mediation' as used in the European Parliament's study can be expressed in terms of 'cost of litigation', multiplied by some factor. In this scenario, let us consider the factor to be 'A' (a percentage). Therefore, we can replace 'cost of mediation' in the calculations by $A \times$ 'cost of litigation'. Hence, we have:

$$X \times \text{cost of mediation} + (1-X) \times (\text{cost of mediation} + \text{litigation}) < \text{cost of just litigation}$$

Here, X stands for the rate of success in case of mediation and (1-X) stands for the rate of failure in case of mediation.

This becomes:

$$X \times A \times \text{cost of litigation} + (1-X) \times (A \times \text{cost of litigation} + \text{cost of litigation}) < \text{cost of litigation}$$

From the above provided, we can deduce that $X > A$

This means that if the success rate of mediation (X) is higher than the relative cost of mediation compared to litigation (A), then it is worth trying mediation first, before going for litigation.

Let us consider an example: if mediation is known to be successful in 45% of the cases ($X=45\%$), and mediation costs 56% of what litigation would cost for the same case ($A=56\%$), then $X < A$ and it is wise to go directly for litigation. On the other hand, if mediation is successful in 60% of the cases, then $X > A$ and it could be ideal to try mediation first.

The above detailed method can be utilized in order to explain the time needed. If $Y > A$ then the rate of success in mediation cases (Y) is higher than the relative time needed for mediation in comparison to litigation (A) and mediation has to be tried prior to litigation. As all of this is about 'probability', nothing is absolutely certain.

Further, on observing the European parliament's study, it is noticeable that there is no discussion that mediation is beneficial to the society as a whole and that a country can benefit on its economy by promoting mediation. The following stipulates the reasons why mediation is not as successful as it has to be:

1. It is not the parties but the national governments that benefit first and foremost from mediation, in spite of which local governments are not promoting mediation in their own cases. According to Art. 1724 of the Belgian Judicial code, public legal entities may only take part in a mediation in the cases provided for by the law or by a Royal Decree decided by the Council of Ministers. It is obvious that mediation for public legal entities should be the rule and not an exception. Local governments should set an example by utilizing mediation in their own cases and this will lead to the increase in usage of mediation in general.
2. Mediation is not that common with the public in general. In 2009, a study revealed that 60% of the population in the Netherlands was unaware of mediation and this is just an illustration of the existing state of mediation awareness. Cross border and national campaigns to promote mediation are the current need of the day.
3. Some judges and lawyers are concerned about losing business when the two-step approach is introduced. Judges are afraid of losing their jobs as local governments may not further invest in

justice and lawyers are considering ADR as synonymous to an alarming drop of revenue.

4. There is lack of good quality control on cross border mediators. There are a large number of mediators engaged in a few cases and this creates a total unbalance between the supply and demand. Voluntary codes of conduct and other control mechanisms concerning the provision of mediation services should become the standard for countering the current situation. For example, AIA established in 2009 a European Mediation Training for Practitioners of Justice which sets criteria for those willing to be cross border mediators. Please visit www.emtpj.eu for details of the program.

Lessons to Be Learnt from the Chinese Lehman Mediation Scheme

by Briana West

Every day, globalization of commerce increases exponentially. Businesses are expanding beyond their national borders and markets into more well-known multinational corporations, where concluding commercial contracts becomes a complex matter with high hopes of rewards, but also huge risk if a deal should fail. Upon failure of a contractual agreement, foreign companies will not always choose to proceed with a dispute in a courtroom in the domestic jurisdiction of the opposing party. This is where the dispute settlement mechanism of mediation has, and should more often, come into play. However, mediation is the last thing companies want to resort to in a dispute; they want to win big (companies tend to care more about winning than going into mediation). International companies should not fear the system of mediation that they, unfortunately, perceive as soft and unreliable. Instead, they should acknowledge the fact that this method of conflict resolution has been used commendably for centuries.

China has been in the forefront, leading the way in mediation, starting as early as the West Zhou period (roughly 1029 BC). For the Chinese, a dispute is considered to be an evil because it disturbs the harmony that governs their social life. Originally, mediation was used on a philosophical basis by Confucius (an ancient Chinese philosopher) who believed that disputes should be resolved by moral persuasion instead of exercise of a sovereign power. Later on, mediation was applied on a legal basis because, historically, China's legal system was corrupt and enforcers of the law were given broad discretion for means of punishment. Therefore, mediation became an alternative method to settle disputes in a fair manner. Progressing at a steady pace, mediation was then utilized on a social basis. Families were organized into clans and members of those clans chose to exhaust all remedies (i.e. mediation) before taking their dispute to the courts. Finally, mediation was exercised for economic reasons when land owners and farmers of small means could not afford to bring their dispute to litigation. This meant mediation was the preferred method to maintain harmony within the small communities. The Chinese have paid close attention to the historical and successful development of mediation and decided to implement this mechanism into the 1989 and 2005 CIETAC (China International Economic and

Trade Arbitration Commission) Rules (CIETAC Rules 2005, art. 40).

Due to the progressive development of mediation, it is no wonder why the people of China chose to use mediation to settle their disputes once Lehman Brothers Holdings Inc. declared bankruptcy on 15 September, 2008. Thousands of Lehman minibonds holders claimed they bought those bonds only upon the assurance by banks that they were low-risk products. Subsequently, the Hong Kong Monetary Authority (HKMA) became involved and facilitated the establishment of the Lehman-Brothers Related Investment Products Dispute Mediation Scheme (also known as Lehman Mediation Scheme). The amounts in dispute ranged from HK\$40,000 to over HK\$5,000,000 (US\$5,000 to \$650,000). The parties involved included 11 Hong Kong licensed banks and many individual investors. Mediators were appointed and each dispute was allotted a mediation session of five hours to come to a settlement agreement. As of 18 February 2009, there had been 105 requests for mediation under the Scheme. Since then, 10 of the 105 requests were settled by negotiation after mediation was requested and another 10 of the 105 requests were settled via mediation. In summary, 20 cases were initiated and all 20 were settled. The HKIAC released an announcement on 19 February, 2009 with the title "Mediation 100% Success for Lehman Brothers-Related Investment Product Cases" ('Mediation 100% Success for Lehman Brothers-Related Investment Product Cases' (HKIAC, 19 February 2009) <www.hkaic.org/documents/Mediation/News/090219_LehmanUpdate_E.pdf> accessed 5 April 2011).

International commercial businesses should become familiar with the mediation practices in China and learn from them in order to not only settle their disputes in a timely and cost-effective manner, but also to possibly stay in good standing with the disputants. Where will mediation be 10 years from now? In the field of law, nothing is predictable. Mediation is not new to society. It has been used for centuries in China and the procedure has been carried out in different areas of law (i.e. public & private) as well as in different corners of the world. It is a mechanism which needs much more publication; more information needs to become available to companies. The Lehman Mediation Scheme is a proof that this resolution method can and does work. International corporations should be more willing to be peaceful and financially sensitive to the current economy where money is fading.

Are Sovereign Bonds an 'Investment' within the Meaning of Article 25 of the ICSID Convention?

by Sophie Bogaert

Introduction

Recent arbitration cases have dealt with the question of how to interpret the notion of 'investment' within article 25 of the ICSID Convention. The ICSID Convention itself is silent on the definition of 'investment'. In the case *Abaclat & others v. Argentina* (ICSID case No. ARB/07/5) the ICSID tribunal split on the interpretation of the *Salini* test.

This case is noteworthy for two major reasons: 1) for the first time ever the ICSID Tribunal has admitted mass claims and

2) it is the first time the ICSID Tribunal had to deal with the issue of whether sovereign bonds constituted an 'investment' within the meaning of article 25 of the ICSID Convention. This article will focus on diverse approaches of the members of the ICSID Tribunal to the interpretation of 'investment'.

Facts of the case

In 2001, Argentina's deep recession reached a crisis point. Argentina defaulted on its debt and suspended payment on its sovereign bonds. In order to restructure its debts Argentina launched in 2005 a voluntary exchange offer pursuant to which existing bonds were supposed to be exchanged for new bonds on revised terms. Italian investors held some 13,5 billion US Dollar of Argentina bonds. A group of the Italian bondholders refused the exchange offer and filed the Request for Arbitration with ICSID. The Italian investors claimed that Argentina had breached its obligations under the Argentina-Italy Bilateral Investment Treaty (Argentina-Italy BIT), which contained an ICSID Arbitration clause, when it defaulted on and subsequently restructured its sovereign debt. The original claim was filed by 180,000 claimants. The number of claimants was reduced to 60,000 in 2010 after a number of them had participated in a second exchange offer on modified terms.

Key issue for ICSID Tribunal

Only investment claims may be arbitrated before an ICSID Tribunal. Therefore one of the key issues in this case was whether sovereign bonds and thereto-related security entitlements could be qualified as an 'investment'.

Approach to 'investment' prior to *Abaclat*

According to the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (ICSID Convention) only legal disputes arising directly out of an investment can be arbitrated before an ICSID Tribunal. The ICSID Convention itself does not provide for a definition of 'investment'. The drafters preferred to leave it to the parties to decide what they would consider as an 'investment' and indeed quite many BITs contain a definition of 'investment'. It was the panel in the case *Salini v. Morocco* (ICSID Case No. ARB/00/4 of 16 July 2001) which intended to solve the problem of the absence of definition of 'investment' in the ICSID Convention and listed its characteristics as involving a contribution, a certain duration, an element of risk and a contribution to the economic development of the host state.

In the aftermath of *Salini v. Morocco* ICSID Tribunals have adopted two different approaches to the notion of 'investment' under the ICSID Convention.

The first approach considers the components of the *Salini* test as mere examples and not all of them need to be fulfilled.

The second approach on the other hand considers the test as a strict one: all criteria are necessary elements that must be satisfied cumulatively.

Majority decision

The majority in the *Abaclat* case (*Prof. P. Tercier and Prof. A. J. van den Berg*) stated that the *Salini* test should not operate contradictory to the intention of the parties or the aim of the ICSID Convention, i.e. the test should en-

courage private investment while giving the parties the tools to further define what kind of investment they want to promote. The *Salini* test remains useful to describe what characteristics contributions may or should have. The majority decided that the only requirement was that the putative investment led to the creation of the value protected under the Argentina-Italy BIT which was, in this case, the right attached to the security entitlements to claim reimbursement from Argentina of the principal amount and interests accrued.

Consequently, the majority found that the bonds in question, and in particular the security entitlements in these bonds held by the Italian investors, qualified as an 'investment' in Argentina.

Dissenting opinion

According to Prof. Abi-Saab, appointed by Argentina, the ICSID Convention contemplated only investments that contributed "to the economic development of the host country". He found that bonds not relating to a financial contribution were *a priori* excluded. He also stated that sovereign bond securities in the dispute did not have connection with the territory of Argentina.

He resigned from the tribunal and stated "*this is the first ICSID case that involves a sovereign debt bond....totally unrelated to a specific project or economic operation or enterprise in the borrowing State. It raises a major issue as to the jurisdiction of ICSID tribunals over a vast new field, with incalculable economic and political ramifications*".

Conclusion

Firstly, the majority's approach to an 'investment' is remarkable. It is questionable that the security entitlements in the hands of the Italian bondholders contributed to the economic development of Argentina. Indeed, the Argentinean bonds with the security entitlements traded through Italian banks did not necessarily represent a contribution of a certain duration or a participation in the risks involved.

This begs the question of whether the strict interpretation of the *Salini* test requires too much, more than the ICSID Convention aims at. In other words, should the parties be free to define 'investment' or should the definition included in the BIT adhere to a minimum of the second approach to the interpretation of 'investment' as contained in the ICSID Convention?

Secondly, it raises questions for the future of sovereign debt restructuring. It can have serious consequences to potential claims against other defaulting states, not least in the light of the insolvability problems of Greece. Indeed, interpreting security entitlements in sovereign bonds as an 'investment' under the ICSID Convention creates a contradiction. When states are in financial difficulties they may take economic measures to restructure their debts in close cooperation with the World Bank or the International Monetary Fund. If creditors of the states can challenge these measures and if ICSID Tribunals can be considered as set up under the auspices of the World Bank Group, can ICSID Tribunals be considered as an appropriate forum to deal with these claims?

Only time will tell what the impact of the *Abaclat* case will be for other defaulting states.

Russian Supreme Commercial Court on the "Lack of Authority" to Conclude Arbitration Agreement

by Dilyara Nigmatullina & Dmitry Davydenko

The case *S. Moiseeva v. CJSC "Tander"* marks a further step of the Russian Supreme Commercial Court to favour arbitration in Russia: the highest commercial court confirmed that notifying a branch of the party of the arbitral proceedings is sufficient for the purposes of the due notice requirement. Also, a reference of a party to lack of authority of its attorney in arbitration is irrelevant if such party was aware of the arbitral proceedings.

Facts of the case

On December 1, 2007 an individual entrepreneur, S. Moiseeva (the "entrepreneur") and CJSC "Tander" ("Tander") concluded sublease agreement. The head of its branch acting pursuant to a power of attorney signed the agreement on behalf of Tander. The agreement contained an arbitration clause providing for resolution of all disputes by the Arbitration tribunal at Ulyanovsk Chamber of Commerce and Industry in Russia. The entrepreneur initiated proceedings at the arbitration tribunal alleging that Tander failed to meet its contractual obligation. On July 6, 2009 the arbitration tribunal partially satisfied its claims.

Tander failed to comply voluntarily with the final award and consequently the claimant requested the state commercial court to issue an enforcement order. The Commercial Court of Krasnodar Region and subsequently on appeal the Federal Commercial Court of the North Caucasian Circuit refused to issue the enforcement order. Both courts considered that Tander was not given due notice because all notifications of the arbitral proceedings were sent to the registered address of the branch whose head was not authorized to represent the company in the arbitral proceedings. Moreover, the representative of Tander at the hearing held a defective power of attorney.

The entrepreneur applied to the Supreme Commercial Court of the Russian Federation (the "SCC") for a supervisory review and requested to vacate the rulings of lower commercial courts. The SCC satisfied the request for the following reasons.

Reasoning of the Russian Supreme Commercial Court

a) notifications of the head of the branch regarding arbitral proceedings

The Law on arbitration tribunals in Russian Federation of July 24, 2002 (the "Law on arbitration tribunals"), regulating domestic arbitration, does not set any specific requirements regarding representation in the arbitral proceedings, nor does it oblige to include into a power of attorney a specific authority to enter into a contract containing an arbitration clause. On April 12, 2011 the Presidium of the SCC already ruled that under the Law on arbitration tribunals a general authority to enter into a contract was sufficient for an attorney to conclude on behalf and for the benefit of a principal a contract containing an arbitration clause.

The head of Tander's branch had such general authority and was empowered through the power of attorney issued by the company. The document gave authority to enter on behalf of Tander into transactions, sign agreements and contracts with



Russian and foreign legal entities and individuals, control their fulfillment, represent Tander in courts of general jurisdiction and commercial ones with all rights of the parties at all stages of the proceedings.

The authority to conclude an arbitration agreement and control their fulfillment also means, in view of the SCC, the authority to receive notifications regarding arbitral proceedings and to participate in them. Russian legislation does not require to indicate specifically in the power of attorney the authority to appear in arbitral proceedings.

The SCC also considered that Tander was given due notice because the head of its branch received notifications regarding arbitral proceedings for the following reasons. Further to article 55.2 of the Civil Code of the Russian Federation (the "Civil Code"), a branch is a separate subdivision of a legal entity, located in a place other than the place of a legal entity itself and exercising all or part of its activities, including its representation. Under article 55.3 of the Civil Code, heads of representative offices and branches are appointed by a legal entity and act pursuant to its power of attorney.

b) lack of notarization of the power of attorney

The SCC disagreed with Tander's argument regarding deficiency of the power of attorney issued by the head of Tander's branch, due to the lack of its notarization. The key issue, as per the court, was whether there had been a violation of a right to judicial protection, i.e. that Tander had not been aware about arbitral proceedings and had not been given the possibility to present its arguments, whereas the fact of improper representation was irrelevant. Tander indeed knew about the proceedings initiated against it from other sources and it could choose another representative for the proceedings. Consequently, the lack of notarization could not be considered as a ground for refusal to issue the enforcement order.

Ruling of the Russian Supreme Commercial Court

Thus, the SCC vacated both rulings of lower courts as being contrary to public interests and violating uniformity of interpretation and application of rules of law by commercial courts. It also ordered the Commercial Court of Krasnodar Region to issue the enforcement order to enforce the award rendered by the Arbitration tribunal at Ulyanovsk Chamber of Commerce and Industry.

Mediation in Italy

by Alessandro Bruni

Introduction

Even though mediation in its multiple meanings (family, civil, commercial, corporate, environmental, social, etc.) is well known in Italy for many years, Italy can be regarded as one of those countries where mediation in its modern form is emerging for the past few decades and only now, a general and common culture with professional discipline and ethics is existent for almost all forms of mediation. However in certain cases, there are still barriers to the use of mediation and lawyers specifically are divided between those "in favour of mediation" and others who are "absolutely contrary" to it.

The European Commission recently published a written resolution, taking a clear positive stand towards the Italian legislation on mediation, which clarifies the possibility that the legislature may provide for an obligation to attempt mediation, without this option preventing the free access to

the ordinary court.

The Legislative Decree no. 28 of 4th March 2010 and the Law no. 69 of 2009 impose an obligation for all lawyers to advise in writing to their clients when mediation is suitable for their cases. This provision has been instrumental in increasing the practice of lawyers to assist their clients in mediation procedures.

Mediation has experienced a luckier period in Italy and from 2007, a majority of the courses relating to mediation training have been approved by the Italian Ministry of Justice for quality assurance and appropriateness. These are advanced level professional training courses for the training of civil and commercial mediators who are expected to occupy top positions (in fact, if they are requested by all parties to a mediation, they are obliged to issue a non-binding proposal about the possibility of resolution of the dispute, and, before writing a negative written minutes paper, they can issue a non-binding proposal, even if they are not requested to do it by the parties).

The Framework of Mediation in Italy

As already recalled, mediation is known in Italy for a long time, but has only started to receive attention as a means of dispute resolution over the last fifteen years or so.

Before the latest Italian law on mediation (the Legislative Decree no. 28 of 4th March 2010) was passed, the mediation procedure had been more commonly known as "conciliazione", since mediation (mediazione) traditionally had another meaning, closer to brokerage and/or to family law. Apart from the new law, the word "mediazione" (translated: mediation) has made inroads amongst the Italian operators and this word is officially adopted in the Italian official text of the EU Directive 2008/52 on civil and commercial matters. The new Italian law has introduced a multi-step procedure: while mediation is the process in which a professional mediator helps the counterparties to hopefully solve their dispute, the conciliation (conciliazione) is the result (positive or negative) of the mediation process.

Currently, the word "mediazione" is applied in civil, commercial, corporate, financial, banking, insurance, family, environmental, criminal and social disputes. The word "conciliazione" is still applied in labour and consumers disputes.

The role played by the Italian Chambers of commerce and by a few leading private ADR bodies in the diffusion of mediation procedures both, before and after, the Law no. 580/1993 is undeniable. In many sectors there appeared a possibility to try to mediate a case and, in some cases, the outcome of the mediation procedure, if positive, started to have binding effects on the parties.

Generally, judges are not permitted by law to refer cases to mediation. They only can "advise" the parties, during the process, to try to mediate their case before them. Only in some cases, as provided in the Legislative Decree no. 274/2000 (relating to the criminal competence of the Italian Judges of Peace) the Judge of Peace promotes mediation, or refers the parties to a public or private Mediation Centre. In other cases judges may only advise the parties to try mediation, without permitting the judge to choose the mediator and/or the mediation provider (as in the Legislative Decree no. 28 of 4th March 2010).



Only in certain disputes the law requires a previous mandatory mediation attempt. Starting from the 1990's the legislature began to require mediation or conciliation and inserted provision in this respect while passing laws that dealt with reforms in various sectors. Some of these earlier attempts were poorly designed palliatives to the chronically ill civil justice system, but the legislative trend has continued and improved certain areas.

The resort to mediation is considered by the Italian law no. 28/2010 as "voluntary" for all disputes but it is a condition for admissibility of a judicial action, and therefore "mandatory", for disputes relating to: condominium; property rights; division; hereditary succession; family agreements; leasing, loan; renting of companies; damages for medical liability and defamation through the press or through other means of publicity; damages derived from driving vehicles and boats; insurance; banking and financial agreements. The parties, in those cases, must first attempt to solve their disputes through mediation before submitting it to the Italian Judicial System. If a party initiates proceedings before the court without first resorting to mediation, the judge shall suspend the case and order the parties first to mediate. Such mediation has to be conducted by one of the ADR Providers accredited by the Italian Ministry of Justice.

The mediation proceeding can last for up to four months, after which the mediation attempt can be considered to be satisfied.

The entire proceeding in this case can be described as follows:

a) The parties (or one of them) submit a written mediation request to an "independent qualified professional- an ADR provider accredited by the Ministry of Justice";

b) The chosen ADR Provider designates an independent mediator (chosen from amongst the mediators accredited by the ADR Provider) and arranges the initial meeting between the parties;

c) The date, location and the name of the chosen mediator are communicated to other parties by the ADR Provider and by the party who initiated mediation, if he/she wants to insure that other parties have received the communication;

d) At this point two different scenarios are possible, depending on the choices open to the parties involved in the mediation. (I) If the parties are able to reach an agreement, the mediator drafts the minutes of the meeting that must be signed by all the parties. Once approved by the President of the court of the district where the chosen ADR Provider has its seat, the signed minutes will be binding on the parties and the agreement will be enforceable. (II) If no agreement is reached by the parties and the mediator is asked by them, he/she is obliged to issue a non-binding proposal about resolution of the dispute, which the parties may choose to accept or refuse. **If the parties (or one of them) refuse the mediator's proposal, the mediation is considered to have failed and every party of that mediation may commence a lawsuit but, then, if the judicial decision is identical to the previous mediator's proposal, such decision may affect the allocation of judicial expenses because the court will refuse to award all the costs and the expenses to the winning party if that party has previously rejected the**

mediator's proposal. In such circumstances, the court will order the winning party to pay the losing party's costs and court fees (here, the new Decree follows the model used for company disputes by the Legislative Decree no. 5/2003, which has been repealed).

Furthermore, the Legislative Decree provides for a soft-entry into the Italian civil procedure system of the so called "mediation delegated by the court" (judicial mediation). The judge may invite the parties to attempt to solve the dispute through mediation at any stage, but before the last hearing.

Judges have another authority: the new Legislative Decree provides that the unmotivated failure of a party to appear at the mediation procedure can be assessed by the judge in the subsequent judicial proceeding and trigger negative inferences, on the basis of Article 116(2) of the Code of Civil Procedure. Additionally, a new legislation (Law no. 148 of 14 September 2011) provides that, in the above-mentioned case, a party who failed to appear will be obliged to pay an amount (equal to the one that a party has to pay to the State when he/she participates in a judicial proceeding) to the State as a sort of sanction.

If a mediation clause is contained in advance in a contract, in a company's statutes or in a company's constitution and if a party has commenced a judicial proceeding without trying to mediate first, the judge or the arbitrator - not automatically but only upon request of the interested party - must postpone the proceeding pending before him/her and fix a time, maximum up to 15 days, so that the parties can request mediation by an accredited provider.

All mediators shall keep confidential any information arising out of (or in connection with) the mediation, including the fact that the mediation exists and has been conducted between the parties.

In addition, the Decree provides that mediators cannot be called as witnesses and the parties to mediation are not allowed to use any communications made and any information collected during mediation in the subsequent judicial proceedings.

Besides, the law confers authority to the Bar Associations to establish, within their territorial jurisdiction, chambers of mediation, directly managed by a Bar Association staff. These bodies may be included in the Register, which is kept by the Ministry of Justice, of the bodies authorized to conduct mediation of civil and commercial disputes.

Other professional associations may also establish mediation chambers to resolve disputes relating to specific subjects. Such chambers will be included in the above mentioned Register.

Finally, the text provides an obligation for lawyers to inform their clients, before the commencement of judicial proceedings, about the possibility of using mediation and involving mediation providers. The parties are granted fiscal benefits: all documents and measures related to the mediation process are exempt from stamp duty and all expenses, taxes or charges of any kind or nature. The mediation minutes are exempt from the registration fee.

Before enactment of the Decree no. 28 of 2010 the most significant innovation over the last few years

for the development of mediation was in the Legislative Decree no. 5/2003 (now repealed by the above-mentioned Law no. 69/2009, and by the subsequent Decree no. 28/2010 that has taken its place and has broadened the scope of mediation to all civil and commercial disputes). The Decree no. 5/2010 has provided for both mediation and arbitration for, among others, disputes within a company, banking and financial disputes.

With the new Decree (as in the repealed Decree no. 5/2010), a formal form of registration with the Ministry of Justice is required for those wanting to conduct mediation in compliance with the new law. Training bodies, such as "CONCILIA", one of the leading Italian ADR providers, headquartered in Rome (www.concilia.it), are also required to register, to submit their training programmes, and to implement a system of quality control by reporting back to the Ministry of Justice.

The system means that, at present, only those ADR bodies listed on the Ministry Register can act as an ADR Provider (with their accredited mediators) in civil and commercial mediations and other disputes covered by the current legislation.

Which means that parties who entrust their civil and commercial dispute to an unregistered mediator risk not being able to enforce any resulting agreement. It seems like the legislator believes that this interventionist regulatory approach is the best for Italy, and that this is the most appropriate way to implement the EU Directive no. 2008/52 in the Italian judicial system.

Conclusion

From the above mentioned, it can be deduced that mediators are highly-qualified specialists who are continuously controlled by the ADR providers and indirectly by the Ministry of Justice. According to the law, the minimum requirement for civil and commercial mediators is to attend a 50-hours basic training course on mediation. In addition to the course they have to attend a minimum 18-hours training course for refreshment every two years. Every course must be organized by an ADR provider accredited for training by the Italian Ministry of Justice.

The preparation of mediators for civil and commercial matters is extremely important as they can be requested by all parties to make a non-binding proposal agreement and each party will have to indicate if it agrees with this proposal. However, the parties will not be able to rely on any civil and/or commercial mediation agreement unless mediation has been conducted through a registered ADR-Provider. Thus, neither mediation-training, nor mediation-providers are likely to be useful, unless they satisfy the requirements of the Ministry of Justice.

CEDIRES - New Center for Arbitration and Mediation in Belgium!

A new center for arbitration and mediation has been launched in Belgium at the end of 2011: The Center for Dispute Resolution (CEDIRES, www.cedires.be).

The objectives of CEDIRES is to offer high quality dispute resolution services in order to allow individuals and companies to solve their disputes rapidly and at acceptable costs.

What distinguishes CEDIRES from traditional centers for mediation and arbitration, is its exceptional flexibility, its speedy procedures, its ability to offer low-cost mediation and arbitration services for small and medium-sized businesses, combined with its ability to offer the highest quality mediation and arbitration services for the most complex and high-stake national and international disputes.

CEDIRES has rapidly grown to become a team of approximately 30 members, some of whom are amongst Belgium's most famed legal professionals. Members also include five university professors, and six (former) heads of bar associations ("stafhouders" / "bâtonniers"). CEDIRES has immediate access to a vast international network, facilitated by its member Mr. Johan Billiet, President of the Association for International Arbitration. The Center for Dispute Resolution was founded by its President Dr. Kris Wagner (LL.M., Harvard) and H el ene de Looz-Corswarem its current Vice-President.

The people who constitute the center are obviously its most valuable asset. However, in addition to the remarkable team constituting CEDIRES, the association has other aces distinguishing it from its competitors. The CEDIRES Rules of Procedures, for instance is a sophisticated yet simple set of rules, easily understandable, even for foreign lawyers, since the CEDIRES Rules of Procedures are to a large extent based on the UNCITRAL Rules, which have withstood the test of time. For the sake of simplicity and transparency, CEDIRES uses only one set of Rules, both for mediation as well as arbitration. A mediation attempt before CEDIRES which happens to fail, would however not be a pointless effort since the procedure continues in that case as an arbitration. The parties, therefore have the guarantee that eventually their dispute will be resolved.

The absence of an appeal and the possibility for company lawyers to plead, can in many cases contribute to important cost savings.

CEDIRES mediation and arbitration proceedings can be organized anywhere in the world. The center is located at a 45 minute travel towards the south of Brussels, in the town of Buvrinnes. Mediations and arbitrations can take place in the charming and spacious Ch ateau du Bois d'Angre, the seat of the CEDIRES.

Perhaps because of lack of serious competitors, certain traditional arbitration institutions have to some extent corrupted the reputation of arbitration in the eyes of many members of the business community. As a consequence, many people are of the opinion that arbitration is excessively expensive, and that the procedures are not that much faster than ordinary court proceedings (or in any case, not expedient enough). CEDIRES intends to stir things up and harness the true potential of arbitration and mediation. For those looking for high quality mediation and arbitration services, who wish to obtain value for their money, without watching the seasons change as their dispute lingers on, CEDIRES is the place to be!

Review – Czech Yearbook of International Law: “Rights of the Host States within the System of International Investment Protection”

by Semir Sali

The second volume of the Czech Yearbook of International Law (CYIL) focuses on current issues of international investment law, albeit from a different perspective, namely that of host states within the System of International Investment Protection.



This “paradigm shift”, – as the editors choose to call it - in contrast with the classical focus on the rights of foreign investors vis-à-vis host states, seems to be the result of the increasing number of counterclaims brought by host states before Investment Arbitral Tribunals against foreign investors and the need to restore a balance in the International Investment Law. This is done, *inter alia*, by touching upon other issues such as:

tax aspects of foreign Investments, confidentiality and publicity in investment arbitration, contractual choice of forum, application of MFN clauses to jurisdiction provisions, international review of decisions concerning recognition and enforcement of foreign arbitral awards, challenge to the traditional BIT system, etc.

Included in the second volume, readers will also find useful case law, book reviews and various news and reports pertaining to private and public international law. Apart from its importance to students and academics, this volume of the CYIL is also a valuable tool for legal practitioners and government officials who can find useful advice on how to approach practical legal issues involving international investment protection.

The CYIL is available for purchase at http://www.jurispub.com/cart.php?m=product_detail&p=8088

AIA Recommends to Attend

Conference on ADR in Poland



The Court of Arbitration at the Nowy Tomyśl Chamber of Commerce and the Association for International Arbitration are hosting a conference “Unification Tendencies in ADR and the Divergences of National Legal Systems” on March 16th, 2012 in Nowy Tomyśl (Poland).

Applications can be sent until March 10th, 2012 to sa@nig.org.pl.
Contact numbers: + 48 61 44 20

185 and + 48 608 080 345. Participation at the conference is free of charge.

Workshop on mediation by Adimer Association (Spain)

Workshop for senior and mid-level entrepreneurs

6th and 13th March, 2012 from 9:00 am to 2.00 pm

Business Mediation is a process of problem solving that enables companies to resolve conflicts both internally and in relation to other public and private agencies by avoiding litigation, preserving confidentiality, trade relations and quality of labor relations.

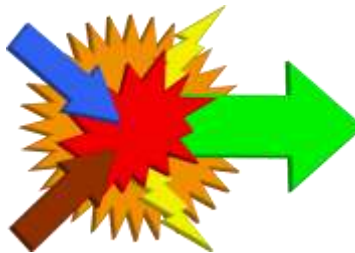
The workshop objectives are:

- ⇒ To promote mediation as a means of conflict resolution in business as an alternative dispute resolution to court proceedings
- ⇒ To provide a forum for debate and analysis for professionals
- ⇒ To raise awareness among organizations for the need to seek new avenues of conflict resolution and to encourage them towards a culture of agreement, leaving aside the mentality of litigation and confrontation.
- ⇒ To discuss the issues subject to mediation in business, its various forms and its application to the job.

For more information, please visit: <http://www.adimer.org/>, or email at adimer@adimer.org

Transformative Mediation in Portorož, Slovenia

Rakmo Institute is pleased to invite you to the One-day Seminar: “Transformative Mediation: Core Principles and Practice”, 12th of March 2012 and the 4 days Training: “Transformative Mediation: Ideological Foundations and Practice”, 13-16th of March 2012.



Both, the seminar and the training will be conducted by Joseph P. Folger Ph.D. from The Institute for the Study of Conflict Transformation & Temple University, a founding father of Transformative Mediation and co-author of the books

“*The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*” and “*The Promise of Mediation: Transformative Approach to Conflict*”, which represent the fundamental literature work concerning transformative mediation.

Both, the seminar and the training will be held in Portorož, Slovenia.

Training Fee: € 1990,00 (for 4 day training)

Registration Fee: € 360,00 (for 1 day seminar)

For more details, please visit <http://www.rakmo.si/seminar-folger2012.htm> and <http://www.rakmo.si/training-folger2012.htm>.

The number of seats is strictly limited!