

December 2012



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**AIA Upcoming Events:**

**Intensive International Arbitration Training Program**

with particular focus on India

LOCATION: Chennai, Tamil Nadu, India

Consisting of sessions on four Saturday's

(January 5, 12, 19 and February 2, 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](http://www.nparbitration.in)

**European Mediation Training for Practitioners of Justice**

LOCATION: Brussels, Belgium

DATE: August 19-31, 2013

LIMITED NUMBER OF PLACES (FIRST COME FIRST SERVED)

EARLY BIRD REGISTRATION UNTIL 1<sup>st</sup> of FEBRUARY 2013 (20% reduction)

"The ideal and unique Christmas present for legal practitioners"

See more details below and on [www.emtpj.eu](http://www.emtpj.eu)

**EMTPJ 2013**

After three years of consecutive success, the Association for International Arbitration (AIA) is proud to announce the fourth edition of its unique European Mediation Training for Practitioners of Justice (EMTPJ).

AIA initiated the EMTPJ project in 2010, with the support of the European Commission and in collaboration with the HUB University of Brussels and the Warwick University. It presents an opportunity for participants from around the world to get together and become trained and specialised as a new type of mediators, since the adoption of the EU Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters.

EMTPJ participants can be experienced mediators (e.g. with over 10 years of experience) or beginners who want to follow an intensive 2 week training program to become a mediator specialized in civil and commercial cross border matters.

EMTPJ is recognized by the Belgian Federal Mediation Commission, as well as by a large number of other regulative bodies and mediation providers in and beyond Europe.

EMTPJ is a 100-hour course comprising 11 days of intensive training and one assessment day at the end of the program. The training is conducted in English and the maximum number of attendees is limited to 30 people. The program is divided in two parts. One part focuses mainly on theoretical issues and aims to introduce participants to the second part of the course, which provides further insights into the practical experience.

The faculty of EMTPJ is impressive and unites great minds in the field of mediation from around the world, including Mr. Johan Billiet, Dr. Paul R Gibson, Ms. Linda Reijerkerk, Ms. Lenka Hora Adema, Mr. Philippe Billiet and Mr. Willem Meuwissen.

EMTPJ alumni have given excellent feedback on the EMTPJ training sessions and strongly recommend this course to all legal practitioners. Thus, one of the former participants said that in only two intensive weeks he acquired all the necessary knowledge to start up a mediation practice. He also described the trainers as "exceptionally qualified and experienced multinational persons that pose wide background and knowledge on the matter of mediation and can turn theory into practical training".

For more details and for all questions regarding the possibility to attend EMTPJ course or only a part of it, please contact: [administration@arbitration-adr.org](mailto:administration@arbitration-adr.org).

To get more information about EMTPJ program, schedule and lecturers, and to register for the course, please visit the website [www.emtpj.eu](http://www.emtpj.eu).

# Book Review: European Mediation Training for Practitioners of Justice

Association for International Arbitration Ed.



The European Mediation Training for Practitioners of Justice (EMTPJ) is a project of the Association for International Arbitration (AIA). Its ultimate goal is to introduce "European Mediators" and to promote cross-border mediation in civil and commercial matters. EMTPJ was launched in 2010 with the support of the European Commission and in close cooperation with the University of Warwick, UK and HUB Brussels.

EMTPJ should become a milestone for mediation in Europe as it is a unique training. First, its content is recognized not only by the Belgian Federal Mediation Commission but also by many mediation centres in and beyond Europe, which allows successful participants to apply for accreditation across the globe. Second, an important feature of the course is its multinational environment and this refers to students as well as to the lecturers. Thanks to such diversity, people explore different cultures and mediation traditions. Third, the EMTPJ is a comprehensive 100 hours training that lasts for two weeks, including an assessment day. Such an intensive program gives participants an opportunity to build a close relationship with each other as they spend quite a lot of time together.

This book is a compilation of the presentations, course materials and articles that address diverse topics associated with mediation. The topics vary from the general aspects of mediation to such specific issues as refusal to mediate and multiparty mediation.

The book begins with the article "Mediation as an ADR Method" by *Alessandro Bruni*. The author makes an overview of skills a mediator needs during the mediation process, such as communication skills, an ability to actively listen to what the parties are saying, patience, and the art of questioning, among others.

In "International Mediation", *Paul Gibson* discusses three areas of international mediation: (1) social and anthropological aspects of cross-border or international mediation; (2) applicable rules and code of conduct; and (3) legal and strategic considerations.

The article "The Role of Law in Interaction: Mediation, ADR and Legal Thinking" by *Frank Fleerackers* focuses on the obligation of Member States to encourage the training of mediators.

The article "Theory and Practice of Contract Law in Europe" by *Andrew Colvin* examines the present state of contract law in Europe and some of the projects proposed to bring out an European contract law.

The article "Theory and Practice of Contract Law in Europe" by *Andrew Colvin* examines the present state of contract law in Europe and some of the projects proposed to bring out an European contract law.

The article "Recent Developments in European Mediation and ADR" by *Johan Billiet* and *Dilyara Nigmatullina* consists of two parts. The first part examines the EU Mediation Directive: its scope, current state of compliance with it by the Member States and its three main objectives as well as the interrelation and applicability to European mediation and mediators of the EU Services Directive and the EU Professional Qualifications Directive. The second part concentrates on the recent proposals of the European Commission on the Directive on ADR for consumer disputes, and the Regulation on online dispute resolution for consumer disputes.

The article "Refusing to Mediate: A Selection of Evolutions in Europe" by *Phillippe Billiet* focuses on the current pro-mediation stance in Italy, England and the Netherlands. For this purpose, the author divides the article in three parts: (1) the obligation to mediate in Italy; (2) abusive refusal to mediate in England, which compared to Italy, has no compulsory mediation procedures and English courts have declined to compel mediation; (3) abusive refusal to mediate in the Netherlands, where the author makes a comparison with different rulings over labour disputes.

*Linda Reijerkerk* and *Marga Schreuder* in their article titled "The Mediation Process" emphasize that the mediation process is dynamic, and it aims to facilitate the participants in clarifying information, working through their emotions, restoring communication, assisting in negotiation and resolving their disputes themselves.

"EU Ethics in Mediation" by *Arthur Trossen* explains that mediation and ethics vary from culture and among EU states, therefore, it is important to understand the ethics of mediation and unify them in a way that is acceptable for each mediator in any Member State.

"No Feelings Please, We Are Executives" by *Theo Van Dijk*, discusses the connection between rationality, emotions, and feelings during the arbitration and mediation processes.

"Persistent Positions" by *Jacques de Waart* focuses on the technique known as "peeling the onion", which aims to effectively intervene with persistent positions. This skill gives the perfect image of solid shells you can peel off one by one until you arrive at the deepest centre, which is the problem in dispute and the solution for it.

In "How to Deal with a Deadlock", *Phillip Howell-Richardson*, describes deadlock as one of the critical stages that may need to be undertaken in mediation and explains what strategies can be used to overcome impasse.

"Multiparty and Group Mediation" by *Linda Reijerkerk* explains the challenges that a mediator encounters in multiparty mediations and the strategies that can be used in this type of mediations using case situations and examples.

The conclusion that *Willem Meuwissen* makes in "The Function of Party Experts and Party Counsel in Civil and Commercial Mediation", is that guiding parties to and through a mediation is a fascinating professional activity and that the bond and goodwill, created within the successful negotiation team, guarantees the professional's concern of a prolonged and profitable professional relationship with the principal.

This book is complemented by a DVD that contains a video made during one of the regular practical sessions during the EMTPJ course of 2011. The video consists of two parts: mock mediation and several interviews of the participants.

For more information regarding the book as well as where to purchase it, please visit

<http://arbitration-adr.org/activities/?p=publications> or <http://www.maklu.be/MakluEnGarant/en/BookDetails.aspx?ID=9789046604991>

## Arbitrators' fees again under debate

by Laura Lozano

A recent debate regarding arbitrators' rates in China has emerged in the arbitration community, after [www.legalweek.com](http://www.legalweek.com) published that top arbitrators are trying to reject CIETAC's appointments as they are not well remunerated. It seems that CIETAC arbitrators' remuneration is too low compared



with international standards. According to local Chinese sources, foreign arbitrators who have once worked with CIETAC would never come back. Surprisingly, rates for Chinese arbitrators range from \$500 up to \$2,000 per case. Generosity and cost saving by the arbitration Institutions as regards to arbitrators is a growing concern around the globe. Moreover, it is well known that every arbitrator would ask such questions before enrolling into any arbitration roster.

However, what's a good arbitrators' remuneration? If one of the advantages for pursuing arbitration is seeking efficiency as well as cost saving in the process, it would make no sense to make arbitrators' remuneration too high. However, if we are talking about a top arbitrator, maybe an exception could be made. But, who has the power to decide on the arbitrators' fee? Is it the institution? Or should it better be the arbitrator himself? Until now, the practice has differentiated 3 ways of arbitrators' remuneration: ad valorem, time spent and fixed fee method, and none is free of polemic.

#### Ad valorem method

It entails assessing the arbitrators' fee as a percentage of the total amount in dispute. The ICC as the most representative institution that follows the ad valorem method, fixes arbitrators' fees itself assessing their diligence, time spent on the proceeding and complexity of the case (ICC Appendix III, Article 2 (2)). Such description seems to be reasonable. In practice, in small claims up to \$50,000 arbitrators will receive a minimum of \$3,000, whereas in more complex cases, disputes over \$500,000 arbitrators' minimum fees go up to \$113,215. With comparably lower rates, \$2,000 less than the ICC, the Cairo Regional Center for International Commercial Arbitration establishes for small claims up to \$50,000 a remuneration of \$1,000. Likewise, the recent 2012 Kuala Lumpur Regional Center for Arbitration Rules (KLRCAR), establish also a scale with minimum arbitrators' fees at \$1,000. Surprisingly, the KLRCAR consider such expenses as laundry, drying, cleaning, and ironing as refundable (KLRCAR Rules Arbitral Tribunal Fees Rule 2.2(f)). To what extent out of pocket expenses are refundable is a matter of opinion.

By contrast, the SCC goes into more details including the arbitrators' individual fees in its award (See Article 43 (3) of the SCC Rules, as well as Section 37(2) of the Swedish Arbitration Act). Though, the SCC Rules contain a schedule table with the arbitrators' fees, for the cases exceeding EUR 100,000,000 arbitrators' fees are now determined by the Board on case by case analysis. Such measure was taken in order to bring certain flexibility to the complexity of the dispute.

#### Time spent method

This method establishes a rate at which the arbitrators are paid according to the time spent on the case. The rate is set either daily or hourly and in respect of the time spent both inside and outside the hearing. Many institutions fix a maximum hourly rate. For example, the LCIA's maximum hourly rate is £450 (an equivalent to 560 €), whereas FINRA applies \$475 daily maximum rate (an equivalent to 365€) including serving as Chairperson, which is considerably lower than at many other dispute resolution forums.

By contrast, the ICDR directly applies the hourly or daily rates proposed by the arbitrators on their biographic notes kept by the institution.

According to the UNCITRAL Rules, arbitrators' fee should be reasonable in amount, and shall be stated separately in the award (See UNCITRAL Rules, Articles 40.2 (a) and 41.1). However, the term reasonable is subject to a wide interpretation. i.e.: in a NAFTA case against Canada, where the tribu-

nal dismissed the claim for the lack of jurisdiction, the Chairman received the amount of \$253,097.47 (an equivalent to 197,339.73€), whereas in a PCA case against the Republic of Ecuador under the UNCITRAL rules, the presiding arbitrator received 255,675.00€ without including his personal expenses.

At the same time ICSID provides daily arbitrator's fees of \$3,000. ICSID arbitrator's fees are set by the Centre, which gives them a certain transparency.

By contrast, CIETAC that also calculates fees based on the amount in claim does not make public either arbitrator's remuneration rates or institutional fees. According to G. Johnston, rates for Chinese arbitrators range from \$500 to \$2,000 per case, therefore, high quality arbitrators who are able to make several hundred of US dollars per hour in the law firms will not be inclined to sit in CIETAC arbitrations (Graeme Johnston, "Bridging the Gap between Western and Chinese Arbitration Systems," in *Business Disputes in China*, 2nd ed., edited by Michael Moser (Juris Publishing, 2009), at 569, n. 18)

In one recorded case a foreign arbitrator received an exceptional remuneration of \$100,000. Nevertheless, it seems that arbitrators that are related to CIETAC are not very eager to spend a lot of time on CIETAC cases, unless it is done as an occasional favor or even a pro bono work. Unfortunately, there are more and more rumors about the bad quality of CIETAC awards and demotivation to serve as arbitrators triggered by low fees.

#### Fixed fee

The compensation due to arbitrators is set at a certain amount, covering all the work in connection with the dispute. However, it is difficult to know how the case will develop, whether the parties will settle or not, how long hearings will last, etc. Therefore, the main disadvantage of this approach is that the remuneration may not correspond to the amount of time spent in connection with the arbitration.

#### Conclusion

Each of the analyzed methods of remuneration has its pros and cons. Nevertheless, it should be noted that if we want to keep arbitration an appealing and desirable ADR process, not only arbitrators' but also institutional fees should be reasonable. However, the meaning of reasonable is still a matter of interpretation.

## Book Review: Consumer ADR in Europe. Civil Justice Systems

by Yaroslava Sorokhtey



The book "Consumer ADR in Europe. Civil Justice Systems", written by Christopher JS Hodges, Iris Benöhr and Naomi Greutzfeldt-Banda, published by HART publishing is a systematic comparative study on how the consumer ADR systems work in different jurisdictions, particularly in Sweden, Belgium, France, Germany, Lithuania, the Netherlands, Poland, Slovenia, Spain and the United Kingdom.

The book consists of introduction, 3 chapters (consumer ADR at EU level, Consumer ADR in selected member states, findings) and appendices (which include relevant legislation).

Introduction gives general overview of what consumer



ADR is (hereinafter – CADR) and different meanings of ADR. It describes main features of CADR, gives important policy decisions concerning these issues – two legislative proposals on CADR adopted by the European Commission. The authors point out that it is important to distinguish CADR from the court-related mediation since most people are familiar only with EU Mediation Directive adopted in 2008 and implemented in 2011. This book answers, among others, such questions as what the current state of CADR is in Europe, how European Governments and those providing or wishing to use CADR might best extend and improve their CADR systems.

The first chapter - “Consumer ADR at EU level” - speaks about alternative dispute resolution in the EU in general, competences of the EU in Civil Justice and CADR, specific EU measures regarding ADR and a number of other issues.

The second chapter (which is divided into 13 subchapters) - “Consumer ADR in selected member states” – describes in detail CADR in each selected Member State, illustrating current models of operation of important schemes. The last sub-chapter provides some examples of cross-border dispute resolution schemes, both at EU and global levels.

The third chapter -“Findings” - is divided into two subchapters – “Empirical Findings” and “Findings and conclusions”. It shows the findings of the preceding national CADR systems, so as to examine the policy issues that arise, basing on the comparative empirical analysis of the information regarding the status of CADR systems in ten Member States. This chapter reveals the factual findings regarding the state of CADR in Europe, the conceptual issues that arise and best practices of CADR schemes. Finally, important legislation is included in the appendices. You can find here Commission recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/EC), Commission recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC), European Code of Conduct of Mediators and French Charter of Consumer Mediation.

Overall, this book takes a fundamental approach in comparing CADR in ten Member States. It would be of special interest for lawyers, as well as arbitrators, academics and students. For further information about the book, please visit the HART publishing website:

<http://www.hartpub.co.uk/books/details.asp?isbn=9781849463485>

## Report on the conference “Arbitration and Mediation in Central and Eastern Europe and some Asian countries”

by Włodzimierz Brych



On 25 October 2012, an international conference entitled: Arbitrators and Mediators in Settling National and International Disputes was held in Azerbaijan. The conference was organized by the Arbitration Court at Nowy Tomyśl Chamber of Commerce (Poland) in cooperation with Polish Association of Arbitration and Mediation, located in Poznań (from the Polish side) and Azerbaijan Arbitration and Mediation Centre in Baku (on the Azerbaijan side). It was one more conference from the series: Arbitration and Mediation in Central and Eastern Euro-

pe and in some Asian Countries.

It is worth mentioning that participation in the conference was open to everyone and free of charge. It was held at the Grand Europe Hotel in Baku - the capital city of Azerbaijan. It was not surprising that the conference attracted considerable attention taking into account the fact that there was a well selected group of speakers, including some outstanding professors and presidents of arbitration courts, as well as representatives of mediation centres from different corners of the world, like: Azerbaijan, Poland, Russian Federation, Turkey, Georgia, Great Britain, Ukraine, Uzbekistan. The conference languages were: English, Russian, Azerbaijan and all presentations were translated into English.

The opening ceremony was conducted, on behalf of the organizers, by Włodzimierz Brych, the President of Arbitration Court at Nowy Tomyśl Chamber of Commerce and by the President of Azerbaijan Arbitration and Mediation Centre in Baku.

The conference was divided into three sessions. The moderator of the first session was Ms A.S. Makhmudova - the Secretary General of Azerbaijan Centre for Arbitration and Mediation. Mr Brych – the President of Arbitration Court at Nowy Tomyśl Chamber of Commerce moderated the second session. The third session was moderated by Dr. Robert Cichórz -member of the Presiding Body of Arbitration Court of Western Pomerania. Among the questions discussed during the conference were those concerning the problems of the regulation of the status of an arbitrator and mediator in particular countries, of relations between them and parties to a dispute and the arbitration institutes, as well as principles of arbitrators' and mediators' ethics. The focus throughout the conference was made on the situation with arbitration and mediation in Central and Eastern Europe and in some Asian Countries.

## Enforcement of Arbitral Awards in Ukraine. Recent Developments

by Yaroslava Sorokhтей

### Introduction

Recently arbitration has become a popular means of dispute resolution in Ukraine. More and more companies include an arbitration clause in their contracts. For the last few years Ukrainian legislation has made some major changes regarding interim measures which will influence future arbitrations. Generally, statistics show that Ukraine becomes more and more arbitration friendly jurisdiction. Each year ICAC at the Ukrainian Chamber of Commerce receives a lot of cases and only one of 50 awards is set aside – the others are left for enforcement (“Ukraine. Arbitration-friendly jurisdiction: statistical report, 2011-2012” Cai & Lenard). Ukrainian parties also tend to choose SCC, ICC and LCIA arbitration institutions to solve their disputes. The legislation and practices of Ukraine regarding recognition and enforcement of foreign arbitral awards comply with international ‘best practice’ standards as contained in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law). Unfortunately, due to the confidential nature of arbitral process, the texts of most arbitral awards are not available to public (p.270, “Enforcement of SCC arbitral awards in CIS Countries: Reflections on Arbitration History”, Vladimir Khvalei (p.269-297), from “Between East and West:

Essays in Honor of Ulf Franke", Kai Hober, Annette Magnusson, Marie Ohrstrom, 2010, by JurisNet,LLC.).

Even though Ukrainian legislation mostly complies with the international standards, in practice Ukrainian courts often interpret the provisions of the New York Convention and the UNCITRAL Model Law from their own point of view and sometimes against international practices. This can be explained by the fact that in Ukraine recognition and enforcement of foreign arbitral awards can be politically motivated, attributed to the debtor's connections with the government or local administration; or direct influence on the judiciary (P.203, World Arbitration and Mediation review, 2010, vol.4, No.3; How to Enforce Foreign Arbitral Awards in Ukraine, by Yaroslav Petrov, Oleksiy Demyanenko, and Liudmila Dubnik).

Recent decisions

Recently, on 3 August 2012 the Court of Appeal of the Odessa Region enforced FOSFA's arbitral awards that had been previously set aside in UK. Request for enforcement was filed by F.F. Engels Investments Ltd (Engels) against Pacific Inter-Link SDN BHD (Pacific) (<http://reyestr.court.gov.ua/Review/25273828>, case No 1511/2458/2012, 2к/1511/12/12). Earlier, on 11 July 2012 Ukrainian District Court of the Pechersk region of the city of Kyiv enforced an arbitral award in the case Remington Worldwide Limited v. State of Ukraine, stating that request of the Claimant to enforce the award met the requirements of the New York Convention (<http://reyestr.court.gov.ua/Review/25171355>, case No 2-к-8/12).

Grounds for refusal

In case a Ukrainian court denies enforcement of a foreign arbitral award in most cases it bases its denial on the following particular grounds. Usually, those grounds are provided in the applicable international treaty. For example, under the New York Convention the enforcement can be rejected if parties did not have legal capacity to sign arbitration agreement, or arbitration agreement is otherwise invalid; award is issued on non-arbitrable matter or goes beyond the scope of the submissions of the parties; composition of the arbitral tribunal didn't comply with the agreement of the parties; or arbitration agreement is not in accordance with the law of the country where arbitration took place (Article V).

Under the current Ukrainian Code of Civil Procedure the Court may refuse the enforcement on the following non-exhaustive grounds:

- The award is not valid under the law of the country where it was issued or has not come into legal force;
- Respondent was not duly notified and was unable to present its case;
- Subject matter of the dispute is under exclusive competence of the Ukrainian court or other competent authority;
- Res judicata effect (the dispute involving the same parties, the same subject matter and cause of action has been examined and resolved by a different forum before the opening of the arbitration proceedings);
- Time limit for the submission of the application has expired;
- The court has no jurisdiction to hear that dispute;
- The enforcement of the award would be contrary to the interests of Ukraine (public policy) (page 207-208, "How to Enforce Foreign Arbitral Awards in Ukraine", World Arbitration and Mediation review, 2010, vol.4, No.3; by Yaroslav Petrov, Oleksiy Demyanenko, and Liudmila Dubnik; CPC, art. 396).

Statistics

According to the recent study of "Cai & Lenard" regarding recognition and enforcement of arbitral awards in Ukraine, Ukrainian courts rarely deny enforcement. The Report co-

vers cases from 2011 and 2012 and analyzes the practice of Ukrainian courts in the recognition and enforcement of arbitral awards. In 2011 only 10 % of awards were rejected enforcement and 6% in 2012. Among all requests for enforcement in 2012 60 % appear to be ICAC at the UCCI arbitral awards, 5% - SCC awards, 8% - ICC awards and the rest – other arbitral awards. As the study shows, in most cases the tendency is to enforce the arbitral awards (only 1 out of 50 awards is set aside) (Statistical Report "Ukraine. Arbitration-friendly jurisdiction: statistical report, 2011-2012" Cai & Lenard)

Conclusion

Ukrainian legislation has a lot of pitfalls regarding the enforcement and recognition of the foreign awards. However, it does not mean that it is impossible to enforce the arbitral award in Ukraine. As it is demonstrated in this article, a lot of SCC arbitral awards have been enforced in Ukraine, but, unfortunately, it cannot be taken as a rule. Since Ukraine is a civil law country and previous court decisions are not binding, courts can decide differently even in the cases where the facts are very similar. The other problem is that not all cases regarding enforcement and recognition are published, since it is not mandatory. Therefore, it is hard to make a definite conclusion regarding this issue.

## New ICSID case against Argentina

by Laura Lozano

Repsol, the Spanish oil major, filed on 3 December 2012 an ICSID arbitration request against Argentina for the expropriation of the Repsol's subsidiary –YPF– that had taken place in May. According to the Spanish oil major, such expropriation represented a breach of the "Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Argentine Republic" (the Argentine-Spain Bilateral Investment Treaty (BIT) of 1991). The Argentine Government nationalized 51% of YPF, the country's biggest energy company, as a measure to avoid the energy importations dependence that the country has been facing since 2010.

Repsol filed its request for arbitration upon expiration of a 6 months' cooling off period as provided under the Argentine-Spain BIT without reaching any settlement between the Government of Cristina Fernández and the Spanish oil group. According to Repsol's claim, Argentina's seizure of its 51% controlled YPF was completely "unlawful and discriminatory". As for the claimed compensation, figures are not yet official; however rumors point out that about \$10 billion are at stake. Once the arbitral tribunal is constituted, Repsol will submit the statement of claim with the corresponding claimed amounts.

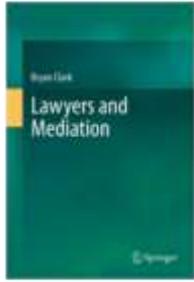
Given the fact that there are currently 13 pending cases against Argentina, 5 of which represent energy cases, and the poor record that Argentina has at ICSID, a lot of controversy is expected. Furthermore, up until today Argentina has paid no compensation to the companies affected in its 2001-02 default and devaluation.

In the meantime, it is expected that it will take at least three to four years to render the award and to see whether Repsol is compensated and if so, to which amount the compensation arises. Additionally, Repsol sued Argentina in May in the US and has threatened to initiate legal actions against those companies that would decide to invest in YPF.



## Book Review: Lawyers and Mediation

by Yaroslava Sorokhtey



The book "Lawyers and Mediation" written by Bryan Clark and published by Springer Heidelberg New York Dordrecht London in 2012 is focused more on the explanation and overview of the lawyers' role and relationships within mediation rather than on providing guidance to them in making the mediation successful.

The book is divided into 6 chapters. The first chapter - "The History of Lawyers and Mediation" - covers the historical development of ADR and the role of the lawyer in it. The author compares the role of the lawyers within mediation in the USA (as an example of common law system country) and continental Europe. The author concludes in this chapter that a lot of developments took place in mediation movements and raises a question whether lawyers with their own traditional legal training are suitable for mediation. In the next chapter - "Lawyers' Resistance to Mediation" the author analyses the notion of lawyers' resistance to mediation and investigates the motives of those who may be seen as a roadblock to mediations' progress. Here the author raises such problems as lawyer-client relationship in ADR, some possible cultural barriers, evidences of financially motivated behavior and fears over the efficiency of mediation. Generally, this chapter reveals the reasons why lawyers may resist use of mediation.

However, in the next chapter - "Lawyers' Involvement in Mediation and the Co-Option Thesis" - it is discussed how in more "mediation friendly" jurisdictions lawyers try to promote mediation. In this chapter engagement of the lawyer with mediation and strategies used by the lawyers are mentioned. The author also recommends the ways to find a mediator and makes a conclusion that usually lawyers are in a better position than their clients to find mediators. Therefore, they have become the so-called "expert shoppers for mediation services".

The following chapter - "Mediation and Lawyers: Does the Cap Fit?" - addresses the issue whether or not lawyers are appropriate participants in mediation. Here author discusses the risks of the lawyers' involvement in mediation, taking into account legal education and personal characteristics of each lawyer. The aspects of judicial mediation are also discussed here, as well as both clients' and lawyers' expectations from mediators. The author states that there is a significant difference in practice when lawyers interact in the mediation process - no matter if they act as lawyer-mediators or party-representatives in mediation proceedings. He points out that a balance should be between the legal disputing environment and mediation.

The fifth chapter - "The Shifting of Mediation into the Mainstream" - discusses the possibility of popularization of mediation as a formal dispute resolution practice globally. The chapter mainly discusses mediation within the civil justice concerns and the institutionalized context.

In the last chapter - "Conclusion: The Future of Lawyers and Mediation" - the author emphasizes the fact that the lawyers involved in mediation proceedings need to have appropriate education, training and their involvement should be regulated. He brings some suggestions regarding how to reform legal education and which changes should be brought to the legal regulation of mediation in order to improve it.

Overall, this book takes a comparative historical approach to explain the role of the lawyer in mediation and compares it in both common and civil law system countries. It would be of special interest and importance for lawyers, as well as academics and students.

For further information about the book please visit the Springer website:

<http://www.springer.com/law/international/book/978-3-642-23473-6>

## Class Arbitration: Where do we go from Abaclat?

by Laura Lozano

On 22 November 2012, leading international practitioners gathered under the auspices of the below forty branch of "Club Español de Arbitraje" (CEA-40) and the Young Arbitrators Forum (YAF) of the International Chamber of Commerce (ICC) at Cuatrecasas, Gonçalves Pereira offices in Madrid, for a colloquium on *Class Arbitration: Where do we go from Abaclat?*

As class actions have come under attack in recent years due to their apparent incompatibility with arbitration, particularly after the Supreme Court in *AT&T Mobility v. Concepcion* permitted contracts that excluded class action arbitration, the goal of this colloquium was to enable young attorneys to hear from and engage directly with experts on this topic. Attendees had the opportunity to listen to a distinguished panel composed of Sofia Martins counsel from Uría Menéndez – Proença de Carvalho and Rémy Gerbay counsel from PriceWaterhouseCoopers and Research Fellow in Arbitration from Queen Mary and Westfield College, University of London. The panel was moderated by Maribel Rodríguez, associate at Cuatrecasas, Gonçalves Pereira (Madrid) and Co-chair of CEA-40 and John Adam, associate at Shearman & Sterling LLP (Paris) and ICC YAF Regional Coordinator for Europe & Russia. Attendees were highly enthusiastic and engaged in discussion.

Regarding the first part of the colloquium in which the IC-SID Abaclat case was analyzed, the speakers opened the floor asking whether Argentina's consent embraced claims presented by the claimants in a single proceeding, and if so, whether such claims were admissible. It was mentioned that if an extremely large number of claimants was involved it would be impossible to treat each individual claim. At the same time, the participants distinguished two levels of consent, the first one regarding the consent to arbitrate and the second one regarding consent to arbitrate "collectively". Interestingly, it was pointed out that it would go against the purpose of the BIT to interpret the silence in collective claims under the Washington Convention as a qualified silence. The conclusion made stated that certain issues had to be addressed collectively. Otherwise, at the end, it would imply a denial of justice.

Turning to the second topic of the colloquium - class actions in commercial arbitration - there was a consensus among the leading European counsel that there was an incompatibility between class actions and arbitration. Throughout the evening, the speakers pointed out that while class actions were public, arbitration was supposed to be confidential. Besides, speakers highlighted that while in class action parties were unknown at the beginning of the process both in opt in and opt out situations, in arbitration the claimant



had to name the party in the request for arbitration. Additionally, though class actions mean a better access to justice, in arbitration the main objective is an effective ADR forum for the business community. Furthermore, while in class action there are weaker and stronger parties, in arbitration the consent is based on equality. Finally, the jurisdiction for class actions is general, whereas the jurisdiction in arbitration is based on the consent of the parties. Therefore, the conclusion underlined an uncertainty of the future of class actions.

The colloquium ended with the intervention of Rémy Gerbay that addressed the challenges raised on collective recourse in international arbitration, such as the risk at enforcement stage that is faced in, for instance, sampling the process or even notifying the parties; the fact that institutional rules are not adequate as well as the problem of apportionment of costs and the case strategy for the class. The evening ended with a networking reception which gave the opportunity to young lawyers to continue the discussion in a more informal atmosphere.

## GAR reports on LLM programs specialized in dispute resolution

Recently GAR analyzed and ranked top specialized master's degrees in international arbitration (<http://www.globalarbitrationreview.com/journal/article/30988/mastering-trade/>)

GAR contacted 180 law firms specialized in arbitration and asked them to report on how many new employees, having LLM or other post-graduate studies specialized in arbitration, they had hired recently. The law firms reported about 284 graduates with such qualifications. GAR considered for its ranking only graduates who received full time permanent position in the field of arbitration, excluding interns or those who had had a position before enrolling into the course, or who had been at the law firm for more than 3 years. The top specialized LLM in Europe (and the second in the world) appeared to be LLM in International Commercial Arbitration Law at Stockholm University, founded in 2003 by Patricia Shaughnessy. According to the results of the study, alumni from this LLM are hired most often for arbitration practice in the law firms.

Recently Vrije University of Brussels (VUB), in Brussels, the capital of Europe, together with AIA also established a post-graduate program in International Business Arbitration. This program exists only for 3 years and it addresses, in particular, the importance of arbitration in business as well as the differences and similarities of a number of jurisdictions and arbitral institutions in approaches to international arbitration. Johan Billiet, president of AIA is one of the lectures at the program. More information about this program can be found at:

<http://www.vub.ac.be/iPAVUB/Postgraduaten/Resources/InternationalBusinessArbitration.pdf>

## Standing Conference of Mediation Advocates

The [Mediation Advocacy Task Force](#) of the [IMI Independent Standards Commission](#) (ISC) has established Criteria for assessing effective mediation advocacy practice. The Criteria form the basis upon which appropriate organisa-

tions may apply to the ISC for approval to qualify suitable individuals as IMI Certified Mediation Advocates via a Qualifying Assessment Program (QAP). The profiles of IMI Certified Mediator Advocates will be visible in an open search engine, enabling users to easily browse candidate profiles and select suitable Mediation Advocates. The proposed Criteria may be found at <http://imimediation.org/mediation-advocacy-criteria>



The Task Force recognises that some individuals already possess the high levels of experience, knowledge and practical skills demanded of mediation advocates during the evaluation, preparation, conduct and implementation of mediation. The Task Force considers that such individuals should be able to qualify for IMI Mediation Advocacy Certification without having to be accessed via a QAP. The Task Force has therefore prepared an Expertise Qualification Path (EQP) to those with the proven knowledge, experience and skills set out in the Criteria to be IMI Certified Mediation Advocates. The proposed EQP may be found at: <http://imimediation.org/mediation-advocacy-eqp>

The Task Force has been unable to agree unanimously on whether the most appropriate terminology should be Certification or Accreditation, and on whether Advocate or Adviser is preferable. The Task Force acknowledges that different titles may therefore be used in English, the options being:

- |          |                                                                     |
|----------|---------------------------------------------------------------------|
| Option 1 | IMI Certified Mediation Advocate                                    |
| Option 2 | IMI Accredited Mediation Advocate                                   |
| Option 3 | IMI Certified Mediation Adviser                                     |
| Option 4 | IMI Accredited Mediation Adviser                                    |
| Option 5 | Allow all four, according to the choice of the person so qualified. |

It is proposed to launch the IMI Mediation Advocacy Certification in January 2013, following an open request for comments on the detailed Criteria, the EQP requirements and the name. Comments are invited by December 31, 2012 by emailing Emma Ewart, IMI Operations Manager at [Emma.Ewart@IMImediation.org](mailto:Emma.Ewart@IMImediation.org)

In the United Kingdom, the SCMA intends to offer both an open QAP path to qualification and a members' only EQP path to qualification. SCMA will be happy to partner with other organisations in Europe to devise and offer expertise in training for a European QAP. For more information contact [agoodman@1chancerylane.com](mailto:agoodman@1chancerylane.com)

IMI ISC Mediation Advocacy Task Force:

Manon Schonewille (Chair, Netherlands); Prof. Harold I. Abramson (USA); Prof. Ewa Gmurzynska (Poland); Aloysius Goh (Singapore); Prof. Andrew Goodman (UK); Jeremy Lack (Switzerland); Deborah Masucci (USA); Khory McCormick (Australia); Alexander Oddy (UK); Sim Khadijah Binte Mohammad (Singapore); Dimitra Triantfyllou (Greece).



## Legal English e-learning course



AIA is pleased to announce its cooperation with the Lodo Arbitrale Institute and to present its first project - Legal English e-learning course. The purpose of this course is to improve general use and comprehension of Legal English. Through a wide variety of legal and law related texts and exercises, participants will acquire the reading, grammar, vocabulary, writing and listening skills necessary for their daily interaction with legal materials. The course is aimed at lawyers, legal experts, accountants, notaries public, jurists and all professionals working in the judicial-economic field. The aim is to improve legal English in general and specific areas of law in particular. The course targets different issues and legal terminology relevant to contracts and setting up a company. It also covers terminology used in EU law, competition law, employment law, intellectual property law, debtor-creditor relations, and alternative dispute resolution procedures, in particular international mediation (civil and commercial). During the course you will also practice a variety of business communications skills such as business correspondence, language of presentations and meetings.

The course consists of 9 lessons, 120 minutes each. You can follow the course using your personal computer, tablet or Smartphone, choosing the most convenient option for you. Our course will not only teach you legal terminology. We also assure you that by the end of the course you will improve your ability to write legal texts, your legal English reading comprehension skills and your ability to use legal English in a spoken context. On completion of our course, you will also be able to run international ADR procedures, write contracts, letters to your clients and e-mails using grammatically correct legal language. And all the above will improve your chances to pass an international Legal English exam with flying colours.

If you want to enrol in our program please follow the link and register:

[www.ila-wpl.com](http://www.ila-wpl.com) accessible starting from 15th December 2012.

Regular price of the course is 350 EUR. The readers of our Newsletter are offered a special price of 250 EUR.

Don't miss your outstanding chance to become more competitive in the legal market!

## AIA Recommends to Attend ICC is gearing up for its 4th ICC International Mediation Conference



The one-day conference entitled "Stay in Control! Managing risks, time and costs of commercial disputes with smart ADR", is set to

kick off ICC's 2013 Mediation Week, which will run from 7-13 February.

The conference, a sell-out event every year since its inception, will provide advantageous insight into how to maintain control over commercial disputes – including the associated costs and risks – through smart choice of the best dispute resolution procedure, efficient collaboration with outside counsel and internal implementation of a mediation-based approach to dispute resolution. With a special focus on mediation, the conference will provide partici-

pants with the know-how to select the appropriate dispute resolution mechanisms and create a dispute resolution roadmap for their respective companies.

Speakers will include leading representatives from *inter alia*, ABB, British American Tobacco, Bombardier, E.ON, Northrop Grumman, Orange and Thales.

Over 100 participants are expected to attend the conference and early registration is recommended to take advantage of an early bird fee and to avoid disappointments. Reduced rates are also available for members of the following conference supporters: the American Bar Association, Association of Corporate Counsel Europe, Corporate Counsel International Arbitration Group and the Round Table Conflict Management and Mediation of the German Economy.

As the conference is designed for in-house counsel, participation in the conference for non-in-house counsel will be restricted.

"The annual ICC International Mediation Conference is a must-attend event for in-house counsel. The topics discussed are on the cutting edge of commercial dispute resolution and the opportunity to exchange know-how with colleagues around the world is unique," said Christine Guerrier, VP Disputes Resolution and Litigation, Corporate Legal and Contracts, Thales, France.

King & Spalding, KPMG, Taylor Wessing, Winston & Strawn, Diales and the John Hardy Group are the event sponsors.

Comprising the ICC International Mediation Conference and acclaimed Mediation Competition, ICC's 2013 Mediation Week promises inspiring discussions on new developments in alternative dispute resolution and the opportunity to share experiences and meet with peers from more than 40 countries.

Further information and a full conference programme are available now from ICC's new look website.

Visit [Mediation Week](#) for details.

