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AIA Upcoming Events

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

European Mediation Training for Practitioners of Justice

LOCATION: Brussels, Belgium

DATE: September 3-15, 2012

See details below and on www.emtpj.eu

and

Intensive International Arbitration Training Program

with particular focus on India

LOCATION: Chennai, Tamil Nadu, India

Consisting of sessions on four consecutive

Saturday's (August 4, 11, 18 and 25, 2012)

AIA will conduct the training in association with the Nani Palkhivala Arbitration Center, India.

To register and for more information visit www.nparbitration.in

European Mediation Training for Practitioners of Justice



After two years of success, Association for international Arbitration (AIA) is proud to announce the third edition of its European Mediation Training for Practitioners of Justice (EMTPJ). AIA initiated the EMTPJ project in the year 2010, with the support of the European commission and in collaboration with the HUB University of Brussels, Belgium and Warwick University, United Kingdom. It marked the first time since the passage of the EU Directive on Mediation that professionals from around the world were brought together to be trained as a new class of mediators.

EMTPJ is recognized by the Belgian Federal Mediation Commission according to the Belgian Law of February 21, 2005 and the decision of February 1, 2007 concerning the settlement of the conditions and the procedure for the recognition of training institutes and of trainings for recognized mediators.

The EMTPJ course is unique because its ultimate goal is to enhance and integrate the different mediation cultures of the EU member states into one, legally sound method of international dispute resolution. It brings together attendees from all over the world, creating a multinational and multicultural environment that fosters exchange of different perspectives, experiences and gives possibility to form a genuine international mediation outlook. Upon successful completion of the EMTPJ course, students may apply for accreditation at mediation centers worldwide.

EMTPJ 2012 is a two-week training program that will take place this year from 3rd to 15th of September. In line with previous training courses, the EMTPJ 2012 program aims to introduce and promote the concept of European mediators in civil and commercial matters. The course will consist of 100 hours of intensive training sessions including an assessment day. The course will cover the following essential topics: conflict theory and mediation, intervention in specific situations, theory and practice of contract law in Europe, EU ethics in mediation, analytical study of conflict resolution methods, the stages in mediation process, and practical training sessions.

The course lecturers for EMTPJ 2012 are: Mr. Eugene Becker, Mr. Johan Billiet, Mr. Philipp Howell-Richardson, Mr. Philippe Billiet, Mr. Alessandro Bruni, Mr. Andrew Colvin, Mr. Frank Fleerackers, Dr. Paul R Gibson, Ms. Lenka Hora Adema, Mr. Willem Meuwissen, Ms. Linda Reijerkerk, Mr. Arthur Trossen, and Mr. Jacques de Waart.

For registration and a more detailed program of the course, logistical information and lecturers, please visit the website: www.emtpj.eu.

Additionally, for those applicants, who come from outside EU, the reduced fee might be applicable. For more information, please, contact: administration@arbitration-adr.org

The participant fee includes a book compiling the entire training material and lunch on all days of the program.

Check the video regarding EMTPJ:

<http://www.advocatennet.be/videos/european-mediation-training-for-practitioners-of-justice/a2031>

AIA June Conference on Arbitration in CIS Countries

by Polina Gryganska and
Dilyara Nigmatullina

On June 21, 2012, the Association for International Arbitration (AIA) together with the Brussels Institute for Contemporary China Studies (BICCS) organized a conference on "Arbitration in CIS countries: current issues". It was held at the Karel Van Miert Building of the Vrije Universiteit Brussel. The media partners of the conference included the CIS Arbitration Forum and the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC). The organizers also relied on the media-support of the web-site "arbitrations.ru". The conference gathered many well-known leading arbitration practitioners from CIS and non-CIS countries whose professional questions and interesting comments created a very productive discussion. The representatives of the CIS Embassies in Belgium also attended the event. The aim of the conference was to enhance and promote the intercultural dialogue and cooperation among lawyers, arbitrators and experts.

The topics chosen for the conference covered diverse facets of arbitration practice in CIS countries. They varied from the general policy of CIS countries towards arbitration to such specific and controversial questions, as the matter of corruption and bribery in arbitration or recognition and enforcement of arbitral awards annulled in the country, where they were rendered etc.

The program of the conference included four sessions. Mr. Edouard Bertrand, Of Counsel from Campbell, Phillipart, Laigo & Associates; Mr. Johan Billiet, President of the AIA, Managing Partner at Billiet & Co, Brussels, and Mr. Graham Coop, independent international arbitration and energy lawyer based in Brussels, acted as moderators throughout all the sessions.

After a warm welcoming speech of Johan Billiet, where he addressed the main issues and current trends in CIS arbitration, the speakers of the first session took the floor.

Session 1: General policy of CIS countries towards arbitration

The speakers of the first session on general policy of CIS countries towards arbitration were Mr. Vladimir Khvalei, Vice-President of the International Court of Arbitration



ICC and Partner at Baker & McKenzie, Moscow office; Mr. Roman Zykov, independent arbitration lawyer and arbitrator and Mr. Andrii Astapov, Managing Partner and Head of International Arbitration and Litigation practice at Astapov Lawyers International Law Group, Kiev, Ukraine.



Mr. Vladimir Khvalei provided a comprehensive overview of "arbitration picture" of CIS countries (with particular focus on Russia, Belarus, Ukraine and Kazakhstan) in comparison with each other, disclosing the most significant features of each of them. After his presentation one could discover, that Russia presents very liberal requirements for the registration of arbitration courts (which can administer international disputes), whereas Ukraine adheres to the policy of not allowing the establishment of any international arbitration courts, which are not envisaged in law. Belarus and Kazakhstan have also gained solid experience with creation of permanent arbitration institutions.

What one could find of interest in Mr. Roman Zykov's presentation, was his attempt to trace the last changes to the arbitration law of Russia further to UNCITRAL Model Law, as amended in 2006, and the intricacies of the implementation thereof. Additionally he provided a detailed overview of the Russian recent case law concerning different arbitration issues, such as state court's interim measures of protection in aid to arbitration (Edimax Ltd. v. Shalva Chigirinsky), optional jurisdiction clauses (Red Burn Capital v. ZAO Factoring Company Eurocommerz, Sony Ericsson Communication v. Russian Telephone Company) etc.

Discussing the general policy towards arbitration in Ukraine, Mr. Andrii Astapov not only laid out the sources of Ukrainian arbitration law in all their peculiarities, paying attention even to the Resolution of the Supreme Court of Ukraine (which

does not comprise a source of law in Ukraine), but also analyzed the general picture of arbitration practice, by including the latest statistics on arbitration cases, dealt with in Ukraine. What was also of high interest for the arbitration practitioners was the issue of arbitrability, which is not clearly defined in the Ukrainian law and which Mr. Astapov thoroughly discussed during his speech. Furthermore, he paid special attention to a well-known case Raiffeisen Property Management GmbH v. Double W LLC in order to explain the whole system of enforcing and recognizing foreign arbitral awards in Ukraine.

Session 2: Specific issues in arbitration in CIS countries (part 1)

The speakers of the second session, Mr. Dmitry Davydenko, Senior Lawyer at Muranov, Chernyakov & Partners, and Mr. Yaroslau Kryvoi, Senior Lecturer in Law at the University of West London, discussed the situation with the arbitrability of real estate and corporate disputes and the phenomenon of bribery in arbitration in Russia.

Mr. Dmitry Davydenko focused mainly on the question of uncertainty of the arbitrability definition and the discrepancies deriving therefrom. The public was impressed by his concise analysis of the dissidence of opinions of the Supreme Commercial Court and the Constitutional Court of the Russian Federation on the rules of disputes' arbitrability and non-arbitrability. A significant part of his presentation was dedicated to the issue of arbitrability of corporate disputes, supported by the examination of the Novolipetsky Metallurgicheskiy Kombinat v. Nikolay Maksimov case. But most importance, in our opinion, presented his analysis of the question, whether the Supreme Commercial Court is generally hostile to arbitration.

More ambiguous questions were raised during the presentation of Mr. Yaroslau Kryvoi about the correlation between bribery and Russia-related arbitration. The speaker disclosed openly one of the most troublesome arbitration (and not only) topics in all CIS countries. His conclusions were based on various data both of international and domestic origin. Especially attractive was the part, in which he envisaged recent legislative amendments to Russian law, adopted in order to bring it in compliance with the requirements of the OECD Anti-Bribery Convention.

Session 3: Specific issues in arbitration in CIS countries (part 2)

The third session included mainly discussions of the topic of recognition and enforcement of international arbitral awards in Russia and Ukraine, but also, in particular, the interim measures at this stage. The speakers of this session were Mr. Igor Sierov, Associate at Arbitrade, and Ms. Dilyara Nigmatullina, Manager of the AIA, Of Counsel at Billiet & Co, Brussels.

Mr. Igor Sierov made an expanded comparison of Ukrainian law, relating to interim measures at the stage of the recognition and enforcement of international arbitral awards, before and after the 2011 reform. But the most precious part of his presentation was, of course, the outline of the guidelines for obtaining court-ordered interim measures in Ukraine. Mr. Sierov supported each of his recommendations with relevant court practice, which was of value for all arbitration practitioners.

Ms. Dilyara Nigmatullina

managed to give an all-encompassing survey of the existent mechanisms of recognition and enforcement of annulled arbitral awards. She focused on the recent Russian case law, concerning the above issue, paying special attention to the *Ciments Francais v. Sibirskiy Tsement* case. It was a challenge to correlate the decisions of different courts in this case and draw relevant conclusions thereof, but Ms. Nigmatullina succeeded therein. She also analyzed a mirror situation: the issue of enforcement in the Netherlands of arbitral awards annulled in Russia.

Session 4: Sector-specific arbitration

The final session comprised discussions of very diverse topics, including investment disputes at the SCC, arbitration in the Energy Sector and the basics of the WTO Dispute Settlement System (accompanied by examples involving CIS countries). The speakers of this session were Mrs. Natalia Petrik, Legal Counsel at the SCC; Mr. Timur Aitkulov, Partner at Clifford Chance, Moscow,

Russia, Litigation and Dispute Resolution practice and Ms. Maria J. Pereyra, Counsellor of the Legal Affairs Division of the World Trade Organization (WTO).

Mrs. Natalia Petrik gave an overview of the SCC's investment caseload. She disclosed not only the general caseload data of the SCC, but also certain procedural issues, arising out of the *Bilateral Investment Treaties' (BIT) and Energy Charter Treaty's (ECT) arbitrations*. Moreover, Mrs. Petrik provided information regarding the duration and necessary steps of the arbitral proceedings at the SCC.

In his presentation on the arbitration in the Energy sector Mr. Timur Aitkulov raised a controversial question of whether the Russian Federation is bound by the ECT.

This was made with the regard to *Yukos v. the Russian Federation* case, all the most triggering intricacies of which were revealed throughout his speech. Mr. Aitkulov also examined the issue of inconsistency of the provisional application principle with the Russian law.

Ms. Maria J. Pereyra

gave a detailed outline of the experience of CIS countries, which are members of the WTO, of using the WTO dispute settlement system. Furthermore, she analysed the reasons for Ukraine (which is the only CIS state that as a WTO-member has frequently made use of the WTO Dispute Settlement System) to raise its claims. Additionally, Ms. Pereyra revealed how, in general, the system of defence in the WTO Dispute Settlement System works.

Each of the conference attendees received a 295 pages book, published by MAKLU, containing articles regarding topics presented and discussed throughout the conference day as well as relevant annexes.

Preparing for an international conference required manpower and inputs from a large number of people. Many people took time from their busy schedule to contribute towards the success of this conference. The



organizers of the conference succeeded in their aim, by creating a warm and productive atmosphere among the participants.

We strongly believe that the conference will serve as a stepping stone for further interaction and activities between AIA and arbitration practitioners, academics and legal professionals from CIS jurisdictions. We hope, that AIA will continue to organize events similar to the CIS Conference in the future and everyone interested in the topics of arbitration and mediation will have the opportunity to learn and share experience with ADR experts and professionals.

CAS at the London 2012 Olympics

by Ian Blackshaw

Later this month, the Summer Olympic Games - often described as 'the greatest sporting show on earth!' - will be celebrated in London. And, once again, the Court of Arbitration for Sport (CAS), which was set up in 1983, upon the initiative of the former IOC President, the late Juan Antonio Samaranch, and opened its doors for business in 1984, will be on hand in the form of its so-called 'Ad Hoc Division' (AHD) to settle any disputes arising during this major event.

In fact, CAS AHD has operated at the Summer and Winter Olympic Games since the Centennial Games were held in Atlanta in 1996. CAS offers this service free of charge to athletes, sports governing bodies and officials - of course, if parties in dispute hire lawyers to represent them or the interpreters (the official languages of CAS are French and English), they will have to pay their fees - and CAS undertakes to give a ruling within twenty-four hours. In sport, time is of essence!

It is an express condition of participation in the Games that all athletes must submit to the jurisdiction of CAS. The jurisdiction of CAS AHD derives from the provisions of article 61.2 of the Olympic Charter, the latest version of which dates 8 July, 2011. The provisions are as follows:

"Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration (emphasis added)."

All athletes competing in the London 2012 Games must agree, whether they wish to do so or not, in their entry forms to submit to the 'exclusive' jurisdiction of CAS AHD and abide by the following 'undertaking' which they must also

sign:

"I shall not constitute any claim, arbitration or litigation, or seek any other form of relief in any other court or tribunal."

The kinds of disputes contemplated by this provision include:

eligibility disputes;

doping test results; and

event results or referee penalties.

Athletes who fail to give this 'undertaking' will not be allowed to participate in the Games, even though they have qualified on sporting grounds to do so.

Quaere: is this a valid and legally binding consent to arbitration? Also, can the jurisdiction of the ordinary courts be ousted in this way?

As it is well known, arbitration is a consensual process and relies on the agreement of the parties who submit their dispute thereto. Thus, is the above undertaking the result of an exercise of freewill on the part of the athletes, who, in reality, are not given any choice in the matter if they wish to participate in the Games?

The juridical position seems to be clear and is as follows. The agreement to refer a dispute to arbitration is a contract in law; and like any other contract requires mutual consent ('*consensus ad idem*'). Such consent must be the result of the exercise of independent freewill. If a party is forced into a contract against his/her will, the lack of real and genuine consent will vitiate the contract. In other words, there is no legally binding agreement and nothing, therefore, to enforce by law. These are the basic and widely accepted rules of contract law. And what about the other matter of ousting the jurisdiction of the Courts, which, generally speaking, is against public policy and, as such, any attempt - even by agreement - to do so is void?

These are thorny issues and ones that, to the best of my knowledge have not - to date - been tested before CAS or the ordinary Courts with jurisdiction in the matter. As to the competent Courts, in view of the decision in the case of *Angela Raguz (Angela Raguz v. Rebecca Sullivan & Ors, 2000 NSECA 240; CAS Digest II, p. 783 - CAS Awards Sydney 2000, p. 185)*, the applicable law is Swiss and the competent Courts are the Swiss Cantonal Courts and,

ultimately, the Swiss Federal Supreme Court, because

CAS and its AHD



have their 'seat' in Lausanne, Switzerland, even though the physical place of arbitration is elsewhere – in that case, Sydney, Australia. Because of this, the New South Wales Court of Appeal held that it did not have jurisdiction to deal with the dispute, which was an eligibility one. As CAS AHD, as stated above, derives its jurisdiction from the Olympic Charter, which governs the IOC, which is based in Switzerland with its seat in Lausanne, again the proper law would, in my view, be Swiss and the competent Courts would also be the Swiss Cantonal Courts and the Swiss Federal Supreme Court, if the submission to CAS AHD were to be challenged by a disaffected athlete. A rather complex situation legally!

What I can say, however, with some degree of certainty, is that, before CAS will accept any case, it must be satisfied that it has actual jurisdiction. This is not a given in every case: CAS does not have any inherent jurisdiction; only such jurisdiction as is expressly conferred upon it.

So, let the London 2012 Games commence and may the best man/woman win in their respective events and, furthermore, may sportsmanship and fair play prevail both on and off the Olympic venues!

Boor Review: The Core Standard of International Investment Protection: Fair and Equitable Treatment

by Polina Gryganska



In her book Dr. Alexandra Diehl provides deep analysis of one of the basics of investment protection standard – Fair and Equitable Treatment (FET).

The author poses a fundamental question for herself of whether the FET Standard is a pitfall or a safeguard for investors and States, which she successfully examines throughout the pages of the book.

The book is divided into two main parts, namely the Framework of Protection and the Content and Scope of the FET Standard.

To get more details, one should look at the following six comprehensive chapters, that the book comprises as well:

- 1) Sources of the FET Standard;
- 2) Forums for Solving Investment Disputes Dealing with FET;

- 3) Concluding Analysis: The Investment Regime as a Regime of Networks;
- 4) Determining the Applicable Law;
- 5) Direct or Derivative Rights;
- 6) The Content of the FET Standard.

In the beginning the author gives a survey of the role of the FET standard within the constituent parts of the international investment regime. Afterwards she explores the content and scope of the FET standard, providing definitions of the terms "fair" and "equitable".

It should be said, that though there is a great number of researches on international investment protection and arbitration, this book should be distinguished by its in-depth concise study of the above issue, its all-embracing approach and original conclusions.

This book is available for purchase at <http://www.kluwerlaw.com/Catalogue/titleinfo.htm?ProdID=9041138692>

The members of AIA receive a 10% discount.

Advisory Board Meeting of AIA European Mediation Network, 22nd of June, 2012



Under the guidance of the AIA on June, 22, 2012, the Advisory Board Meeting of AIA European Mediation Network (Network) was held. The Network comprises mediation centres established in different EU Member States.

The participants of the Advisory Board Meeting elected the new Board Members of the Network during the meeting. Those are: Ivan Veroustraete (AIA), Elena Koltsaki (Greek Mediation Institute), Andrew Colvin (Concilia) and John GUNNER (InterMediation). Maria Francesca Francese (InMedia) volunteered to provide technical support for functioning of the net-



work.

AIA thanks everyone for active participation at the meeting.

Mediation as part of other access to justice mechanisms

Mediation as a service to be delivered to two parties in a conflict on a voluntary basis is not a viable proposition. There are too many problems at the demand side. New value propositions are needed. Mediation is likely to consist a number of services that are integrated in other access to justice mechanisms.

This is the conclusion of a position paper by Barbara Baarsma of SEO economic research and Hiil academic director Maurits Barendrecht prepared for the Dutch Mediation Institute and the Dutch Ministry of Justice. Baarsma and Barendrecht investigated 6 potential explanations for the low number of mediated cases in Netherlands and elsewhere.

Mediation may be an unknown product, transparency of quality and costs may be a problem and positive external effects are not fully internalised in the price. But the most likely cause it does not sell is that a mediator needs two buyers who are unlikely to agree on a way to resolve their conflict (known as the submission problem in the dispute resolution literature). Moreover, facilitative mediation cannot guarantee a fair outcome if the dispute is of a distributive nature (about money or allocation of assets).

So mediators better find ways to integrate their services in other dispute resolution products and they increasingly do so. Many lawyers, paralegals and legal expenses insurance companies now use mediation methods. Judges use such techniques in the court room. Government agencies, and companies facing many potential disputes integrate them into complaint handling mechanisms.

This integration could be done in a much more transparent and effective way. Mediators could sit on cases together with judges in higher value cases, and judicial mediation can be an option for lower value ones. Online dispute resolution with mediation services is another possible way forward. Transparency of quality and costs of these integrated services is an issue. Protocols and best practices for dealing with disputes could ensure that clients know that mediation techniques belong to the state of the art of solving conflicts and what they can expect

from lawyers, courts and any other supplier on the market for conflict resolution.

Mediation could also be offered with modules for dealing with distributive issues and for conflict resolution without the cooperation of one of the parties. Innovation is needed and has a huge potential.

Published at http://www.hiil.org/project/mediation-2-0?goback=%2Egmp_1863991%2Egde_1863991_member_123727192

Russia as a Place for Arbitration (published

at www.iccwbo.ru, www.arbitrations.ru)

In September 2011 ICC Russia (ICC National Committee in the Russian Federation) launched an initiative aimed at improving Russia's image as a place for international arbitration – Survey "Russia as a Place for Arbitration". The survey was announced at various arbitration-related internet sites, arbitration groups in social networks and distributed via email and at ICC Russia conferences.

The purpose of the survey was to identify the participants' views and study factors that influence the choice of Russia as a place for international arbitration, to enable work towards creating better conditions for international arbitration in Russia and promoting Russia as a place for arbitration.

The results of the survey were analyzed and a summary drafted by the Task Force of the survey. The draft was subsequently approved by the ICC Russia Arbitration Commission at its regular meeting.

The final report on the results of the survey is now available, comprising the description of the findings (in English and Russian), with the diagrams attached as Annex I (in English and Russian), and the list of the survey participants who agreed to the disclosure of their participation attached as Annex II (in the language used by the participant of the survey).

The results of the survey are published at [ICC Russia](http://www.iccwbo.org)

