

July 2013



CONTACT US:
146, Avenue Louise
B-1050 Brussels
Belgium
Fax: +32 2 646 24 31
Tel: +32 2 643 33 07

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European Mediation Training for Practitioners of Justice
LOCATION: Campus Brussel - T'Serclaes/Hermes/
Erasmus Stormstraat 2 Rue de l'assaut 1000 Brussels,
Belgium

DATE: August 19th -31st, 2013

Conference on Online Dispute Resolution
LOCATION: VUB University, Brussels, Belgium

DATE: September 18th, 2013

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

Participate in the EMTPJ 2013!

Do you want to become a mediator specialised in civil and commercial cross border matters and hone all the necessary skills to start up a mediation practice? If the answer is yes, then take part in our European Mediation Training for Practitioners of Justice (EMTPJ) from the 19th-31st of August 2013. Participants can be experienced mediators or beginners .

The course is comprised of 100-hours of training spread over 11 days . It covers both theory and practice and culminates in an assessment day at the end of the program. The classes are conducted in English and are recognized by the Belgian Federal Mediation Commission, as well as by 17 mediation providers in and beyond Europe.

For those who would like to follow some aspects of the EMTPJ course but not everything, we now offer EMTPJ *continuous hours* which allow participants to pick and choose classes . These include: Conflict theory and mediation, theory and practice of contract law in Europe, analytical study of conflict resolution methods, International mediation, EU ethics in Mediation, theory and practice of EU law and mediation acts, interventions in specific situations, the function of party-experts and party counsel in civil and commercial mediation. The EMTPJ's closing networking drinks on the 31st of August are open to those who would like to take this opportunity to meet and exchange with practitioners working in the field of ADR.

For more details on the EMTPJ course please contact: administration@arbitration-adr.org. For more information about the EMTPJ program, schedule, lecturers and to register for the course please visit the EMTPJ website www.emtpj.eu

EU Recommendations Regarding Collective Redress

EU recommendations regarding collective redress were proposed by the European Commission on the 11th of June 2013, which will be of great interest to those businesses operating within the European Union. The recommendations should provide equal protection amongst consumers and easier enforcement of competition laws.

Claimants will be able to claim compensation for the actual loss, lost profits and interest. There will be a presumption of harm if an infringement occurred in cartel actions.

Collective redress differs from class actions in the USA. In contrast to US class actions, collective redress does not allow representation of a broad class of claimants; those claims would either wait for the courts final decision or would proceed as follow-on actions. Target groups such as consumers, businesses and third-party representative entities will be able to initiate the dispute.

It will be the Court who decides if collective redress is admissible and if the claim fulfills all the conditions to proceed as a collective one. Moreover, the settlement reached will be reviewed and it's the Court's responsibility to ensure that the rights of each party are protected. Courts should also ensure that the procedure for the taking of evidence is followed. Interestingly, collective redress as adopted by the Commission, has a lot of similarities to the UK's current system of opt-in and follow-on actions.

Even though this is an important step toward reaching something very similar to class actions in the USA – critics say that this will not represent a substantial change to into the current litigation system for the moment because a) Member States will have two years to adopt their legislation according to the recommendation which is a relatively long time frame and b) it restricts the availability of third-party financing thereby meaning that all the damages should go to consumers.

For further details and the full text please visit the link below:

http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf

The Background Paper on Annulment for the Administrative Council of ICSID (August 2012) by Olivia Staines

The purpose of the Background Paper 2012 originally stemmed from concerns raised by the Philippines with regard to a decision on annulment in *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*.

In the *Fraport* case, an ICSID ad hoc committee annulled an award in favour of the Philippines on the ground that a fundamental rule of procedure had been ignored. It was found that the Tribunal had not given the parties the chance to address all the evidence submitted by the Philippines thereby denying them the right to be heard and impacting the outcome of the case.

The Philippines argued that the decision of the ad hoc committee was not in accordance with Article 52 of the ICSID Convention and that this was not the first time that this had happened, highlighting a systematic and reoccurring concern. Undoubtedly, the criticism of the ICSID ad hoc committees was met with some antagonism. Commentators have argued that if discussions are to be dominated by those who 'lose out' in annulment proceedings, larger investor state arbitration enterprises will suffer the consequences.

The Arbitration Counsel to *Fraport AG* argued: "The potential for the discussion to become distorted is especially great when the state party that has suffered a loss on annulment is a party to on-going arbitral proceedings at the same time that it is petitioning the Administrative Council."

This controversy has been said to echo that of the Republic of Ecuador in 2011, where Ecuador initiated arbitration against the US in order to deliberate on the correct interpretation of a treaty clause. This has led state-parties to investment treaties to consider whether a joint interpretive statement might be an appropriate response to avoid incongruities.

Fundamentally, Article 52 clearly stipulates that an ad hoc committee may fully or partially annul an award on the following grounds: a) if the Tribunal



was not properly constituted b) the Tribunal manifestly exceeded its powers c) there was corruption on behalf of a Tribunal member d) there was a serious departure from a fundamental rule of procedure or e) the award failed to state the reasons on which it was based.

The Philippines urged the Administrative Council to tackle the problem by issuing guidelines to ensure fair and effective annulment proceedings. Among these: the need for re-affirming the limited scope of Article 52, reaffirming that annulment is limited to very serious cases, confirming that ad hoc committees must accord the parties the same right to present their case and emphasizing that they are not to offer critical or corrective commentary on decisions of the Tribunal for which there is no basis to annul.

The background paper summarises the drafting history of the ICSID Convention provisions on annulment proceedings, outlines the conduct of an ICSID annulment proceeding and informs on the standards and grounds for annulment.

Essentially, the ICSID ad hoc Committees have affirmed in their decisions that:

- The grounds listed in Article 52(1) are the only grounds on which an award may be annulled: Amco Asia Corporation and others v Republic of Indonesia (Amco II) ICSID Case No. ARB/81/1
- Annulment is an exceptional and narrowly circumscribed remedy and the role of an ad hoc committee is limited: Maritime International Nominees Establishment v Republic of Guinea ICSID Case No. ARB/84/4
- Ad hoc Committees are not courts of appeal, annulment is not a remedy against an incorrect decision and an ad hoc Committee cannot substitute the Tribunal's determination on the merits for its own: Amco Asia Corporation and others v Republic of Indonesia (Amco I) ICSID Case No. ARB/81/1
- Ad hoc Committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards: Maritime International Nominees Establishment v Republic of Guinea ICSID Case No. ARB/84/4
- Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly:

(Klockner I) ICSID Case No. ARB/81/2

An ad hoc Committees authority to annul an award is circumscribed by the Article 52 grounds specified in the application for annulment, but an ad hoc Committee has discretion with respect to the extent of an annulment (full or partial) : (Klockner II) ICSID Case No. ARB/81/2

However, the annulment procedure has been criticised on the basis that it can be problematic if the award creditor does not have a guarantee to counterbalance the automatic continuation of the stay of enforcement during an annulment procedure which lasts rarely less than a year.

In conclusion, approximately 13 percent of ICSID cases registered up to and including 2012 have been subject to annulment proceedings. Article 52 has been hailed in the past as one of the paradigmatic features of ICSID arbitration and reasons for its success, an important safeguard against the violation of the fundamental principles of law governing the Tribunal's proceedings.

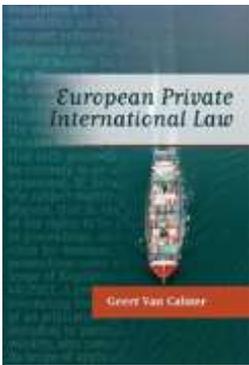
Consequently, the ad hoc Committee has a hefty weight on its shoulders when it comes to taking decisions. This is particularly the case when it comes to making subtle distinctions between failure to apply the law and incorrect interpretation of the law. Whereas the first is clearly a ground for annulment, the latter is not.

Ultimately, it is for the Committee to assess whether a tribunal's failure to deal with questions submitted to it constitutes a) A severe retreat from a fundamental rule of procedure or b) A failure to state the reasons on which the award is based. What is fundamental is that the assessment must balance the finality status of the award against the protection of parties against procedural injustice in order to reach a justified and defensible conclusion.

Book Review: "European Private International Law" by Vladimir Cupryszak

"European Private International Law" by Geert Van Calster is his latest work on the topic. The book was printed by Hart Publishing. Geert Van Calster is most





notably known for being a Professor and Head of the Department of International and European Law at KU Leuven. He is also a visiting lecturer at King's College in London, Monash University and CESL in Beijing.

Mr. Van Calster is also a member of the Brussels Bar and a practicing lawyer with expertise in WTO law, private international law / conflict of laws, EU economic law and EU and international environmental law.

As a result of his broad knowledge on the subject and rich professional experience, Mr. Van Calster provides great insight into current issues within international law.

The book is practical as both a student textbook and a general introduction for legal professionals. It is divided into seven chapters, all aspects of which are crucial for proper understanding of the subject.

This publication highlights the principles of PIL and the foundations under which the law is based within a clear and manageable framework. The study includes Brussels and Rome Regulations regarding applicable law for contracts, tort and jurisdiction. The author pinpoints their impact internationally on contractual law (insurance, consumers and employment) and issues related with jurisdiction (agreements in general, multiple litigation, recognition and enforcement). One of the chapters is dedicated to Insolvency Regulation whereas the final two chapters revolve around free movement of establishment (with an emphasis on a case study), private international law and corporate social responsibility.

We advise both students and professionals to take a closer look at this publication as it offers the reader all the vital elements and structure of PIL and its development.

For further information about the book and where to purchase it, please visit the Hart Publishing website: <http://www.hartpub.co.uk/BookDetails.aspx?ISBN=9781849462419>

Book Review: International Arbitration: A Practical Guide by Yaroslava Sorokhtey



Since arbitration has become the most popular method of dispute resolution – leading arbitration experts from Everheds law firm: Stuart Dutson, Andy Moody and Neil Newing decided to draft a practical guide on how to conduct effective arbitration.

The book "International Arbitration: A Practical Guide" is divided into 13 chapters, a preface and appendices. It begins with the basics, explaining what international arbitration is and the framework in which it operates. It also touches upon how to draft arbitration agreements, how to prepare for arbitration and what parties should do before the commencement of arbitral proceedings.

In addition, it considers the commencement of the proceedings, appointment of arbitrators, establishment of procedure and provisional measures. The author goes through the procedure with an emphasis on the practical aspects such as arbitration costs and what needs to be done after the award is rendered. Finally, enforcement and recognition procedure, together with an explanation of the challenging of an award is provided. At the end, the author compares some important aspects of the arbitral rules of SCC, AAA, ICC, ICSID, LCIA and other arbitral institutions.

The book doesn't just explain what arbitration is about and how it works; the authors also give their own practical tips on each issue. The book is therefore an extremely useful and practical read for all practitioners involved in arbitral proceedings. We recommend it to all those interested in the field. For further information about the book and where to purchase it, please visit the website of Globe Law and Business: <http://www.globelawandbusiness.com/IAP/>

The New Arbitration Rules of the Hong Kong International Arbitration Centre

by Yaroslava Sorokhтей

The Hong Kong International Arbitration Centre (hereinafter – the HKIAC) adopted its new arbitration rules recently. These will apply to all arbitral proceedings in which the notice of arbitration was submitted on or after the 1st of November 2013.

The key changes to the 2008 rules include the introduction of emergency provisional measures, the possibility of joinder of additional parties, the power to consolidate two or more pending arbitrations, the ability of the parties to choose the basis on which arbitrator's fees will be calculated and finally under the new rules, a single arbitration under multiple contracts is possible following the fulfillment of special conditions.

Under Schedule 4 of the Rules, it is now possible to apply for an emergency arbitrator who should be appointed by the HKIAC within two days and be able to render the decision within 15 days after appointment and receipt of the case file.

Moreover, under art. 27 of the Rules, an additional party may submit a request of joinder to the HKIAC directly. The following Article (art. 28 of the Rules) now allows for the consolidation of several pending arbitrations if requested by the parties and with the fulfillment of special conditions.

The new Rules also give the parties the opportunity to determine how they want the arbitrators' fees to be calculated – on an hourly basis or on the basis of the value of the dispute (so-called "ad valorem").

Finally, the Rules provide the option of uniting several cases if they arise out of and in connection with the same contract. This is extremely useful and makes the process more cost effective for the parties.

In conclusion, the new and improved Rules will undoubtedly make the HKIAC a more popular arbitral institution in the international arena.

Book Review: Dispute Resolution in the Energy Sector. A Practitioner's Handbook

by Yaroslava Sorokhтей



The book "Dispute Resolution in the Energy Sector: A Practitioner's Handbook" is a helpful collection of essays written by experienced practitioners from law firms and by legal counsels from well-known companies. The guide opens with an Introduction by Ronnie King, a lawyer from Ashurst LLP. This book answers all the major questions regarding the

drafting of effective dispute resolution clauses, expert determination, contract pricing and joint venture disputes, as well as EPC claims and construction disputes. It also gives judicial review on precedents in the energy sector in England and Wales and explains all the peculiarities of decommissioning disputes, disputes in the nuclear industry and international boundary disputes. Authors also examine different alternative dispute resolution methods and offer an overview of international commercial arbitration and investment treaty arbitration.

The book is aimed principally at lawyers involved in the field of energy disputes. This publication is particularly valuable since it provides a well-rounded approach and is both concise and to the point. Usually the costs of energy sector disputes are very high; this explains why most of them are resolved by negotiations, conciliations or mediation. In light of this, the precedents discussed in this book are of great importance because they are relatively uncommon.

In sum, this publication will be of great interest to in-house corporate counsel and commercial personnel at companies operating in the energy sector, as well as to students and practicing lawyers. For more information on how to purchase this book, please follow the link below <http://www.globelawandbusiness.com/DRE/>



Financier Worldwide Presents the Jul-Sep 2013 Issue of Corporate Disputes Magazine

AIA is pleased to have worked with Financier Worldwide on the development of the latest issue of Corporate Disputes magazine which highlights the latest developments in corporate and commercial disputes.

The magazine draws on the experience and expertise of leading professionals in the field in order to deliver insight on litigation, arbitration, mediation and other methods of dispute resolution. Yaroslava Sorokhtey of the Association for International Arbitration wrote one of the articles, which examined "What's New About Party Representation in Arbitration".

Financier Worldwide has provided AIA members a complementary digital version of these reports. Please click on the following link for access; and allow a couple of minutes for this to open up in your browser.

For further information about Corporate Disputes magazine please contact Peter Livingstone on +44 (0)121 600 5915 or via email at peter.livingstone@financierworldwide.com

The Refusal to Enforce Arbitral Awards where Shanghai Stipulated in the Arbitration Clause by Yaroslava Sorokhtey

Recently, a local court in Jiangsu province denied recognition and enforcement of an arbitral award where Shanghai was stipulated in the arbitration clause. This can become problematic for those who are seeking enforcement and recognition in that area. Those who just chose Shanghai, but who have not had any disputes to date yet will have the option to revise their arbitration clause and choose another place of arbitration.

A few months ago, an award rendered by the respected arbitral institution known worldwide as- China International Economic and Trade Arbitration Commission (hereinafter – CIETAC) was refused enforcement by the Suzhou Intermediate People's Court. The parties to the arbitral proceed-

ings were Jiangxi LDK Solar Hi-Tech (hereinafter – LDK), who is the world's second-biggest maker of wafers used in the making of solar cells and Suzhou Artes Sunshine Power Technology (hereinafter- Artes), who is a mainland subsidiary of Nasdaq-listed Canadian Solar. On the 7th of December 2012, CIETAC rendered its award in favor of LDK, and in less than 6 months it was denied enforcement as mentioned above.

The Court ruled that enforcement of the award should be denied because CIETAC did not have jurisdiction over the disputes, on the ground that Shanghai Arbitration Centre did not belong to CIETAC by that time.

Earlier, CIETAC separated from the Shenzhen and Shanghai sub-commissions and both changed their names to Shanghai International Economic and Trade Arbitration Commission and Shenzhen Court of International Arbitration.

This created a risk that awards could be denied enforcement for ongoing Shanghai arbitrations, and it cannot be predicted how the foreign Chinese courts will treat an application of enforcement. At the moment there are no clarifications from the Supreme People's Court or the State Council on this issue.

AIA Recommends to Attend SAVE THE DATE! Conference on Online Dispute Resolution Brussels, Belgium 18th of September, 2013

We would like to invite you to our Conference on Online Dispute Resolution, which will take place on the 18th of September 2013, from 2.00pm to 5.00pm.

This will be a great opportunity to raise awareness on Online Dispute resolution, discuss the Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (March 12th, 2013).

This will be used as a platform to examine what the future holds for ODR on both a European and International level. To find



more information about the event please follow the link

<http://arbitration-adr.org/activities/?p=conference&a=upcoming#46>

Participation fee - 50€.

FREE ENTRANCE FOR:

- PRESS
- EMTJ Alumni
- AIA members

To register please send an email to :

administration@arbitration-adr.org

Do You Want to Become an Arbitration Practitioner? Apply to the Postgraduate Program in International Business Arbitration

The Association for International Arbitration together with the Department of Law at VUB University Brussels has established an intensive and unique postgraduate program specialised in international business arbitration.

It gives the opportunity to participants to gain knowledge in international commercial arbitration and other forms of alternative dispute resolution such as mediation, negotiation and conciliation. What are the advantages of this postgraduate program?

- You will be able to apply for an internship with the Association for International Arbitration to gain some

practical experience.

- You will gain knowledge in investment arbitration, commercial arbitration, ADR in consumer disputes, consumer ADR and consumer ODR and domain name disputes.
- You will be able to participate in mock arbitration proceedings and understand how arbitration works practice.
- You will meet a lot of well-known ADR professionals from all over the world who will share their experience with you.

The quality of the classes delivered, the networking events and the field work opportunities provided, will ensure that students will have developed and enhanced skills to work as arbitrators, arbitration counsels, in-house dispute resolution specialists and legal counsel within Government.

For more information about admissions please follow the link below:

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

