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## European Mediation Training for Practitioners of Justice

LOCATION: Brussels, Belgium

DATE: August 19-31, 2013

Limited number of places (first come first served)

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



### EMTPJ 2013

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After three consecutive years of 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 launched the EMTPJ project in 2010, with the support of the European Commission and in collaboration with the HUB University of Brussels and Warwick University. It presents an opportunity for participants from around the world to get together and become trained and specialised as a mediator specializing in cross-border disputes under Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters.

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.

The training 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 intensive practical training.

Course alumni highly recommend this course to all legal practitioners. One of the former participants in EMPTJ 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)

# Protection of Legitimate Expectations by International Investment Law

by Felipe Mutis Tellez

It is well-known that international investment law protects foreign investors from changes in the legal order and/or from a reversal of governmental assurances on which they rely for investing through the doctrine of legitimate expectations. However, the undefined nature of bilateral investment treaty (BIT) obligations can be interpreted to create unlimited expectations by foreign investors. Therefore, the question is what is considered necessary to determine the conditions and criteria for the protection of legitimate expectations under international investment law from a practical perspective? Or, in other words, what conditions and criteria should investors observe such for structuring a potentially successful arbitral claim?

Thorough research on this subject suggests that the following are the conditions and criteria for the protection of legitimate expectations under international investment law.

Only expectations that are legitimate will be protected by international investment law. Since legitimate expectations cannot be solely the subjective expectations of the investor, not all expectations upon which a foreign investor takes a business decision are legitimate; thus, some expectations are excluded from the protection afforded by international investment law.

The legitimacy of expectations is determined by three main conditions:

(i) Reliance on the law. Under international investment law, investors rely on the stability, predictability and consistency of the host state's legal and business framework. This framework consists of general legislation and regulations, any undertakings or representations made explicitly or implicitly by the host state, or even of a mixture of these factors. Therefore, investors legitimately expect that the host state will not alter the legal and business environment and/or administrative practices upon which the investment has been made.

(ii) Objective and subjective reasonableness. From an objective perspective, the expectation should be that of a diligent or prudent investor, that is, an investor that has taken into account all circumstances surrounding the investment, including the political, socioeconomic, cultural and historical conditions prevailing in the host state. In *Saluka v The Czech Republic* the Tribunal held that the Claimant could not reasonably rely on an assurance issued by the Minister of Finance, since the latter could not bind future governments.

An expectation will be subjectively unreasonable if such expectation conflicted with other knowledge the individual had about the law and/or representations made by the host state. Accordingly, an investor may not argue that his investment fails merely because of laws, policies or practices which were in place at the time of the investment, and which were, or ought to have been, well known to him before making the investment. The tribunal in *Thunderbird v Mexico* concluded that the Claimant could not rely on a legal opinion issued by the Government, not only because such opinion was based on the Claimant's misrepresentation about the nature of the games it operated, but also be-

cause the Claimant knew that gambling was an illegal activity in Mexico.

(iii) The beneficial effect for the investor. In order to give rise to legitimate expectations in international investment law, the host state's legal order, including any governmental assurance, generally has to tend to the benefit of the investor.

Host states violate investors' legitimate expectations in three main ways:

(i) Overtaking specific representations or assurances. Investors are entitled to rely on specific representations or assurances made directly to them by the host state and upon which they were induced to invest. Indeed, international investment law grants a heightened level of protection for investors against any reversal of such specific representations or assurances, as the *Duke v Ecuador*, *Duke v Peru*, *Eureko v Poland*, *Metalclad v Mexico*, *MTD v Chile* and *Tecmed v Mexico* decisions evidence.

Moreover, legitimate expectations may also arise out of specific representations or assurances made by the host State, not directly to a particular investor, but in a general manner as to attract investment for a determined sector or industry. The cases of *CMS v Argentina*, *LG&E v Argentina*, and *Enron v Argentina* constitute a clear example thereof.

(ii) Altering the legal order upon which the investor relied. Although specific undertakings are more likely to generate legitimate expectations than general legislative statements, such expectations can arise out of the existing background of regulation, and so changes in the law or in the governmental conduct may violate legitimate expectations even in the absence of promises or assurances to the contrary, as the tribunal in *Saluka v The Czech Republic* concluded.

(iii) Repudiating or interfering with investors' licence or contract rights. When foreign investors acquire rights from contracts or in the nature of licences, legitimate expectations arise, and international investment law will protect them not only from a host state's repudiation of such legal or contractual obligations, but also from any governmental or regulatory interference with their rights. This reasoning was held by the tribunals in *Occidental v Ecuador*, *CME v The Czech Republic*, *Iurii Bogdanov v Moldova*, and *SGS v Philippines*.

There is a trend, already reflected in various academic writings and arbitral decisions (such as the ones taken in *PSEG Global v Turkey*, *Parkerings-Compagniet v Lithuania*, *Plama Consortium v Bulgaria*, *ADF v United States*, *Biwater v Tanzania*, *Continental v Argentina*, *Jan de Nul v Egypt*, *William Nagel v The Czech Republic* and *EDF v Romania*), which narrows the applicability of legitimate expectations strictly to cases where a specific representation is made by the host State. If this pattern continues, claims based solely on the existing legal framework will encounter more obstacles for succeeding.

Some arbitral decisions suggest that international investment tribunals are inclined to detach legitimate expectations from licence and contractual disputes. While the decisions taken in *Consortium RFCC v Morocco*, *Duke v Ecuador*, *Duke v Peru*, and *Impregilo v Pakistan* observed that a host

state's breach of contract will only violate the investor's legitimate expectations if such breach involves the exercise of sovereign power, the tribunal in *Waste Management v Mexico* went even further by establishing that investment arbitration was not a forum for the resolution of contractual disputes. As a result, investors may have to take licence out of contractual claims out of the legitimate expectations standard, and place them into the arbitrary conduct or expropriation standards.

Since a state's regulatory powers and economic character need to evolve, the protection of legitimate expectations must be qualified by the need to maintain a reasonable degree of regulatory flexibility on the part of the host state to respond to changing circumstances in the public interest. At the same time, in future reforms, the host state must take into account that its legal order forms the basis of investors' legitimate expectations. This approach does not necessarily imply a denial of all claims related to violations of legitimate expectations. This was the case in *Saluka v The Czech Republic* and in *Tecmed v Mexico* where both tribunals, despite having included an explicit balancing test, found a breach of the investors' legitimate expectations. This threshold was also used by the tribunals in *Ronald Lauder v The Czech Republic* and in *EDF v Romania*.

Moreover, *Tecmed v Mexico* and the *Thunderbird v Mexico* Separate Opinion indicate that investment tribunals, when evaluating legitimate expectations claims, may be willing to introduce some weighing of the public interest said to counterveil the investor's legitimate expectations. Accordingly, legitimate expectations, particularly those based on unlawful administrative acts, may not to be protected when the public interest served by the act that disappoints the expectations outweighs the investor's individual interest in having its expectations met.

According to the international law of state responsibility, reparation for a wrongful act takes the forms of satisfaction, restitution or compensation. The tribunals in *Texaco v Libya* and in *Kuwait v Aminoil* found that, although restitution was the appropriate remedy for a breach of investors' legitimate expectations, host state sovereignty poses an obstacle for the enforcement of in-kind remedies, especially when the host state has breached a stabilization clause or a promise not to change the law. In view of these complications, and the fact that satisfaction does not play a practical role under international investment law, the protection of legitimate expectations has taken, and would nearly always take, the form of monetary compensation. This was the case in *Metalclad v Mexico*, *MTD v Chile* and *Tecmed v Mexico*.

However, restitution in kind should not be definitively disregarded. In *Occidental v Ecuador* the investor sought the in-kind remedy of declarations that it was entitled to certain refunds of taxes paid and that the state should make those refunds, all of which were awarded by the tribunal.

This is an excerpt from the paper "Conditions and Criteria for the Protection of Legitimate Expectations under International Investment Law", which was selected as the winner of the 2012 ICSID Review Student Writing Competition, and was recently published in the Fall 2012 (27(2)) Issue of ICSID Review Foreign Investment Law Journal. For a free access to the full version of the paper, please visit the ICSID Review Foreign Investment Law Journal website: <http://icsidreview.oxfordjournals.org/content/current>.

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lution and Management at the University of Dundee.

## Book Review: The Dutch Collective Settlements Act and Private International Law by Paul Frankenstein



The new book the *Dutch Collective Settlements Act and Private International Law* by Helene van Lith takes a look at the international implications of the 2005 Dutch Collective Settlements Act (WCAM). WCAM is a law that allows for class-action settlements. Like American class-action settlements, WCAM is built around an "opt-out" mechanism; if the court approves a collective settlement, the settlement applies to all individuals who are covered by the terms of the agreement, excepting those who have affirmatively signaled that they choose not to be part of the settlement.

Unlike American class-action law, however, WCAM only provides for collective settlement and redress; the legislation does not provide for actual class-action litigation.

WCAM settlements are a relatively straightforward and uncomplicated legal issue when dealing with purely domestic, i.e. Dutch, claims; however, when dealing with international claims and an international plaintiff class, the private international law issues become much more complicated.

This book starts with a brief introduction to the WCAM, and then plunges into the heart of the matter: how do the choice-of-law rules of the EU affect settlements under the WCAM? There are four foundational documents in play: 1) the Brussels I Regulation 44/2001 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters; 2) the 1968 Brussels Convention, which preceded Brussels I; 3) the 1988 Lugano Convention; and 4) the revised 2007 Lugano Convention.

The book looks at how these conventions and regulations play out in the context of international settlements under the WCAM; to illustrate the issues, the author looks at the *Shell* and *Converium* settlements. Those two cases which were WCAM settlements that were adjunct to American class-action cases that were designed to provide relief for classes of affected parties who were not eligible for relief under the US class-action system; this is to say, these were settlements designed for non-US citizens.

After looking at both cases, the author comes to the conclusion while WCAM was successfully applied to international interested parties in both cases, the ideas that underpin Brussels I as well as the other conventions are a poor fit, conceptually, for the international application of collective redress settlements under WCAM and that perhaps they could be amended or expanded to provide a more solid legal basis for the international application of WCAM.

The book then goes on to look at the issues and problems with notifying foreign parties in a collective settlement; the issue of representation for foreign parties; and the question of international recognition of WCAM settlements.

The book finishes with a section on applicable law and conclusions. It should be noted that the

law applicable to WCAM proceedings is not necessarily the same law that applies to the settlement itself; moreover, there may be mandatory law in the country of foreign interested parties that may assert itself, depending on the subject matter of the settlement.

In conclusion, while slim, this is an exhaustively researched and well-written treatise on how WCAM interacts with private international law. Lawyers and academics who are interested in international collective action will find this a thoughtful and interesting read.

For more information about the book and where to purchase it, please visit the website of MAKLU- Publishers:

<http://www.maklu.be/MakluEnGarant/BookDetails.aspx?ID=9789046604076>

## Cross-examination in International Arbitration

by Laura Lozano

On 14 February 2013, leading international practitioners gathered under the auspices of the below-forty branch of "Club Español de Arbitraje" (CEA-40) at Uría Menéndez offices in Madrid, for a seminar in cross-examination in international arbitration.

The challenges faced by counsels according to their jurisdiction of origin were analyzed in the seminar. The goal of this seminar 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 José María Alonso, partner at Baker & McKenzie, president of the Arbitration Court of the Madrid Association Bar and Adolfo E. Jiménez, partner at Holland & Knight. The session was introduced by Quinn Smith, partner at Smith International. The panel was moderated by Katharine Menéndez de la Cuesta, senior associate at Uría Menéndez and secondee in the Miami office of Holland & Knight. The activity took place via videoconference between Miami and Madrid, as well as in the cities of Barcelona, Lisbon and Oporto. Attendees were highly enthusiastic and engaged in discussion.

Mr. Smith opened the discussion by describing cross examination as an art using three words: witness, counsel and arbitrator. The issue is which party has control over the examination. On the subject of the preparation of the witness for achieving the right level of control, he highlighted that whereas in the common law jurisdiction witness preparation is a must, in civil law jurisdictions that kind of preparation can discredit the witness. Therefore, in cross examination in international arbitration the witness should be prepared to achieve the desired confidence as well as a certain degree of credibility.

For counsels, the element of control is more present in common law jurisdictions than in civil law jurisdictions; in civil law jurisdictions, the questions posed by counsel are limited by the arbitrator. In common law jurisdictions, witness preparation should be wider and more detailed because the witness will face leading questions. Therefore, according to Mr. Smith, in international arbitration the practice should be a mix of both systems, not making many leading questions, as otherwise, the arbitrators will not take into consideration such questions. Thus, it is recommended that lawyers asking questions should not make them too direct in order to maintain credibility. Also, this will help the arbitrator hear and follow the line of questioning.

Mr. Quinn closed his introduction with the use of evidence in

cross examination. While there are tribunals in common law jurisdictions that only accept witness evidence from oral testimony and not from written witness statements, in civil jurisdictions, witness statements have more weight than oral testimony. According to Mr. Quinn, the lack of specific rules in international arbitration allows lawyers to be more creative in their approaches to witness examination, and relying only on the rules and techniques of only one jurisdiction should be avoided.

The debate led by Mr. José María Alonso and Mr. Adolfo E. Jiménez and moderated by Katharine Menéndez de la Cuesta started by looking at the goals of cross-examination. According to Mr. Jiménez, lawyers should be taking advantage of the time frames between witness statements and cross examination to study the case with great detail, rather than simply using cross examination to attack the witness. Interestingly, in words of Mr. Alonso, the counsel in cross-examination should be kind, rather than antagonistic, and not pit himself against both the witness and opposing counsel. Cross-examination should be an opportunity to learn from the witness.

Both members of the panels were asked to share their thoughts while acting as arbitrators. For Mr. Alonso, leading questions should be avoided, as the arbitrator wants to listen the witness rather than the counsel. On the other hand, Mr. Jiménez felt that one of the most important issues is the weight given to the witness, and the time spent by counsels to cross-examine them. Both members of the panel agreed that having a complete understanding of the case was very important and believe that having twenty-seven witnesses testifying about the same issue the same way twenty-seven times is bad practice.

Witness statements were also analyzed. The conclusions regarding this topic were that questions in cross examination should be limited to the witness statement. Nonetheless, it is recommended practice that witnesses be prepared to discuss matters beyond their witness statement, in the event that arbitrators decide to ask further questions.

Lastly, both members of the panel agreed that the witness should testify on what she or he is aware of, and from that knowledge the examination should be based. Counsel should object in the event that during the cross-examination **questions outside of the scope of the witness's knowledge** are asked by the opposing counsel. To conclude, the seminar ended with a number of open questions from the participants. In a nutshell, it was a great opportunity to hear from excellent practitioners and learn important issues about cross-examination in international arbitration.

## Book Review: Litigation in the Netherlands: Civil Procedure, Arbitration and Administrative Litigation

by Yaroslava Sorokhtey

The book "*Litigation in the Netherlands: Civil Procedure, Arbitration and Administrative litigation*," by Marieke van Hooijdonk and Peter Eijsvoogel gives a quick overview of the main features of litigation in both civil and administrative courts in the Netherlands and gives to the reader clear understanding of the litigation procedure in the



Netherlands. While procedural law in the Netherlands is logical, well-structured and understandable, this book helps Dutch lawyers advise English-speaking clients on the issues of litigation in the Netherlands. The book is divided into 3 chapters: civil procedure, arbitration and administrative procedure.

The first chapter – civil litigation – gives a detailed overview of the litigation procedure in the Netherlands, compares it with common-law litigation procedure, where it explains the role of the judge and sources of law; it talks about evidences in litigation and goes through each stage of the procedure – from the first instance to enforcement and recognition of judgements.



The second chapter – arbitration – describes particularities of the arbitration procedure in the Netherlands according to the national arbitration act (articles 1020 to 1076 CCP). This chapter includes different issues on how to draft enforceable arbitration agreements, the jurisdiction of the Civil Courts, the proceeding itself and requirements for producing an enforceable arbitral award. This chapter also talks about arbitration outside the Netherlands and enforcement of foreign arbitral awards. At the end of the chapter, it briefly goes through the arbitration procedure under the NAI Arbitration Rules and explains mediation procedure in the Netherlands.

Finally, the third chapter talks about administrative review and three types of pre-proceedings. You find here useful information about so-called objection proceedings, administrative appeal and public preparatory procedure. The public preparatory procedure provides for public input into preparation of certain administrative orders. This chapter also explains administrative enforcement procedure.

This book is recommended to those who provide legal advice on Dutch litigation to English-speaking clients as well as those seeking information regarding practical aspects of litigation in the Netherlands and arbitration. It would also be an asset for everyone interested in arbitration, civil and administrative litigation in the Netherlands, especially to foreign lawyers, businessman, foreign students or other individuals involved in litigation there and who are willing to learn more about its practical aspects.

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

AIA Members receive a 10 % discount!

[http://www.kluwerlaw.com/Catalogue/titleinfo.htm?wbc\\_purpose=basic?ProdID=904114143X](http://www.kluwerlaw.com/Catalogue/titleinfo.htm?wbc_purpose=basic?ProdID=904114143X)

## Investment Arbitration in ICSID Statistics by Matthew Nowak

The number of cases registered in 2012 in the International Centre for Settlement of Investment Disputes (ICSID) was the highest in the last forty years. With the prolonging international crisis, controversial political and economic decisions of some governments, the risk of bankruptcy of Greece, Spain, Portugal or Italy etc., it's all just a matter of time before foreign investors start using investment arbitration to try to recover their losses during the crisis.

As of December 31, 2012, ICSID had registered 419 cases under the ICSID Convention and Additional Facility Rules. Cases registered by ICSID have been continuously growing

for the last few years, from 21 in 2007 to 50 in 2012. From the time ICSID was founded there have been over 400 procedures, with the highest sentenced award for US\$ 1.769.625.000 in the case *Occidental v. Ecuador* (ICSID Case No. ARB/06/11, award from 5 October 2012)

The 2012 has brought yet again a numerous amount of cases of which 80% (40) were arbitration cases registered under ICSID Convention (*Convention on the Settlement of Investment Disputes between States and Nationals of Other States*) also known as the Washington Convention from 1965. Following 20% (10) more cases registered under the so called ICSID Additional Facility Arbitration Cases, which enables the possibility to use conciliation or arbitration proceedings not governed by the provisions of the Convention. They provide, among other things, that the Additional Facility will not be available for the settlement of ordinary commercial disputes. These procedures have been becoming more popular and since 2007 there has been over 300% **growth in the registration of those cases**. Even though it's a small sample, it would seem that investors are becoming more and more confident with the procedure. On the other hand there have been signals of critic towards the procedure because of the high cost and lack of enforcement in some of the countries.

Distribution of all ICSID Cases by Economic Sector registered in 2012, could be seen as follows: Oil, Gas & Mining (28%); Other Industry (22%); Information & Communication and Finance (10%); Electric Power & Other Energy and Construction (8%); Water, Sanitation & Flood Protection (6%); Transportation (4%); Agriculture, Fishing & Forestry and Services & Trade, Tourism (2%).

The highest amount of registered cases in 2012 concerned South America (30%) from which 9 refer to Venezuela, followed after in Eastern Europe & Central Asia (23%) of which already three cases concern a claim against Hungary. Finally Sub-Saharan Africa with (16%) of all the cases including Equatorial Guinea – 3, Guinea -2 in 2012.

This attracts the attention of the statistics of the nationalities of the arbitrators, conciliators and *ad hoc* committee members appointed by geographical regions. Most appointments come from Western Europe (46%) followed by North America (22%), it should be also mentioned that both South America and South & East Asia & the Pacific regions rank 3<sup>rd</sup> with the amount of around 10% of all the appointments. Even though most of the appointments come from Western Europe, on an individual basis the leading country is US with more than 160 appointed.

There are a number of countries that are neither a contracting or signatory state to the ICSID Convention. One of those countries is Poland, which has not ratified the ICSID Convention. Investment arbitration cases process on the base of bilateral agreements (BITs) it is also one of the main reasons why there has been no polish arbitrator/conciliator/*ad hoc* committee so far in any ICSID procedure. It would also seem unusual for that to be the case, due to the fact that there have been appointed arbitrators from other not contracting or signatory states like Brazil (11), India (6) or for that matter Mexico (47). It all may be connected with a political importance on the international arena.

With the global crisis hitting countries around the world, investors should be ready for an unexpected business outcome. In that case they may be looking to recover damages. Investment arbitration is becoming a relatively attractive alternative dispute resolution procedure. A straight forward procedure with qualified staff can make the outcome quite predictable. Investors are growing fonder of the ICSID and are



interested in pursuing their legal protection on the international market.

## Book Review: Arbitration in China: A Legal and Cultural Analysis by Yves Claeys



The book "Arbitration in China: A Legal and Cultural Analysis" is written by Kun Fan, a former deputy counsel of the ICC International Court of Arbitration, and currently assistant professor at the Chinese University of Hong Kong. This book is based on her PhD dissertation presented at Geneva University and is the 5<sup>th</sup> Volume in the China and International Economic Law Series, published by Hart Publishing.

This book addresses the contemporary arbitration in China from an interdisciplinary perspective, using a comparative approach. It examines the development of arbitration in China in the context of the globalisation and harmonisation of law by comparing Chinese law and practise of arbitration with so-called transnational standards, taking into account China's specific legal, cultural, sociological, political and economic circumstances.

The first of ten chapters gives an overview of the Chinese legal framework and arbitration system. Chapters two to six cover the comparison of the Chinese arbitration with transnational standards, by means of examining respectively the arbitration agreement, the arbitral tribunal, the recognition and enforcement of awards, practices at Chinese arbitration institutions and the role of mediation in arbitration in China.

Chapter seven then discusses the unique characteristics of law and practice of arbitration in China in the light of traditional legal culture of China (chapter eight) and the effects of modernisation (chapter nine) and its influences on the contemporary Chinese arbitration system.

Finally, in the last chapter, the author describes her idea of how China will respond to the continuation of global harmonisation of arbitration law and practice and, inversely, how China may influence practice and law of arbitration elsewhere.

This book is of great value for academics, scholars and students of international arbitration and comparative studies. It may also be very useful for practitioners of arbitration in China.

For more information about the book and where to purchase it, please visit the website of HART Publishing: <http://www.hartpub.co.uk/books/details.asp?isbn=9781849463775>

## *CE International Resources v. SA Minerals Ltd., Tantalum Technology, and Yeap Soon Sit: How American Courts Look at Interim Awards* by Paul Frankenstein

American courts are often considered by international commentators to be out of touch with international norms in cases dealing with arbitration or international commercial transactions. Critics point to *Beijing Metals* or *First Options* as

classic examples of US provincialism, or worse, outright American hostility to international legal standards. However, a recent decision in the case of *CE International Resources v. SA Minerals Ltd., Tantalum Technology, and Yeap Soon Sit* suggests that this popular view is exaggerated and overblown.

In *CE International Resources*, the claimant had brought an arbitration claim against three respondents under the International Dispute Resolution Procedures ("IDRP") of the American Arbitration Association. In the course of the arbitration, the claimants filed for interim relief. Specifically, they asked the tribunal to grant pre-judgment security and a so-called "Mareva" injunction, prohibiting the transfer of assets in the event the respondents failed to post the pre-judgment security.

The tribunal, acting in accordance with Article 21 of the IDRP, issued an "interim award" that ordered the respondents to post \$10 million USD as security and granted a Mareva injunction that prohibited the respondents from transferring assets internationally until the pre-judgment security was posted.

The claimants filed an application in the Southern District of New York to confirm and enforce the "interim award". One of the respondents opposed the motion on two grounds: first, that as the award was not a final award, it cannot be confirmed by a US court; and second, that by ordering pre-judgment security and a Mareva injunction, the arbitrators exceeded their authority.

The first issue, that the court lacked the power to confirm and enforce the award as it was not a "final" award, raises the question of what exactly constitutes a final award in an arbitral setting.

The first problem—that the award was styled an "interim" award—is relatively easily disposed of: it's settled law that US courts look beyond the title of an award to the substance to determine if it is, in fact, a final award.

The general view, which was argued by the claimant, is that an award is a final award if it makes a final determination on an issue. The respondents disagreed, arguing that an award is final only if it reaches of the merits of the case. In this case, the judge found that the issue of interim relief was a separate issue from the merits of the case and that the arbitrators had reached a final determination on that issue; thus, the award, despite being referred to as an "interim award", was, in fact, a final award.

It should be noted that it is becoming more common for international tribunals to issue partial final awards, as they determine issues during the course of the proceeding. The most common form is to issue a partial final award on the question of jurisdiction, allowing the parties to address that issue before addressing the merits; however, bifurcation of the issues between jurisdiction and merits is hardly the only way to divide the issues.

On the second issue, the question of whether the arbitrators exceeded their authority, the judge turned to the powers vested in the arbitrators under Article 21 of the IDRP.

The respondents argued that the contract was limited to remedies available under New York law, as the contract provided that it was to be construed and enforced in accordance with the laws of New York. New York does not make pre-judgment security an available remedy for plaintiffs; therefore, according to the respondent, the remedies available to the claimant are only those that are allowed under New York law.

The judge disagreed with that logic, pointing out that by adopting the IDRP rules, the parties had agreed to empower the arbitrators to take interim measures that



included "measures for the protection or conservation of property"; thus, the parties agreed that the arbitrators could render an award that provides for interim security.

The question of the *Mareva* injunction is a more difficult one, as a *Mareva*-style injunction is not a judicial remedy that is allowed under US law.

A *Mareva* injunction is essentially a pre-judgment injunction that freezes the assets of the respondent or the defendant. There are several court cases that have stated that *Mareva* injunctions are not just unavailable in the United States, but they are explicitly disallowed.

The difference, here, however, is that in those court cases, the *Mareva* injunctions were ordered by a judge; in this case, the *Mareva* injunction was ordered by an arbitral tribunal. More importantly, the *Mareva* injunction was ordered by an arbitral tribunal that was specifically empowered to issue injunctions that provided for "whatever interim measures [the tribunal] deems necessary".

This creates the slightly unusual situation where arbitrators may have, depending on the rules they operate under, actually greater power to grant interim relief than judges sitting in a court of law.

Thus, after finding that the "interim award" was, in fact, a partial final award and that the relief granted was within the scope of the arbitrators' power, the court granted confirmation and enforcement of the award.

## Book Review: The Secrets of Gaining the Upper Hand in High Performance Negotiations

by Matthew Nowak



The book "The Secrets of Gaining the Upper Hand in High Performance Negotiations" by Manon Schonewille & Felix Merks focuses on the subject of high performance negotiations. Negotiations have become an important aspect of our lives. We negotiate on a daily basis, at work with colleagues, employees, customers and superiors. We also

negotiate home with our partners and family. We even negotiate when meeting friends or planning to meet them.

As the book says in its introduction: "Determining what price we will pay, the amount of our salary, what movie to watch, who will clean up the garbage, where we shall meet ... all of these are negotiation situations".

In the era of internet and fast developing technology, we also negotiate through e-mails, video conferencing, long distance internet calls, and online meetings. In fact, in all of those situations we are negotiating without even knowing it.

The book is structured into seven chapters and a glossary. The first chapter, "High Performance Negotiations," is a basic introduction to the book itself, where the authors provide us with general information regarding negotiations. Chapter two, "The Secrets Of Gaining The Upper Hand Is To Give The Other Side The Illusion Of Control" is essentially an interview with Chris Voss, an ex FBI lead international kidnapping negotiator and current CEO of a consulting organization. The interview covers aspects of basic and advanced negotiations, based on Voss's 24 years of experience in the FBI. Chapter three, "Design: The U.S. Army's Approach To Negotiate Wicked Problems" demonstrates through a military example of "wicked problems" the need for the development of cognitive skills which allow for creative and critical judgment in deciding a course of action to pursue when

solving complex problems in a conflict. Chapter four, "Escalation phases of a conflict: Glasl's Stairway Of Conflict Escalation And Techniques To De-escalate" addresses a diagnostic instrument developed by Friedrich Glasl to analyze conflict behaviour on the basis of patterns. Chapter Five, "Moving Beyond 'Just' A Deal, A Bad Deal Or No Deal" examines advantages and potential disadvantages of working with a neutral third-party in a commercial transaction or international negotiation process. Chapter Six, "You've Got Agreement: Negoti@ting Via Email" focuses on the use of electronic communications in a professional context, presenting research on the effect the message has, to basic suggestions on how to negotiate via e-mail and on the importance of this for future generations. The final chapter, "Role-play: Special chemistry Problem Solving Advocacy" points out a few cases for practical understanding of the negotiation process.

The book "The Secrets of Gaining the Upper Hand in High Performance Negotiations" is of great value for all interested in negotiations. It is friendly and easy to read while it explains in detail the whole process of negotiation and possible outcomes.

For further information about the book and where to purchase it, please visit the Maklu website: <http://www.maklu.be/MakluEnGarant/BookDetails.aspx?ID=9789046604045>

## Controversial Spanish Preferred Stocks Go To Arbitration

by Laura Lozano

Financial entities in Spain started using preferred stocks as a cheap way to find financing when the markets started to decline after the fall of Lehman Brothers in 2009. Many individual investors purchased these stocks, attracted by promises of 7% to 15% interest. However, these preferred stocks were complex financial instruments that are not necessarily suitable for small savers. Now consumers claim that no-one from banks that sold them these stocks explained what their characteristics and disadvantages were. The principal aim of this review is explaining the problem of the preferred stocks, the regulation of the preferred stocks under the Spanish law and the peculiar use of arbitration under the Bankia dispute.

The problem of the preferred stocks

To begin with, the problem of preferred stocks has affected approximately a million of the Spanish small savers. The preferred stocks' main characteristic is that its value is subject to trading. Consequently, if a customer wants to get rid of their preferred stocks, he should go to the secondary market to sell them. Nonetheless, that does not guarantee that he will recover his entire investment as there are stock market fluctuations.

In the Spanish market, Bankia, Novagalicia and Cataluyna Bank were the banks that most used preferred stocks to finance their balances sheets. Since the dispute has reached unforeseen proportions in Spanish society, the government decided that once it established the bank bailout, consumers who were sold these stocks by Bankia can settle their dispute using consumer arbitration. Nevertheless, this alternative dispute resolution tool has already been used by consumers affected by the other banks since the summer of 2012.

## The Spanish regulation

According to the Spanish Securities Market Law 24/1988, reviewed on 21 December 2012, preferred stocks can only be sold to clients with a financial profile, regarded in the law as "professional" clients. In other words, consumers without a financial profile, who are regarded by the law as "retail investors", who are not aware of the risks inherent in preferred stocks cannot purchase preferred stocks.

The unusual arbitration procedure in the Bankia dispute

The arbitration proceeding is supposed to be available for those who previously have done a stock swap, which is a very risky decision as the value of the stock swap depends on the value of the stock at the time of conversion. Bankia stocks value are currently valued at 0,33 euro per stock (as 28 February 2013). In other words, in order to become eligible for this procedure, consumers will have to first convert their securities into stocks; this transforms the process into a **impure form of arbitration**. It's not a common practice in arbitration to fulfill a prerequisite such as exchanging your securities for stocks in order to be eligible for arbitration; usually, the only requirement for entering into binding arbitration is the loss of the right to have the dispute heard by a national court.

Additionally, there is another unusual feature in this arbitration proceeding: the figure of the "external advisory". The external advisory will filter the cases that can go to arbitration. The external advisory will send to arbitration only those cases where there is no doubt that either consumers purchased the disputed preferred shares without understanding the implications of the risky financial product or where there is no doubt there was misconduct by the bank. Examples of these are those cases in which the signatory signed with a cross X; there is clear evidence of the consumer's limited knowledge; or where the bank did not even check if the client had a financial profile. Most of the affected people are claiming that they signed the contracts thinking that they were entering into a deposit instead of into a hybrid financial instrument, as no information related with the product was provided at all.

The role of the "consumer organs of the autonomous regions" is essential as they will be the ones administering the proceeding. Both bank and consumers will have to agree to go to arbitration. However, consumers are not very excited about the benefits of this peculiar arbitration, as not only they will have to exchange their securities but also because the lack of clear information surrounding the government action.

Indeed, there are many judicial decisions in favor of consumers, such as the case of the married couple from a town near Barcelona, where a man with Alzheimer's disease was sold preferred shares. In that case, the bank had to pay back the preferred stocks as if it were a deposit, plus the default interest rates. Cases like this might lead to consumers to prefer litigation in the courts to arbitration.

We had the pleasure of interviewing Ricard Torres, the President of APACBANK, the Spanish Association of the Affected by the Banks, a non-profit organization. He provided us with a better understanding of the dispute and how the possible defense of the affected might look like. Apparently, there was improper marketing of the product as the banks did not follow the Spanish Securities Market Act 24/1988 and the Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). Mr. Torres bases his speech on the fraud that the banks did to consumers who deposited all their life saving in these risky

financial hybrids without providing the required information. According to Mr. Torres, most of the affected people did not fulfill the financial profile that the Spanish Securities Market Law 24/1988 requires. Furthermore, Mr. Torres highlights many particular cases in which retail investors lost all their life savings with investments that carried risks that neither were transparent nor understood by those consumers.

The idea of pursuing class-action arbitration should be dismissed as the arbitrator, or even judge, for those going to courts, will have to take into consideration the suitability of each customer. Factors such as whether the affected saver had a suitable financial profile or was aware of the risks carried by the product would have to be considered on a case-by-case basis, which defeats the purpose of a collective redress action.

Some may think that the current dispute is an excellent opportunity for the use and promotion of mediation. Indeed, many affected consumers claim that the trusting relationship with their banks is completely broken. Consequently, mediation could help to build up and repair these bonds. Nonetheless, it seems that the banks are not willing to use mediation to settle these disputes.

In conclusion, those affected by Bankia who are willing to go to arbitration will have to wait until March 31<sup>st</sup> for the conversion of the securities in stocks, and then will need their petition approved by the "external advisory".

Time will tell how this arbitration procedure performs. Many hope that the consumer organs of the autonomous regions administrate arbitration in a fair and efficient way. Successful outcomes from this procedure will help to make arbitration become more accepted in Spanish business and consumer culture.

## AIA Recommends to Attend Encouraging Cross-border Mediation,



### ADR & ODR

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#### Key topics

- Different concepts of mediation and consumer ADR schemes in the Member States
- Innovative processes for solving e commerce disputes
- Normative framework(s) for ODR:





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- Professor Carlos Esplugues, University of Valencia
- Ana Maria Maia Gonçalves, Mediator, Convergente, Lisbon
- Jeremy Lack, ADR Neutral and Attorney-at-Law, JAMS International Panelist and Vice-Chair of the Independent Standards Committee of the International Mediation Institute (IMI), Geneva
- Dr Rafal Morek, Attorney-at-Law, K&L Gates and University of Warsaw
- Manon Schonewille, Trainer and Business Mediator, JAMS International Panelist, Lecturer at Utrecht University, President of ACB Foundation, Partner in Toolkit Company and Schonewille & Schonewille, Haren
- Professor Hans Schulte-Nölke, European Legal Studies Institute, University of Osnabruck
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- Arbitration and Asia
- Crafting Dispute Resolution Mechanisms in Cross-Border Business Contracts: Leveraging Party Autonomy to Reduce Risk, Improve Outcomes & Lower Costs
- What is My Award Worth? And What Can I Do to Make Sure I Get Paid?
- Obtaining Evidence in the U.S. for Arbitrations Abroad: Practical Lessons on When and How To Use Section 1782
- Managing A Procedural Menu With Common Law and Civil Law Offerings – All About “Americanization” and “Civil-ization”

Speakers include: Doak Bishop, Chip Brower, Robert Davidson, Franco Ferrari, Fabien Gélinas, Pierre Yves Gunter, Kaj Hober, Ju Jianlong, India Johnson, Mark Kantor, Peter Leaver, Bart Legum, Anton Maurer, Horacio Grigera Naon, Catherine Rogers, Bo Rutledge, Patricia Shaughnessy, Abby Cohen Smutny, Paul Stephan, Nathalie Voser, Mark Weidemaier, and Amb. Andrew Young.

The conference will be held at the Four Seasons Hotel-Atlanta, 75 14th Street NE, Atlanta, Georgia, USA.

For more information about the conference, please visit the ATLAS website at <http://arbitrateatlanta.org/events/convergence-and-divergence-in-international-arbitration-practice/>

