

November 2012



CONTACT US:
146, Avenue Louise
B-1050 Brussels
Belgium
Fax: +32 2 646 24 31

Inside this month's issue:

<i>AIA Upcoming Events</i>	1
<i>Effective Use of Damages Experts in International Arbitration</i>	1
<i>Book Review: The Public Policy Exception Under the New York Convention</i>	3
<i>New National and International Arbitration Statute for Colombia</i>	3
<i>Book Review: Arbitration – The Next Fifty Years</i>	5
<i>The Republic of Tajikistan Acceded to the New York Convention</i>	5
<i>Book Review: Arbitration Advocacy in Changing Times</i>	6
<i>Appeal of Ecuador against an ICSID Award</i>	7
<i>Book Review: Mediation. Principles and Regulations in Comparative Perspective</i>	8
<i>Book Review: The Practitioner's Handbook on International Arbitration and Mediation</i>	8
<i>No Mandatory Mediation in Italy Colloquia Papers on International Arbitration</i>	8
<i>AIA's Partnership with Legal Matchmakers International</i>	9
<i>AIA Recommends to Attend</i>	9

AIA Upcoming Events

Intensive International Arbitration Training Program

with particular focus on India

LOCATION: Chennai, Tamil Nadu, India

Consisting of sessions on four consecutive

Saturday's (January 5, 12, 19 and 26, 2013)

AIA will conduct the training in association with the

Nani Palkhivala Arbitration Center, India.

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

Effective Use of Damages Experts in International Arbitration

by Vidya Rajarao

Introduction

The growth in international trade and globalisation has resulted in cross-border mergers and acquisitions as well as growing number of bilateral and multi-lateral investment treaties. Inevitably, this has led to numerous cross-border disputes between companies and sovereign governments. Increasingly, international arbitration is the preferred choice for resolving cross-border disputes. A study by PricewaterhouseCoopers LLP and the School of International Arbitration at the Queen Mary University of London found that 73% of companies prefer international arbitration rather than cross-border litigation to resolve cross-border disputes (Survey results titled: "International Arbitration: Corporate attitudes and practices 2006" published by PricewaterhouseCoopers LLP).

Further, damages claimed and awarded in international arbitration are also increasing in value and damage awards of US\$ 1 billion are not uncommon (Michael D. Goldhaber, Focus Europe, Arbitration Scorecard, The American Lawyer, (Summer 2011) available at <http://www.americanlawyer/focuseurope/contracts0605.html>). With the consequent increase in damages awarded and the complexity of damage calculations, the use of experts to quantify damages is quite common.

Against this backdrop, use of experts appointed by the parties to quantify damages is a growing trend. A recent study by White & Case and the School of International Arbitration at the Queen Mary University of London found that in the vast majority of arbitrations, expert witnesses are appointed by the parties (90%) rather than by the tribunal (10%) (The 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process). This article will examine the effective use of a damages expert, when not to use such experts and authoritative guidance with respect to use of experts to quantify damages.

Guidance regarding use of experts

In May 2010, the International Bar Association (IBA) issued the IBA Rules on the Taking of Evidence in International Arbitration. These rules provide guidance on use of party-appointed experts and Tribunal appointed experts.



"European Mediation Training for Practitioners of Justice" (with DVD)

This book may be regarded as the unique guide on mediation in Europe and on how to become an EU qualified mediator. It is of particular interest for those willing to practice mediation. The enclosed DVD contains a mock mediation conducted during a regular practical session of EMTPJ 2011, which is commented by one of the EMTPJ lecturers.

For further information please visit our website: <http://www.arbitration-adr.org/>

Further, the rules specify the nature of disclosures that must be contained in an Expert Report (whether appointed by the parties or the Tribunal) including (IBA Rules on the Taking of Evidence in International Arbitration adopted by a resolution of the IBA Council on 29 May 2010):

1. **Statement regarding the expert's past relationship, if any, with any of the parties, their legal advisors and the Arbitral Tribunal;**
2. **Statement of the expert's independence from the parties, their legal advisors and the Arbitral Tribunal;**
3. **Description of the expert's background, qualification, training and experience;**
4. **Statement of the facts on which the expert is basing his or her opinions and conclusions; and**
5. **The expert's opinions and conclusions including a description of the methods, evidence and information used in arriving at such opinions and conclusions.**

Professional organisations that govern accountants, surveyors, appraisers, engineers etc. also have rules that govern provision of expert reports and expert testimony in litigation and arbitration. These rules place an emphasis on independence, integrity and objectivity, credibility and qualifications of an expert. In addition, these rules provide guidance on selection of an appropriate methodology that may be used to compute damages in certain instances and the factors that must be considered while selecting and applying the said methodology based on the relevant facts and circumstances.

Are damages experts needed in every case?

Given the complexity of damage calculations and the amounts at stake, parties may view retention of damages experts as indispensable. However, this is clearly not the case since each case must be assessed on a stand-alone basis and an assessment of whether a damages expert is needed must be made early and in conjunction with counsel.

Cases that require fairly complex valuation methodologies or financial modelling such as the discounted cash flow (DCF) method, internal rate of return etc. would benefit from an expert who is well versed with such techniques.

Similarly, cases that revolve around interpretation and application of complex accounting principles as in the case of revenue recognition under long term contracts, valuation of financial instruments etc. would benefit from an expert who has substantial experience in these fields.

The client and counsel should jointly assess the facts and legal basis of their claims and involve damages experts early so that the appropriate documents needed to prove damages (assuming liability) and the amount of possible damages can be estimated reliably. Such estimate of dam-

ages can greatly benefit the client and counsel in developing their legal case.

How (Not) to use damages experts?

Damages experts should be used carefully and their remit and mandate should be clearly codified in a retention letter.

It is important that clients or counsel be aware of the risks in using damages experts improperly. Damages experts should be independent, objective and credible in their methodology, assumptions, conclusions and opinions. Damages experts should be wary of the following traps:

An expert should not be used to evidence facts or cure the facts of the case. This aspect is best handled by counsel or fact witnesses.

An expert should not be an advocate for the client. Advocacy is the prerogative of counsel and is best done by counsel. An expert should be independent, objective and open minded to the methodology used to compute damages, the assumptions used and the sensitivity of such assumptions on the damages computed.

An expert should not defend facts and should be willing to change the quantum of damages if the underlying facts or **assumptions change. This will lend credibility to the experts' damages quantification** and the Tribunal is more likely to consider such experts views rather than an expert who is wedded to the facts and is unwilling to consider facts that have been successfully challenged by the counter-party or proven wrong during the arbitration hearings.

An expert should not be retained simply because the counter-party has an expert. Counsel may often advise clients to retain experts in this instance but it is worth exploring whether an expert is needed at all and for a purpose other than to counteract an expert from the other side.

An expert should not be retained to undertake fairly simple mathematical calculations or to summarise amounts stated in various fact witness statements even if such calculations require fairly laborious evaluation of numerous documents and **fact witness statements. In this instance, an expert's work is to merely compute or 'add up' the various amounts 'presenting' or 'simplifying' information contained in several pleadings, submissions and fact witness statements in a form that is easily understood by either counsel or the arbitration tribunal.**

Conclusion

Damages experts, retained (early) and used properly, can add tremendous value to the arbitral tribunal, counsel and clients.

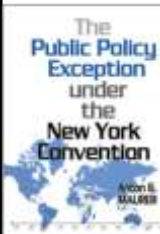
Damages experts can provide an independent, objective and credible determination of the damages due and this can only be achieved if the damages expert retains his or



her independence from the counsel, client and facts of the case. In summary, damages experts should not trade independence for advocacy and acquiescence to counsel or client demands.

Book Review: The Public Policy Exception Under the New York Convention

by Missuly Clark



The Public Policy Exception under the New York Convention: History, Interpretation, and Application, describes in detail the drafting history of the public policy exception of Art. V (2) (b) of the New York Convention in order to determine the purpose that the signatory states wanted to achieve with this clause. This book written by Anton G. Maurer, explains how the public policy exception clause is applied by the courts in many economically relevant states, specifically in Brazil, Russia, India, and China, - the countries where foreign awards will seldom be enforced.

The author explains that Brazil recognized the importance of arbitration through attracting and maintaining foreign investors by applying the exception narrowly in accordance with the New York Convention. On the other hand, Russia, India and China seem to have a broad interpretation of the exception, which is discussed in more details in the book.

Moreover, the book deals with the interpretation and application of the public policy exception clause in such countries as Austria, Canada, England, Hong Kong, Japan, and Mexico among others.

The book represents a very valuable source for understanding one of the most controversial grounds for refusal of enforcement under the New York Convention, and it is also a useful guide to understand how different jurisdictions have interpreted the public policy principle.

This book is very handy for practitioners in the area of international law and international arbitration, students and academics. For more information about this book, please visit the Juris Publishing website: http://www.jurispub.com/cart.php?m=product_detail&p=12675

New National and International Arbitration Statute for Colombia

by Laura Lozano

Seeking to be selected as seat of more international arbitrations, Colombia enacted a new arbitration Statute. The present Statute, which entered into force on 12 October 2012 (Law 1563) after a month *vacatio legis* period, regulates both national and international arbitration (Art.119 Law 1563). Since 2002 there have been four bills to modernize the regulation on arbitration in Colombia, but all have been withdrawn because of the lack of consensus. The Law 1563

is also known as the "Hinestrosa Law" as a tribute to the recently deceased jurist Fernando Hinestrosa who was the Chair of the Drafting Committee and Chancellor of the Externado University of Colombia. The Law 1563 contains 119 articles and is divided into 5 sections: National Arbitration, Amiable Compositeur, Internacional Arbitration, Social Arbitration and a final Unique Chapter

The Law 1563 follows the UNCITRAL Model law for the international arbitration regulation and has been influenced by such advanced arbitration legislations as the Peruvian or Swiss legislations. One of the main objectives pursued by the legislator is to end the "current imbalance or differential treatment" that the previous legislation contained. The most representative changes have been introduced regarding the recognition and enforcement of international arbitration awards. To modernize the arbitral proceedings the Law 1563 also includes the use of new technologies during the arbitration proceeding as, for instance, virtual hearings or records in digital form. In order to provide a general perspective on the current arbitration situation in Colombia, the present review will cover the most innovative changes presented by the Law 1563.

National arbitration

The legislature defines arbitration in Article 1 of the first chapter, as the alternative dispute resolution mechanism in which parties defer to arbitrators to settle a dispute concerning matters in which party autonomy might prevail or those authorized by law. At the same time this article overcomes the traditional approach of the two bases for dispute resolution in arbitration: in accordance with the law and *ex aequo et bono*, introducing the technical arbitration. The incorporation of technical arbitration is extremely innovative as technical arbitration awards are based on a special expertise in a particular field to resolve a conflict of technical nature, leaving aside application of the law. As for the length of the arbitral proceeding, failing an agreement between the parties, a 6 months renewable period is established.

Amiable compositeur

The Law 1563 provides that if the decision is taken as amiable compositeur it means that the parties delegate to a third party the power to resolve in a binding way a contractual dispute which is within their free disposition (From Art. 59 to 61 Law 1563). The decision of the neutral will have the corresponding legal effects on the transaction. Furthermore, the neutral will resolve the dispute in accordance with the law and *ex aequo et bono*.

International Arbitration

Following Article 62 of the UNCITRAL Model Law, the Law 1563 defines the notion of "international arbitration". Arbitration is international if parties to an arbitration agreement have at the time of the conclu-



sion of that agreement their places of residence in different states, or the place of performance of a substantial part of the obligations or the place with which the subject-matter of the dispute has a closer relationship is situated outside the state in which the parties are domiciled, or the dispute submitted to arbitration affects the interests of international trade. The possibility of attributing an international character to controversies uniquely based on the will of the parties (situation referred in the Colombian Constitutional Court jurisprudence) has been removed from the definition of the international arbitration.

Furthermore, the Law 1563 establishes that "any State or the company owned, or controlled by the organization that is a party to an arbitration agreement may invoke its right to challenge its own ability to be a party to an arbitration or the arbitrability of a dispute covered by an arbitration agreement". Such provision is regarded in international arbitration as very desirable because it prevents the avoidance of the application of the arbitration clause agreed by the parties once the dispute arises.

Local courts role

The Law 1563 includes provisions regarding the ability of local courts to assist arbitral tribunals during the arbitration process. Among the services in which local courts can assist are compelling arbitration in both national and international settings (for domestic arbitration see Art. 29, for international arbitration see Art. 68 Law 1563), granting preliminary relief (Art. 71 and 90 Law 1563), enforcing provisional measures (Art. 32 for domestic arbitration and Art. 90 for international arbitration Law 1563) as well as ordering the production of evidence (Art. 100 Law 1563).

Recognition and enforcement of the awards

The main improvement of the legislation on arbitration is the recognition and enforcement of international awards, which is now regulated by the Law 1563 and international conventions. Fortunately, it is now in the past the time when parties had to rely on the local civil procedure rules for the recognition and enforcement of international awards. Likewise, the Law 1563 makes a distinction in the recognition of international awards between awards rendered inside and outside the Colombian territory. As for the awards rendered by a tribunal seated outside Colombia, awards resolving disputes between private parties need to be submitted for recognition to the Supreme Court, whereas awards involving governmental entities need to be submitted to the Council of State. At the same time, international awards rendered by tribunals seated in Colombia are now considered as local awards. Thereby, they will no longer need recognition before local courts prior to their enforcement.

As for the time frames, the legislator has wisely shortened the period for the recognition of awards from the exorbitant long 2-year period to the prudent 30-day period. The 30-day period is composed of a 10-day period to challenge the recognition by the opposing party and a 20-day period for courts to decide on the matter (Art. 115 Law 1563). Once

courts rule on the matter, no appeal or challenge is available.

The recognition and enforcement provisions are applicable without prejudice to bilateral or multilateral treaties. Nevertheless, one can find that the provision for the enforcement of ICSID awards as if they are final judgments of a Colombian court, in accordance with the ICSID convention (ICSID Convention Art. 54), is still missing.

Annulment of the awards

According to the Law 1563 the only recourse against arbitral awards is to apply for their annulment. The only grounds contemplated to annul the award are identical to the ones contained in Article V of the New York Convention. Furthermore, the judge examining the application for annulment will not revise the merits of the dispute or assess the motivation or the reasoning of the tribunal. Besides, it is possible to **waive the right to apply for the award's annulment** when none of the disputing parties is domiciled or resides in Colombia. Moreover, the annulment decision shall be given in two months.

The arbitrator

In cases where parties fail to appoint an arbitrator or fail to empower the Arbitration Center to make the appointment, it is the Colombian Court that is entitled to make such appointment (Art. 14.1 Law 1563). This consideration has raised much controversy, as according to academics it is completely against the UNCITRAL Model Law. In words of Alvaro Mendoza, Dean of The Sabana Law School, the UNCITRAL Model Law provides arbitrators with the powers to act on behalf of the parties, and such delegation can be made either directly or indirectly but never through judiciary (See <http://www.diariojuridico.com/arbitraje-y-mediacion-4/entrevista-arbitraje/alvaro-de-mendoza-decano-de-la-facultad-de-derecho-de-la-universidad-de-la-sabana-la-nueva-ley-de-arbitraje-de-colombia-senala-que-las-autoridades-respaldaran-el-trabajo-de-los-tribunales-a.html>).

Interestingly, the Law 1563 reduces the arbitrator's fees to the maximum of 1.000 times the minimum Colombian wage. The Government shall further regulate the arbitrator's fees rates and expenses. In certain cases, the arbitrator's fees rates can be increased up to 50%. The rates of the Secretariat cannot exceed half of the arbitrator's rate.

In multiparty arbitration matters, the Law 1563 clarifies that both claimant and respondent will have to appoint together the 3 arbitrator panel (Art.74 Law 1563).

Social arbitration

Furthermore, the Law 1563 introduces the new term of "social arbitrage" under which all arbitrators registered in Colombia must provide their services free of charge as part of the pro-bono work (Art.117 Law



1563). In case of not complying with such an obligation arbitrators can have their name removed from the arbitration institutions' lists.

Overall, it seems that the Law 1563 makes Colombia arbitration friendly, and there is a hope to be chosen more often in the future as arbitration seat. Finally, the fact that it is not necessary to be a qualified Colombian lawyer or a Colombian citizen in order to represent clients in arbitration makes the option of choosing Colombia as an arbitration seat more appealing for private business parties. Time will tell how the Law 1563 works in practice, but so far this innovative law can be regarded as a major achievement in the field of arbitration that Colombia has made.

Book Review: Arbitration – The Next Fifty Years

by Yaroslava Sorokhtey



The book "Arbitration – the next fifty years" was published in 2012 by Kluwer Law International BV (the Netherlands). This publication is the result of the Conference in Geneva (19-20 May, 2011) devoted to the 50th anniversary of the International Council for Commercial Arbitration (ICCA). It includes the conference papers, where well-known arbitration scholars and practitioners address the current situation of both – international investment and commercial arbitration, and possible future developments of arbitration and ICCA. The book starts with the preface of the general editor - Albert Jan Van Den Berg and four introductory remarks.

The book is divided into three chapters – following the structure of the discussions at the conference. The first one is named "The present – commercial arbitration as a transnational system of justice", the second one - "The present – investment arbitration as a governance tool for economic international relations" and the third one – "The future – what will change?". Additionally, the book contains two annexes – a brief history of ICCA and an article by Clyde Croft "The development of Australia as an Arbitral seat – a Victorian Supreme Court Perspective", where the author lists specialists in arbitration at the Commercial Court of the Supreme Court of Victoria, points out key legislative provisions regarding arbitration in Australia and explains advantages of choosing Australia as the seat of arbitration. You can also find list of participants of the Conference and a list of ICCA officers and members attached after the last article.

The first chapter of the book consists of introduction made by Albert Jan Van Den Berg and report prepared by W. Michael Reisman and Brian Richardson – "Tribunals and Courts: An interpretation of the Architecture of International Commercial Arbitration" where the authors discuss recent initiatives to change the control scheme of international

commercial arbitration, followed by comments and critiques regarding the challenges to the control regime of international commercial arbitration.

The second chapter of the book is dedicated to the investment arbitration – the main discussion here is whether investment arbitration can be seen as a governance tool for economic international relations. The chair of the discussion, Donald Francis Donovan, makes his introduction to the session, followed by comments of Bruno Simma analyzing whether investment regime is a form of a Global Governance, whether the investment treaty arbitrator can be seen as agent of global governance (by Sir Franaklin Berman) and what the standards of review in investment treaty arbitration are.

The last chapter of the book raises discussion regarding future developments of the international commercial and investment arbitration and what changes should be brought. The discussion was developed in the form of round table with Gabrielle Kaufmann-Kohler as a chair.

Overall, this book took a fundamental approach to examine the reasons for such a big difference in views between those who root international arbitration in a national legal system and those who recognize the transnational character of the process. It suggests debate on this topic. It would be of special interest and importance to lawyers practicing international commercial arbitration law and international investment arbitration law, as well as for arbitrators, governmental officials dealing with trade and international economics, academics and students.

For further information about the book and where to purchase it, please visit the Wolters Kluwer website:

http://www.kluwerlaw.com/Catalogue/titleinfo.htm?wbc_purpose=Basic%25?ProdID=9041138080

AIA Members get a 10% discount!

The Republic of Tajikistan Acceded to the New York Convention

by Yaroslava Sorokhtey

Recently on 24 August 2012 the United Nations Commission on International Trade Law (UNCITRAL) announced the accession of the Republic of Tajikistan (hereinafter – Tajikistan) to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter - the NY Convention). Tajikistan became the 147th state party to the NY Convention, which enters into force for Tajikistan on 12 November 2012 (source: 24/08/2012, UNCITRAL Press release, <http://www.uncitral.org/>).

Before signing the NY Convention Tajikistan was far away from becoming a popular seat of arbitration. The only arbitration-related institution functioning in this country is the so-called Public Organization for the Development of Third Parties Arbitration and Legal Support Centres (hereinafter - "ARBITRAZH"). This organization is arranged on a local, national



and international level to address issues in support of the country's land reform programme. It was registered with the Ministry of Justice of Tajikistan on 14 November 2005 and its mission is to provide access to alternative dispute resolution mechanisms and affordable legal services in order to enhance livelihoods of local communities (The Public Organization "ARBITRAZH" http://www.tpac.tj/eng/index.php?option=com_content&task=view&id=45&Itemid=51).

What concerns the investment arbitration – Tajikistan concluded so far only 9 Bilateral Investment Treaties with such countries as Austria, France, Germany, India, Netherlands, South Korea, Spain, Turkey and Vietnam.

Signing of the NY Convention is a big step for this country to increase economical stability and to make it more attractive for foreign investors. The NY Convention is widely recognized, 147 out of 196 countries of the world signed it. This is the main instrument of international commercial arbitration, because it obliges states to recognize and enforce awards internationally. Tajikistan signed the NY Convention with certain reservations. It will apply the NY Convention to all disputes arising after its entry into force (after 12 November 2012). It should be also pointed out that Tajikistan shall not apply this Convention in respect of disputes relating to real estate (source: State Committee on Investments and State Property Management (SCISPM) of Tajikistan). It is also significant that the accession of Tajikistan to the NY Convention is an important step towards joining the World Trade Organization (WTO). Now Tajikistan became friendlier to the foreign investors, since they became protected from going to local courts to resolve their disputes.

There are several advantages and disadvantages for Tajikistan (as any other country) regarding becoming a signatory to the NY Convention. First of all, as it was mentioned above, it will increase the inflow of foreign investments, since from the 12 November 2012 investors will not have to resort for dispute resolution to the local courts that can be considered as partial and protective for national companies. Moreover, arbitration proceedings can be private and confidential when parties agree so unlike the court proceedings. The accession also will automatically lead to increase of economic stability and development. Secondly, as it can be seen from the experience of the other countries that signed the NY Convention – it usually leads to the increase of trade (source: David Berkowitz, J. Moenius & K. Pistor, Legal Institutions and International Trade Flows, 26 MICH. J. INTL. LAW 15). Finally, after ratification of the NY Convention Tajik companies can enforce awards in foreign countries, which was impossible before (for example, a national company could not obtain an award in Tajikistan and enforce it against the assets of the company which is located abroad). And what is even more important is that now Tajik local courts have limited grounds to intervene in arbitration proceedings.

As for the disadvantages, there are, indeed, some negative consequences for Tajikistan after becoming a signatory to the NY Convention. First, from now on the Government of

Tajikistan has limited rights to intervene in transactions involving foreign investors after the contract containing arbitration clause is signed, since the International Court for Settlement of Investment Disputes might award damages against a country if its courts interfere in an arbitration case without being authorized to do so (source: Saipem SpA v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/7). Second, in most cases small companies would not be able to afford arbitration; therefore, the accession to the NY Convention gives more advantages to big businesses that can pay costs of arbitration. (« Analysis of the Effect of Tajikistan's Future Ratification of the NY Convention», CTO/USAID/CAR: Lora Kudaibergenova, John Irons; Project Manager: Mohammad Fatoorechie, Chief of Party: Terence Slywka).

In conclusion, even though there are some disadvantages for every country that signs the NY Convention, it is proven since 1958 that there are much more advantages and positive changes in the countries that are signatories to it, such as economic development, increase in foreign trade, development of international relations and so on.

Book Review: Arbitration Advocacy in Changing Times by Laura Lozano



The book "Arbitration Advocacy in Changing Times" (ICCA Congress Series No 15) edited by Albert Jan Van Den Berg and published by Wolters Kluwer Law & Business is a collection of articles emanating from the twentieth Congress of International Commercial Arbitration

held in Rio de Janeiro in 2010. It is especially remarkable that this was the first ICCA Congress held in South America. The Congress sessions explored the arbitration advocacy from practical, theoretical and ethical perspectives in changing times. Such topics as effective advocacy in arbitration, the advocate's role at different stages of arbitral proceeding, the role of experts, arbitration advocacy and constitutional law, as well as advocacy and ethics in international arbitration are addressed in the book. Furthermore, a new approach to expert evidence – "the Protocol on Expert Teaming" – is included in this book. The collection of articles finishes with a proposal for an International Code of Ethics for Lawyers Practicing Before International Arbitral Tribunals. This collection of articles would be very useful for practitioners, academics and students in the arbitration arena.

For more information about this book as well as where to purchase it please visit the Wolters Kluwer website: http://www.kluwerarbitration.com/book-toc.aspx?book=TOC_ICCA_CB-15_2011

AIA Members get a 10% discount!



Appeal of Ecuador against an ICSID Award

by Laura Lozano

Ecuador has filed an appeal to overturn a \$1.77 billion award in favor of the American petroleum company Oxy, contesting that the ICSID tribunal lacked jurisdiction. The arbitral tribunal chaired by the Canadian Yves Fortier and by the arbitrators David A.R. Williams and Brigitte Stern rendered a final award on 5 October 2012 (ICSID Case No. ARB/06/11). The award included a not uncommon in big ICSID cases dissent by Brigitte Stern, which has made Ecuador feel more confident to appeal.

Background

On 15 May 2006 the Minister of Energy and Mines decided to terminate Oxy's 30-year oil concession for an oil block in the Amazon region, claiming that the American petroleum company had sold a stake in its operations without the required ministerial approval. Oxy had transferred 40% of its operation rights on Block 15 to the company Alberta Energy Corporation (AEC), which later became Encana and to Andes Petroleum, of Chinese origin. The Minister claimed that the American company had entered into a consortium to carry out exploration or exploitation operations without ministerial approval besides not having invested the minimum amounts required under the Participation Contract. Therefore, the Energy Minister declared the caducity of the Oxy's agreement as it was against Article 69 of the Hydrocarbons Law.

The claimants filed their request for arbitration two days after the ministerial notification regarding termination of the Participation Contract, on 17 May 2006. According to the claimants, the termination of the Participation Contract was made without legitimate cause. Such position is based on the absence of legal grounds for termination under both the Participation Contract itself and Ecuadorian law, in particular under the Hydrocarbons Law.

On the one hand the Ecuadorian government claimed that they had complied with the law in all contracts with the US Company, whereas on the other hand, Oxy stated that they had been illegally deprived of their exploitation rights as well as their assets had been expropriated. The Ecuadorian response was that the Ecuadorian law and not the ICSID convention governed the dispute. Additionally, Ecuador claimed that disputes arising out of termination could not be characterized as "contractual disputes". Rather, such disputes were "extra-contractual" by nature and, were non-arbitrable pursuant to Article 4 of the Ecuadorian law on Mediation and Arbitration.

Award

The ICSID tribunal rendered on 5 October 2012 its award, more than six years later since Oxy had filed a request for

arbitration. The fourth largest US oil company was awarded the largest compensation coming from Ecuador, for taking over its assets in 2006. The award ordered Ecuador to pay Occidental Petroleum US\$1.77 billion – which is expected to amount to around US\$2.3 billion with interest - for the cancellation of a 30-year oil concession for an oil block in the Amazon region.

The tribunal found that the termination of the contract had been "tantamount expropriation" and that the USA-Ecuador BIT had been violated. Besides, ICSID ordered Ecuador to pay pre-award interest on the amount at the rate of 4.188 percent per annum, starting from May 2006 until the date of the award.

Request for annulment

The ICSID Secretariat registered an application for annulment of the award, filed by the Republic of Ecuador on 11 October 2012, only six days after its publication, even though ICSID's Article 52.2 grants parties a 120 days period to request the annulment of the award. The request for annulment is based on ICSID's lack of jurisdiction as the contract between Oxy and Ecuador did not refer to ICSID for resolution of their disputes. Additionally, Ecuador expects that as the award does not indicate that Ecuador did not apply the measures of the law, but only states that the law was very severe, there is still a possibility for Ecuador to succeed. Furthermore, the fact that Brigitte Stern dissented, encouraged Ecuador to proceed with this battle.

Ecuador alleges that Oxy created a consortium in order to secretly operate the block in the Amazonian region, and, therefore, the Ecuadorian law was violated. At the same time, Oxy claims that the only purpose of consortium was funding.

Though Ecuador withdrew from ICSID in 2009, the country cannot disregard the present ruling as the arbitration case was filed in 2006. In the meanwhile, there are still at least 12 pending ICSID arbitration claims involving Ecuador. The most known are the one filed by Burlington Resources, a subsidiary of the U.S. energy company ConocoPhillips, and another one initiated by a French oil company Perenco. The companies are seeking compensation related to confiscation of assets by the Ecuadorean government in 2009.

The latent discontent of the Ecuador President, Mr. Correa has been expressed numerous times and recently he has publicly announced that this award is a consequence "of having handed the country's sovereignty over to these (arbitration) tribunals" that "always rule in favor of capital, in favor of companies, never in favor of the state."

Time will show how the next Oxy-Ecuador episode evolves, but so far we can only say that the end is still far away because the expected time frames for this appeal process are about one to two years.

Book Review: Mediation. Principles and Regulations in Comparative Perspective

by Laura Lozano

Klaus J. Hopt as the Emeritus Director and Felix Stefferk as a Senior Research Fellow of the Max Planck Institute for Comparative and International Private Law of Hamburg have edited this unique comprehensive comparative analysis of the mediation law, policy and practice in Europe and throughout the world that will be published this November 2012.

The book is divided in two parts: the EU and the Wider World. The European Directive on Mediation is assessed as well as the new practice momentum in Europe. At the same time, the current reforms in countries beyond Europe, such as China, Japan and Russia are covered.

Twenty two countries with their laws and practices are analyzed in order to give an understanding of a common framework for cross border mediation. A study of both harmonization and diversity in the law on mediation is included. Besides, authors cover the economic and constitutional problems associated with privatizing civil justice from a critical point of view.

The book represents the most comprehensive comparative mediation study prepared specially for academics and scholars of mediation, policy-makers, practitioners involved in cross border cases. For further information please visit the website: www.oup.com/uk/law.

Book Review: The Practitioner's Handbook on International Arbitration and Mediation

by Laura Lozano



"The Practitioner's Handbook on International Arbitration and Mediation" edited by Richard Chernick, Daniel M. Kolkey and Barbara Reeves Neal and published by Juris Edition, is divided in three parts. This publication is a collection of essays written by leading experts that would be an asset for everyone interested in the field, including practicing attorneys, young professionals, professors and students.

This new edition on international arbitration and mediation is a unified expert field work, designed to be a reference guide for every practitioner.

Part one analyzes each stage of an international arbitration starting with the advantages of arbitration. It addresses a wide variety of issues from drafting a valid arbitration clause to the enforceability of the award. Likewise, it wisely explains how to commence an international arbitration and addresses procedural issues as well as practical considerations for conducting the arbitral hearing. What is unique about this book is that every chapter contains a conclusion - consequently practitioners can get a straight forward ad-

vice on each topic. For instance, in dealing with civil and common law jurisdictions, the practitioner points out the importance of the discovery scope.

Part two addresses each facet of an international mediation. Starting with the mediation concept it develops on how to get this process started. Interestingly, the book contains a note on maintaining the mediator's neutral role, as an administrator. Furthermore, it deals with clients' representations through the process starting from the pre-mediation conference to the post sessions. Finally, it summarizes facts regarding mediation in China, a method of dispute resolution alternative to litigation encouraged by Chinese authorities.

Part three deals with arbitration law and practice of leading arbitral venues, concentrating on topics such as costs, recourse against awards and major arbitration institutions. The selected countries are Canada, China, Hong Kong, France, Germany, Japan, Sweden and the United States.

Overall this book gives practical guidance and legal commentary on both international arbitration and mediation. The reader will find very useful practical hints that come along in every section of the book. Moreover, this book is accompanied by a handy CD-ROM containing original materials that led to this edition.

For further information regarding the book and where to purchase it, please visit the website of Juris Publishing, Inc: http://www.jurispub.com/cart.php?m=product_detail&p=10489

No Mandatory Mediation in Italy

Italy's Constitutional Court ruled that the Italian government had exceeded its legislative authority in making mediation a mandatory precursor to trial. The Court's ruling on Legislative Decree no. 28 (2010) from 24 October 2012 is limited to provisions concerning mandatory mediation. The press release merely states that an Act of Parliament, rather than an Act of Government, is required to lawfully implement mandatory mediation. The ruling caused a lot of discussions among Italian lawyers practicing mediation. At the same time EU countries became very interested in Italy's approach to mediation.

Colloquia Papers on International Arbitration

The Colloquia on international arbitration are seminar series launched by the Milan Chamber of Arbitration, held periodically in an informal round-table setting and addressed to professionals and in-house counsels who can, thus, exchange views with arbitration experts from different jurisdictions.

The Colloquia papers on international arbitration publish the papers written by the Colloquia's speakers on the subject treated.



The Colloquia papers are published yearly and are issued in an electronic form with free access to the full text, thus contributing to the widest diffusion of the knowledge of alternative justice.

To download the copy please visit the website below:

http://www.camera-arbitrale.it/Documenti/colloquia_quaderno1.pdf

AIA's Partnership with Legal Matchmakers International

We are honored to announce that AIA and Legal Matchmakers International (LMI) have become partners. LMI is a network of legal service providers. LMI gives access to both legal services and legal support services across the world. The services provided include: advice, representation, outsourcing, pre-incasso and incasso, insolvency, office support, corporate housekeeping.

Under the current economic global crisis, LMI's main activities are related to debt and asset recovery. Management support (e.g. company restructuring), debt restructuring, company reforms, aspects in relation to the continuity of undertakings, collateralization of debts, bankruptcy filing, liquidation and administration of assets, local representation of interests are LMI's strategies to face the market reality.

At the same time, as timely and commercially efficient claim recoveries are extremely important to avoid "snowball effects", ADR presents itself as an alternative tool to protect business relationships. This is the main reason why AIA and LMI have decided to start a journey together: "We believe in the ADR advantages, such as confidentiality, expertise, efficiency and cost-saving".

Under the present partnership AIA will assist LMI in reaching the highest ADR standards, using such tools as negotiation, conciliation, mediation, med-arb, arb-med, arb-med-arb, expert determination, arbitration, etc. In order to achieve these goals, AIA will promote its national and international ADR member providers. For any further information or suggestions please do not hesitate to contact the Secretariat of LMI or AIA:

partners@legal-matchmakers.com

administration@arbitration-adr.org

AIA Recommends to Attend Save the Date! ICC Mediation Week 2013: 7 – 13 February

The next Mediation Week organised by the International Chamber of Commerce (ICC) will comprise the 4th ICC International Mediation Conference on 7 February 2013 and the 8th ICC International Commercial Mediation Competition from 8 – 13 February 2013.

4th ICC International Mediation Conference



The 4th ICC Mediation Conference is entitled "STAY IN CONTROL!

Managing risks, time and costs of commercial disputes with smart ADR". The Conference will examine how in light of the current economic climate alternative and amicable dispute resolution (ADR) mechanisms can provide companies with greater control over the ever increasing costs and risks of dispute resolution processes.

As the first three editions of this international event, next year's Conference will showcase first-rate speakers from multinational companies positioned to provide real-world insight on dispute resolution and, in particular, settlement proceedings. The speakers will aim to provide practical advice and tested tools for improving dispute management.

The Conference is in particular tailored to the interests and needs of corporate representatives. For registration information please [click here](#).

8th ICC International Commercial Mediation Competition



The Competition is considered to be one of the main educational events in international

mediation. During the Competition university students face complex, international business problems, which they attempt to resolve by mediation conducted under the ICC Amicable Dispute Resolution (ADR) Rules. By participating in the Competition, students get the unique opportunity to exercise their negotiating and problem-solving skills in mock mediations guided by professional mediators. Further, they profit from the feedback they receive from the professional mediators who evaluate their performance.

Each year the Competition attracts teams from renowned law and business schools and features some of the world's leading mediators. For the 8th edition of the Competition in 2013, ICC expects over 60 university teams and about 120 professional mediators and corporate representatives from more than 40 countries. During the Competition, ICC also organizes various training sessions and social events which allow all participants to share their experience, know-how and best practices. Universally recognized for its important contribution to nurturing best practices in cross-border commercial mediation, the Competition enjoys the support of practitioners, academics, law firms and corporations worldwide. For further information, please [click here](#).