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**SAVE THE DATE**

**A - Z TRAINING ON BELGIAN AND EU ARBITRATION**



**TOPICS INCLUDE:**

Ethical rules & conduct of the arbitrator, organization & formalities of the arbitrator profession, liability risks of the arbitrator and existing insurance tools, overview of the arbitration procedure & principles, overview of arbitration terms & definitions, types & styles, arbitration costs, the arbitration clause, the request for arbitration and notifications within an arbitral procedure, constitution of the arbitration panel, the arbitrability of disputes, the arbitrator's competence and challenging the arbitrator.

In addition, arbitration & third parties, in limine litis arguments & consequences, evidence in arbitration, hearings and interim measures, expert interventions, interrelation with public tribunals and mediation/conciliation, termination of proceedings, types of awards (incl. dissenting opinions), drafting & registration of awards, selected issues in relation to the arbitral award, interpretation and correction of awards, possibility for appeal, annulment proceedings, exequatur proceedings, selected challenges of arbitrators, suggestions to develop your arbitration practice and overview of Belgian arbitration centers will be examined.

**LOCATION:** The Institute for European Studies (IES), Pleinlaan 5, 1050 Brussels, Belgium

**DATE:** 17th November 2014 – 28th November 2014

**Time:** Monday to Tuesday 17.00 - 20:00; Fridays: 16.00 - 19:00

**LANGUAGES:** English, Dutch & French

**FEE\*:**

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**A-Z Training on Belgian and EU  
Arbitration**

**AIA Members Feature  
Chris LaHatte**

**AIA Members Feature  
David L. Kreider**

**Summary of AIA Submission on  
investment protection and investor-  
to-state dispute settlement (ISDS) in  
the Transatlantic Trade and  
Investment Partnership Agreement  
(TTIP)**

by Daria Levina and Tatiana Proshkina

**Regulatory Competition in Contract  
Law and Dispute Resolution**

Book Review by Olivia Staines

**Arbitration of M&A Transactions: A  
Practical Global Guide**

Book Review by Daria Levina

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**Marc Wagemans**  
*in memoriam*

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**AIA Members Feature**

**Chris LaHatte**



Mr. Chris LaHatte is the current ICANN Ombudsman, a position he has held since July 2011. Prior to this, he was a practicing Barrister for 33 years. His role in ICANN is centered on dispute resolution. Besides being a member of AIA, he is also a member of the panel of Building Adjudicators, a Fellow of AMINZ in Mediation and Arbitration, an editor for Brookers District Court Procedure, and a Costs Assessor and Mediator for the New Zealand Law Society in Auckland and Wellington. He holds a Master of Management in Dispute Resolution and now works primarily as the ICANN Ombudsman.

Mr. LaHatte has many years' experience practicing as a barrister in New Zealand and worldwide. He served as the in-house advocate for construction conciliations and arbitration for Taiwan High Speed Rail Corporation and in Kazakhstan, on a very large international arbitration case centered on multiple issues of fraud and concealed profits. Chris is highly experienced in several areas including insolvency litigation. He has also worked on criminal trials and appeals and has argued many civil cases in the District Court, High Court and the Court of Appeal. He has appeared in the Maori Land Court, Taxation Review Authority and numerous other tribunals.

For details, you can check out the [ICANN Blog](#) or the [ICANN Website](#).

- *What encouraged you to become a member of the AIA?*

Because of my role as Ombudsman to ICANN, an international not for

**AIA Members Feature**

**David L. Kreider**



Mr. David L. Kreider is a Chartered Arbitrator, recognized by the Chartered Institute of Arbitrators (UK). He has been appointed to the panels of arbitrators of the world's major arbitral institutions. David has spent more than 20 years in the Asia Pacific Region, living and working in Taiwan, Japan, Hong Kong and New Zealand. He speaks fluent Mandarin, reads Chinese and has a working knowledge of Japanese.

Mr. Kreider has over a decade of courtroom experience as lead counsel in more than 70 bench and jury trials in both the state and federal court systems, practicing first with a boutique Florida law firm and then with the New York-based Pillsbury law firm. He is a licensed attorney-at-law in the States of New York, California, New Jersey, Florida, and the District of Columbia, and is also a licensed English and Hong Kong solicitor, skilful at identifying the critical issues in complex fact patterns and in finding breakout strategies to bring about the early resolution of disputes.

In addition to being a consummate lawyer, Mr. Kreider has substantial business experience and executive insight gained from 15 years as legal counsel with China Mobile in Hong Kong and Vodafone in New Zealand. In Hong Kong, he was the sole American executive and General Counsel to China Mobile, the world's largest telecommunications operator. After 10 years in Hong Kong, David moved to New Zealand to head the Legal Department at Vodafone,

profit organization with strong ties to Europe, I am keen to maintain professional contact with mediators in Europe. ICANN has offices in Brussels, Istanbul and Geneva, and learning about professional practice in Europe is therefore valuable.

- *What is your expertise in the field of Alternative Dispute Resolution methods?*

I am qualified in alternative dispute resolution, through my career as a Barrister, and followed by a Masters in Dispute Resolution through Massey University in New Zealand studying the Judicial Settlement Conference. I also have obtained Fellowship in Arbitration and Mediation through the Arbitrators and Mediators Institution of New Zealand, obtained by examination. I am a qualified Family Mediator under New Zealand Family Law, and a mediator and costs assessor for the New Zealand Law Society. I also undertake other mediations as instructed. Primarily, as the ICANN Ombudsman I use mediation and negotiation techniques for problem solving, which is the principle work I do.

- *What do you think is your main challenge as Ombudsman for ICANN?*

The challenge for me as Ombudsman is to ensure the ICANN Community is aware of the office and the use for dispute resolution within the community. Outreach to a global community has challenges including the need to be available in many languages. I must ensure I can make my office open to all cultures and languages, and be able to assist whatever the source of the complaint.

- *How would you describe the development of Arbitration in New Zealand over recent years?*

This has become widely accepted, with a real strength in international arbitration. New Zealanders are seen as neutral without the ties of other countries, and we have a number of internationally recognized arbitrators. We have developed an appeal system for arbitrations as well, so that parties can opt to appeal to a panel of senior arbitrators, which has real advantages over appealing to court. This does need specific mention in the agreement to arbitrate, but is now being used for the first cases on appeal.

- *In your opinion, what is the strongest trend in Arbitration?*

The need for a mediation level at first instance, and the ability to refer back to mediation when necessary during the course of the arbitration

- *Are you planning any future professional projects in this field?*

Not at present, apart from presenting on cultural diversity in mediations later this year to a group of American mediators.

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### **Summary of AIA Submission on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)**

Prepared by Daria Levina and Tatiana Proshkina

#### **General comment on the transatlantic trade and investment partnership (TTIP)**

Negotiations for the Transatlantic Trade and Investment Partnership (TTIP) started in July 2013. The TTIP will affect the investment flows between two important economic powers – EU and US. There is no surprise then that the announcement of the intention of the negotiating Parties to include a chapter on the ISDS in the TTIP raised concerns of the various stakeholders, ranging from the non-governmental organizations to scholars and citizens. Mostly, the public attention is concentrated around the obstacles the ISDS system presents before sovereigns restricted in their abilities to regulate their internal affairs;

where he managed a team of 10 lawyers. Savvy about technology and innovation, David was a member of the executive management teams of both China Mobile and Vodafone, determining the strategic direction of the businesses and participating in the day-to-day decision-making about people, technology initiatives and business plans.

In the financial sector, Mr. Kreider has acquired experience working in three different jurisdictions across the globe. After two years as Chief of Enforcement with the U.S. Securities and Exchange Commission in New York, David was recruited to Hong Kong as the Director of Corporation Finance for the Hong Kong Securities and Future Commission. Currently, David is a Member of the NZX Markets Disciplinary Tribunal, which conducts hearings into alleged financial market misconduct, on appointment by the New Zealand Government.

His unique career path, which combines big law firm practice, corporate counsel roles with management decision-making responsibilities, and financial regulatory roles in major markets, has given David a skill set uncommon among arbitrators – insightful in law; commercial and pragmatic; and technologically savvy. He is fair, balanced, and enthusiastic.

Currently residing in New Zealand, David undertakes appointments as arbitrator globally on a full-time basis. He lectures on international arbitration to post graduate law students at universities in Hong Kong and New Zealand.

- *Why did you decide to become a member of AIA?*

After reviewing the roster of the AIA's members at the time, and considering the AIA's "track record" for providing training and educational activities to expand the promotion of international commercial arbitration ("ICA"), it was apparent to me that I would be joining an organisation of like-minded professionals with whom I shared common goals. I did not hesitate to become an AIA member.

- *How did you start your path in Arbitration?*

In 2003, while living in Hong Kong and working as the General Counsel to China Mobile, I enrolled in the Chartered Institute of Arbitrators' "Fast Track to Fellowship" Program being conducted by the Hong Kong International Arbitration Centre. In those days, ICA was far less transparent than it is today. I was uncertain about ICA, yet it seemed to me that ICA would be a good fit, as I am a trial lawyer at heart. It also seemed like a way for me to make the most of my Chinese language and cultural background and skills. Moreover, dating back to the early days of my career standing up in the courtroom as a trial lawyer, colleagues have been telling me that I would make a good judge, given my calm personality and even disposition, and my skill and interest in trial strategy and procedure. It would be correct to say that I "caught the arbitration bug" immediately. Even while working full-time managing the legal function (which included managing a great many court and arbitration cases) for China Mobile, and thereafter for Vodafone, I continued to receive arbitration references and sit as arbitrator, mostly in Hong Kong and Singapore. Balancing two careers at the same time over more than a decade was enormously demanding for my wife and me, but it was also very gratifying. I felt fortunate to have found not only one, but two careers, both of which I greatly enjoyed.

- *What is your perspective about the development of arbitration during all the years that you have been dedicated to that practice?*

Along with the globalisation of commerce, ICA has exploded in

abundance of frivolous claims brought by the investors against States; inequality between foreign and local investors resulting for the former in the free access to arbitration, broader substantive rights etc.

The main criticism of the negotiations is that the draft documents and negotiating positions are generally not made available to the public. Therefore, the launch by the European Commission of the online public consultations, accompanied by the answering guide and commentaries, represented an opportunity to assess the arguments of the opposing stakeholders and partly lifted the veil covering the TTIP negotiations. On July 11, 2014 the AIA in submitted its reply to the EU Commission's online questionnaire. The below is a summary of the views presented in the submission.

### **Scope of the substantive investment protection provisions**

The Commission believes that investment protection should apply to those investments and to investors that have made an investment in accordance with the laws of the country where they have invested. The main aim of the EU is to avoid abuse and eliminate from the scope so-called "shell" or "mailbox" companies owned by nationals of third countries. According to the Commission a juridical person must have substantial business activities in the territory of a Party in order to qualify as a legitimate investor. Additionally, the protection will only be granted in situations where investors have already committed substantial resources in the host state and not when they are simply at the stage where they are planning to do so.

The stated objectives are understandable. However, the approach taken by the EU raises several questions. In particular, it is proposed to recognize as an investment only a substantial resources commitment in the economy of host State, while the stage of planning will be excluded from the scope. However, the stage of planning often results in substantial costs for the investor. In this respect, excluding the period of planning from investment protection seems unreasonable as it might lower the previously adopted standards of protection and potentially influence the investors' decisions as to whether to invest in the country.

Further, the term "substantial business activities" is not self-defining and should either be defined in the TTIP or addressed in explanatory notes. The question of whether a company is engaged in substantial business activities turns on the facts of the case and by leaving the requisite level of activity undefined, states therefore retain the flexibility to make an evaluation on a case-by-case basis. However, the states do not give sufficient guidance to the tribunals for determining whether a state's exercise of its right to deny benefits was correct.

In order to eliminate so-called "shell" or "mailbox" companies owned by nationals of third countries from the scope, it is necessary to consider adding to the definition of the investment that the TTIP covers only the investments that result in the flow of capital between the US and EU.

### **Non-discriminatory treatment for investors**

The EU considers that, as a general rule, established investors should not be discriminated against after they have established in the territory of the host country. The situation is different with regard to the right of establishment, where the Parties may choose whether or not to open certain markets or sectors, as they see fit. Such differentiation seems to be reasonable; however, for the case of discrimination against established investors a provision granting fair compensation would be appropriate.

Additionally, while "On the 'importation of standards' issue, the EU seeks to clarify that MFN does not allow procedural or substantive provisions to be imported from other agreements", Table 2, article X.2.4 provides that: "For greater certainty, the "treatment" referred to in Paragraph 1: a. does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements, including compensation granted

popularity. Incident to its growth and wide acceptance, ICA is considerably more accessible and transparent than was the case a decade ago. ICA is less "clubby" now, but that same "clubbiness" of the past also provided a high level of mutual trust among the players and upheld a high standard of performance. As ICA becomes more accessible and available to a wider number, and lesser known players enter the arena, standards still need to be maintained. I know that I am not alone in viewing this as a key challenge to our industry -- hence the quantities of "soft law" being developed to fill the lacunae.

- *What are the main trends in Arbitration in Asia?*

The continuing rise of China is, of course, impacting hugely on the development of ICA within Asia, as it is elsewhere around the world. We are also witnessing the rise of an entire new generation of ICA professionals emerging out of Asia, with diverse combinations of Asian cultural and language skills and a common understanding and appreciation for the UNCITRAL Model Law approach. The South Koreans have established themselves on the ICA stage as a force to be reckoned with, even as Seoul works towards a (possibly longer term) goal of emerging as an equal competitor with Singapore or Hong Kong as a top Asian "seat". We are living in interesting and very competitive times here in Asia.

- *What are the principal differences that you find between arbitration in Asia and other areas of the world where you practice?*

I sit as arbitrator mostly in Hong Kong and Singapore, which requires that I travel frequently from my home in New Zealand. I sit as arbitrator in New York and other venues outside Asia less often. When I do, the principal difference I find is that the expectations of the parties about the arbitration procedure tend to vary more widely outside of Asia. To account for this difference, I will make a greater effort to sound out the party representatives at an early stage to ensure that we are all "on the same page" about how the proceedings will be conducted and that everyone is feeling comfortable with the way the reference will be progressed.

- *What is next for David Kreider as an international Arbitrator?*

After 33 years' working in private practice and as a general counsel in the telecommunications industry, I "took the plunge" and put myself forward as a full-time, independent arbitrator only nine (9) months ago. My new business is going well. Even while busily handling the myriad administrative matters required to launch my new business, interesting and exciting appointments as arbitrator have been regular and increasing -- though I've got plenty of capacity to undertake additional references!

On 27 July 2014, I was approved by the ICC World Council in Geneva to serve for a three-year term as the NZ alternate member of the ICC Court of Arbitration. I am absolutely delighted to have this opportunity to work as a member of the ICC Court and I am deeply honoured to be representing my adopted homeland, New Zealand, in this important role.

- *Any advice that you can give to young lawyers who want to pursue a career in International Arbitration?*

My advice is not to rush to become an arbitrator, if that is your ultimate goal, or you may find yourself frustrated. Focus on working hard to become the very best legal professional that you can be, regardless what area of the law you pursue early in your career.

It is wonderful that ICA is now a part of the curriculum offered by many

through such procedures, and b. shall only apply with respect to treatment accorded by a Party through the adoption, maintenance or application of measures.” It is not clear whether this means that only investor-to-state dispute settlement procedures including compensation are excluded and not substantive investment protection provisions. If yes, it seems that companies will be able to use the substantive investment protection provisions in any other investment agreement the EU or EU member state ratified until EU countries have withdrawn from all of them.

### ***Fair and equitable treatment***

The obligation to grant foreign investors fair and equitable treatment (FET) is one of the key investment protection standards. It ensures that investors and investments are protected against treatment by the host country which, even if not expropriatory or discriminatory, is still unacceptable because it is arbitrary, unfair, abusive, etc. According to the Commission, the main objective of the EU is to clarify the standard, in particular by incorporating key lessons learnt from case-law, in order to eliminate uncertainty for both states and investors.

Under this approach, a state could be held responsible for a breach of the fair and equitable treatment obligation only for breaches of a limited set of basic rights, namely: the denial of justice; the disregard of the fundamental principles of due process; manifest arbitrariness; targeted discrimination based on gender, race or religious belief; and abusive treatment, such as coercion, duress or harassment. This list may be extended only where the Parties (the EU and the US) specifically agree to add such elements to the content of the standard, for instance where there is evidence that new elements of the standard have emerged from international law.

The “legitimate expectations” of the investor may be taken into account in the interpretation of the standard. However, this is possible only where clear, specific representations have been made by a Party to the agreement in order to convince the investor to make or maintain the investment and upon which the investor relied, and that were subsequently not respected by that Party. The intention is to make it clear that an investor cannot legitimately expect that the general regulatory and legal regime will not change. Thus the EU intends to ensure that the standard is not understood to be a “stabilisation obligation”, in other words a guarantee that the legislation of the host state will not change in a way that might negatively affect investors.

In addition to that a more specific definition of fair and equitable treatment should be agreed with, it is also necessary to clarify which measures of the State should be considered as permissible regulation and what measures fall outside of this scope and violate legitimate expectations of an investor.

Further, it is recommended to indicate what is meant under the “representation of the State” – a declaration by the Head of the State, or by the Prime Minister, etc. Also, it should be noted that every specific representation by a State Party to a BIT upon which an investor relies while deciding to invest in the country, should not be regarded as creating legitimate expectations: more restraints are needed.

### ***Expropriation***

The EU wants to make it clear that non-discriminatory measures taken for legitimate public purposes, such as to protect health or the environment cannot be considered equivalent to an expropriation, unless they are manifestly excessive in light of their purpose. The EU also wants to clarify that the simple fact that a measure has an impact on the economic value of the investment does not justify a claim that an indirect expropriation has occurred.

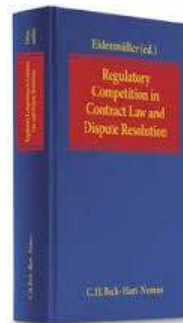
It is widely accepted that any expropriation must be compensated. Thus, it is highly important to define what qualifies as a direct or indirect expropriation. Although the definition of indirect expropriation

law schools and post-graduate programs. This allows law students to gain an understanding of ICA early in their professional careers. Yet, I think there may be some risk to young lawyers who focus too narrowly on ICA from the start. In my view, a capable arbitrator will have a great many years of experience in, and a wide understanding of the law, combined with a well-above-average measure of common-sense and, ideally, commercial sense. In my considered view, such qualities are seldom to be found in professionals under the age of 50. As a career choice, ICA is a marathon, not a sprint!

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## **Regulatory Competition in Contract Law and Dispute Resolution**

Book Review by Olivia Staines



This volume is divided into fifteen chapters which comprise a series of papers that analyze, but are not limited to the following topics: regulatory competition in contract law and dispute resolution, intellectual property law and growth economics, standard form contracts as private law regimes, regulatory competition in international trade, characteristics of contract law(s), the EU context, jurisdictional competition for dispute resolution: courts versus arbitration, arbitration and access to courts (from an economic point of view)- and the English vs the American rule on attorney fees, which provides an empirical study of public company contracts.

The book opens with a preface written by Prof. Dr. Horst Eidenmüller, who considers the three forms of regulatory competition specifically in contract law and dispute resolution, namely: the horizontal regulatory competition between states or other public entities, the vertical regulatory competition between states and some supra-national or federal entity that offers its own legal product and regulatory competition between public and private systems. In this context, transnational corporations inevitably play an important role. This taster thus provides insight into the subject matter at hand, before delving into some highly interesting and controversial issues in detail.

Subsequently, in Chapter 1: Regulatory Competition in Contract Law and Dispute Resolution, Prof. Dr. Horst Eidenmüller clarifies that the various forms of regulatory competition with respect to contract law and dispute resolution give rise to a set of research questions to be observed: (i) First, what are the most successful legal products in the field of contract law and dispute resolution, and why are these products successful? (ii) Second, what is the role of multinational corporations in particular? (iii) Third, what are the beneficial and/or detrimental effects of regulatory competition with respect to particular legal products, and what standard is used for measuring these relative effects? (iv) Fourth, how should affected states react? (v) And finally, what should the European and/or international regulatory framework in this field look like? Are changes necessary?

Chapter 14: Arbitration and Access to Justice: Economic Analysis is particularly engaging as crucially, the relationship between arbitration as a dispute resolution mechanism that excludes access to state courts and consumer protection concerns is inspected.



clarifies its scope and rejects an understanding of indirect expropriation which is only based on the effects of the measure, it is still broad. In order to avoid opening the doors for an indefinite amount of claims, it would be sensible to limit the definition of indirect expropriation to cases "in which a host state appropriates an investment for its own use, or the use of a third party". Additionally, it is necessary to address the notion of "manifestly excessive" in explanatory notes in more details. The important question that needs to be clarified by the EU in this regard is what "public interest" includes.

### ***Ensuring the right to regulate and investment protection***

Most agreements that are focused on investment protection are silent about how public policy issues, such as public health, environmental protection, consumer protection or prudential regulation might interact with investment. Consequently, the relationship between the protection of investments and the right to regulate in such areas, as envisaged by the contracting Parties to such agreements, is not clear and this creates uncertainty.

In more recent agreements, however, this concern is increasingly addressed through, on the one hand, clarification of the key investment protection provisions that have proved to be controversial in the past and, on the other hand, carefully drafted exceptions to certain commitments. In complex agreements such as free trade agreements with provisions on investment, or regional integration agreements, the inclusion of such safeguards is the usual practice.

The indicated objective of the EU is to achieve a solid balance between the protection of investors and the Parties' right to regulate. First, the EU wants to make sure that the Parties' right to regulate is confirmed as a basic underlying principle. Second, the EU aims to introduce clear and innovative provisions with regard to investment protection standards that have raised concern in the past (for instance, the standard of fair and equitable treatment is defined based on a closed list of basic rights; the annex on expropriation clarifies that non-discriminatory measures for legitimate public policy objectives do not constitute indirect expropriation). Third, the EU wants to ensure that all the necessary safeguards and exceptions are in place. For instance, foreign investors should be able to establish in the EU only under the terms and conditions defined by the EU. A list of horizontal exceptions will apply to non-discrimination obligations, in relation to measures such as those taken in the field of environmental protection, consumer protection or health. Additional carve-outs would apply to the audio-visual sector and the granting of subsidies. Decisions on competition matters will not be subject to investor-to-state dispute settlement (ISDS). Furthermore, in line with other EU agreements, nothing in the agreement would prevent a Party from taking measures for prudential reasons, including measures for the protection of depositors or measures to ensure the integrity and stability of its financial system. In addition, EU agreements contain general exceptions applying in situations of crisis, such as in circumstances of serious difficulties for the operation of the exchange rate policy or monetary policy, balance of payments or external financial difficulties, or threat thereof.

The approach of the Commission emphasizing the right of the State to regulate is reasonable as it shifts the perception of the State's regulating power as of a mere exception to its understanding as an underlying rule. In particular, the direct exclusion of States' non-conforming measures from investment protection seems to be a solution. At the same time, it is unclear how the preamble which is non-binding in nature may be useful for achieving the EU objectives in this context.

### ***Transparency in ISDS***

It is true that many ISDS cases take place behind closed doors and no

The author of this chapter, Prof. Dr. Omri Ben-Shahar, determines that access to litigation omits a significant sub group of consumers in real need, giving focus to supporting the stronger, more informed and litigious consumers- a type of access policy that therefore shows significant regressive effects. The role of class actions is also considered in the context of whether weak consumers are the indirect beneficiaries of class action litigation.

In light of this, we highly recommend this publication to practitioners, academics and researchers who are interested in the intersection between contract law and dispute resolution. Ultimately, the papers in this volume not only significantly enrich ones understanding of horizontal and vertical regulatory competition in contract law and dispute resolution, but also illustrate that the most essential form of regulatory competition at the present time, occurs between state law rule systems and privately crafted contractual regimes.

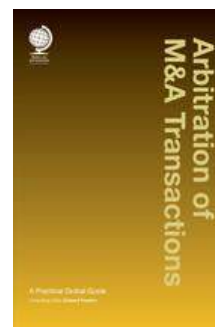
As Prof. Dr. Horst Eidenmüller stipulates, this is to be expected, as in an environment characterized by rapid changes of the framework conditions for transactions – technology, modes of communication, regulatory environment, etc. – the parties have more faith in their own ability to adequately solve particular problems than in the boilerplate of some state law regime. Consequently, such state law frameworks will often represent a compromise solution at the end of a long lawmaking process and may already be outdated when finally entering into force.

For more information, please visit the Hart publisher [website](#) or [beck-shop](#).

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## **Arbitration of M&A Transactions: A Practical Global Guide**

Book Review by Daria Levina



This book, published by the Globe Business Publishing Ltd in 2014, comprises the contributions of more than fifty leading legal practitioners and scholars. It may well be named a most comprehensive analysis of the most acute problems of arbitration in the sphere of M&A transactions to date.

The book consists of four parts arranged in a logical order of consideration: first, in Part 1, the overview of twenty jurisdictions is presented, where the specialists in the named sphere discuss the current state of law, as well as desirable changes. Namely, these jurisdictions include: Australia, Austria, Brazil, China and Hong Kong, England and Wales, France, Germany, India, Italy, Japan, Mexico, Netherlands, Russia, Singapore, Spain, Sweden, Switzerland, Turkey, United Arab Emirates and the Middle East, United States. This variety ensures the breadth of perspectives and an in-depth analysis.

This is followed by Part 2, which is devoted to the fundamental questions arising in connection with the arbitration agreement in the M&A transactions.

or a limited number of documents are made available to the public. The EU wishes to include provisions to the TTIP to guarantee that hearings are open and that all documents are available to the public. The proposition of the Commission to adopt the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration seems reasonable. In spite of the presence in the Rules of exceptions as to the general rule of transparency subject to the tribunal's discretion, these concerns seem to be overestimated. First, there is no rule without exceptions, especially in a sphere as complicated as investor-State arbitration. The preservation of confidentiality in certain occasions may indeed be justified due to essential security interests etc. At the same time, the Commission, providing an example of the similar CETA provision (Article x-33 para. 6), ensures that the disclosure of information required by national laws of the respondent State may not be prevented.

### **Multiple claims and relationship to domestic courts**

Investors who consider that they have grounds to complain about action taken by the authorities (e.g. discrimination or lack of compensation after expropriation) often may be able to go to domestic courts and seek redress there or to go to other international tribunals under other international investment treaties.

Existing investment agreements generally do not regulate or address the relationship with domestic courts or other ISDS tribunals. Some agreements require that the investor chooses between domestic courts and ISDS tribunals. This is often referred to as "fork in the road" clause.

As a matter of principle, the EU's approach favours domestic courts. The EU aims to provide incentives for investors to pursue claims in domestic courts or to seek amicable solutions – such as mediation. The EU will suggest different instruments to do this. One is to prolong the relevant time limits if an investor goes to domestic courts or mediation on the same matter, so as not to discourage an investor from pursuing these avenues. Another important element is to make sure that investors cannot bring claims on the same matter at the same time in front of an ISDS tribunal and domestic courts. The EU will also ensure that companies affiliated with the investor cannot bring claims in front of an ISDS tribunal and domestic courts on the same matter and at the same time. If there are other relevant or related cases, ISDS tribunals must take these into account.

The concerns of the Commission in respect of the inequality between local and foreign investors are understandable. However, the reason for this inequality is that foreign investors bear more risks than the local investors. Therefore it seems that the main question here is not how to eliminate the additional protection of foreign investors, but rather how to balance the different types of protection so that this additional protection was comparable with the risks foreign investors undertake.

In this respect, the proposition of the Commission as to the "fork-in-the-road" provision is reasonable to the extent it does not make the investors wait for unreasonably long periods of time or engage into the negotiations promising to be futile from the very beginning. Indeed, as the arbitral practice shows, the tribunals tended to refuse to dismiss the investors' claims in cases where there was no hope for successful negotiations between the parties [Detailed analysis: Christoph Schreuer, Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road] or where the difference between claims under the contract and claims under the BIT was found [Andrea Dahlberg, Fork-in-the-Road Provisions in Investment Treaty].

With regard to the commentary in the Answering Guide that domestic courts are "designed to be independent and impartial", while arbitral tribunals, to the contrary, are dependant and easily influenced, it does not reflect the reality. There are indeed countries which succeeded in establishing well-functioning independent court system. However, they are not in the majority: national courts of other countries are

Then, Part 3 analyses certain types of disputes which are most common in this kind of transactions, namely pre-signing disputes, pre-closing disputes, claims for breach of representations and warranties, claims for breach of indemnities, price adjustment and closing account disputes, disputes arising out of joint venture agreements and shareholder agreements, tortious claims. With regard to each type, the authors adopt a way of analysis very easy to follow even for those not familiar with the topic: the introduction into the topic, current state of law, particular issues connected with this type of claim and possible remedies are thoroughly addressed in each chapter of the Part 3.

Finally, the closing Part 4 articulates questions having paramount importance for every M&A transaction, which are antitrust issues, procedure & tactics, confidentiality.

The book may be recommended to the graduates and practitioners beginning their legal career in the field of M&A, as well as experienced lawyers and scholars.

For more information, please visit the [publisher website](#).

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### **Support the Future of Mediation In Belgium (FMB) Initiative!**

The FMB initiative is an initiative that aims to provide a joint communication platform to all mediation stakeholders, thereby offering them the opportunity to contribute to identifying best practices (including legal amendments) and setting out a common action plan for the enhancement and promotion of Mediation in Belgium.

To this end, Belgian mediation stakeholders gather periodically (at least twice a year) in the form of brainstorming sessions and/or working groups. The meetings are held in English, Dutch and French (without simultaneous translation).

The Brainstorming event which was held on 27/06/2013 in the Brussels Palace of Justice, resulted in the first FMB report. The FMB meeting held on the 10<sup>th</sup> of February 2014 at the Institute for European Studies (IES), resulted in the second FMB report. Both reports are available via our [website](#).

To read the first FMB report [click here](#).

To read the second FMB report [click here](#).

The FMB project was created with the support of AIA IVZW ([www.arbitration-adr.org](http://www.arbitration-adr.org)).

For those interested in joining or sponsoring the Initiative, please send an email to the [AIA team!](#)

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### **Feature: AIA Gold Sponsor Billiet & Co**



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dependant and may be easily influenced as well. The same may be said about arbitral tribunals: some of them are impartial and independent, some of them are not. However, this is not a sufficient ground to claim that arbitral tribunals are more inclined to rule in favour of the claimant and the state courts are inclined to rule in favour of the respondent State.

#### **Arbitrator ethics, conduct and qualifications**

International rules on arbitration address the issue of the conduct or behaviour of arbitrators by allowing the responding government or the investor to challenge the choice of arbitrator because of concerns of suitability. Most agreements allow the investor and the responding state to select arbitrators but do not establish rules on the qualifications or a list of approved, qualified arbitrators to draw from.

The EU aims to establish clear rules to ensure that arbitrators are independent and act ethically. The EU will introduce specific requirements in the TTIP on the ethical conduct of arbitrators, including a code of conduct. This code of conduct will be binding on arbitrators in ISDS tribunals set up under TTIP. The code of conduct also establishes procedures to identify and deal with any conflicts of interest. Failure to abide by these ethical rules will result in the removal of the arbitrator from the tribunal. The EU also aims to set up a roster, i.e. a list of qualified individuals from which the Chairperson for the ISDS tribunal is drawn, if the investor or the responding state cannot otherwise agree to a Chairperson.

Although the intentions of the European Commission to ensure the impartiality and independence of arbitrators are commendable, it is very difficult to see how the Code of Conduct will solve currently posed before the ISDS system problems. It might be pointed out that the Code once included in the TTIP will constitute its integral part and thus be binding upon the parties to the dispute. However, the Code as proposed by the Commission in its substance does not seem to be different from other codes and rules in this area envisaging the same standards. Furthermore, the rules of procedure binding on the parties of a particular case usually contain provisions sufficient for dealing with this kind of problems. All this evidences the absence of necessity in the provisions regulating ethical standards in the TTIP.

With regard to the rules of the CETA (according to the commentary of the Commission concerning to the conduct of arbitrators, namely Articles x-25 "Constitution of the Tribunal", x-42 "Committee") it may be noted that they seem to be not quite related to the question of ethics and conduct of arbitrators.

With regard to the proposed qualifications of the arbitrators, the idea of competent arbitrators should be supported. However, the main question here is what mechanism ensuring the competence of the arbitrators, on the one hand, and not restricting the right of the parties to choose an arbitrator, on the other hand, the Commission has in mind.

The proposal draws attention to the idea of a roster intended to provide for an appointment of the Chairperson of the tribunal if the parties did not agree on this. It seems to be reasonable, although the particular importance of this tool in comparison with other problems, deserving attention, remains unclear.

#### **Reducing the risk of frivolous and unfounded cases**

The EU will introduce several instruments in TTIP to quickly dismiss frivolous claims. ISDS tribunals will be required to dismiss claims that are obviously without legal merit or legally unfounded. For example, this would be cases where the investor is not established in the US or the EU, or cases where the ISDS tribunal can quickly establish that there is in fact no discrimination between domestic and foreign investors. To further discourage unfounded claims, the EU is proposing that the losing party should bear all costs of the proceedings. So if investors take a chance at bringing certain claims

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#### 4 Day Seminar on Investment Arbitration Brussels Diplomatic Academy

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#### **Kiev Arbitration Days 2014: Think Big!**



The Ukrainian Bar Association is arranging its fourth conference entitled "KIEV ARBITRATION DAYS 2014: THINK BIG!". The event will be held on 6-7 November 2014 in Kiev, Ukraine.

The outcomes of the last year have proved that this event is extremely relevant and up-to-date. Thus, the conference provides a perfect opportunity for the leading international experts to meet with European and Ukrainian colleagues and discover Ukraine as a relatively new and promising jurisdiction.

The conference will attract plenty of leading professionals in commercial arbitration and dispute resolution from Ukraine, CIS and Europe, arbitrators, state officials and lawyers practicing in commercial arbitration.

Please follow the [LINK](#) for details.

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and fail, they have to pay the full financial costs of this attempt. The proposition of the Commission in respect of diminishing the caseload by precluding frivolous claims has a rational core. However, there are several concerns which may be raised.

First, the Articles x-29 "Claims Manifestly Without Legal Merit" and x-30 "Claims Unfounded as a Matter of Law" of CETA are provided as a relevant example. At the same time, the differentiation between Art. x-29 and Art. x-30 is unclear: although the different procedure for two types of claims is established, the submission of a claim "manifestly without legal merit" may exclude examination by the tribunal of the claim "unfounded as a matter of law" (Art. x-30 para. 3), which evidences substantial overlap between the two. Therefore, this differentiation does not seem to be useful in the context.

Furthermore, by indicating the absence in the IIAs of mechanisms preventing frivolous claims and it seems that the Commission implies that this is a gap in the investment protection system. It should be noted that some of the IIAs provide for such mechanisms [e.g., Dominican Republic-United States-Central American Free Trade Agreement (CAFTA), Art. 10.20.4 and other treaties (BITs and FTAs) modelled on the 2004 US Model BIT]. The explanation for this situation may be that the notion of the frivolous claim (claim with legal merit, claim unfounded as a matter of law, ill-founded claim, prima facie unfounded claim etc.) mostly regarded as a procedural question and, consequently, is usually included in rules of procedure of certain fora (e.g. ICSID Rule 41(5); Art. 35 §3a ECHR, criteria of admissibility; Art. 294 UNCLOS).

On the other hand, although the ICSID is administering the majority of investment disputes, it is not the only one [see "Latest Developments in Investor-State Dispute Settlement" by UNCTAD, IIA Monitor No. 1, March 2011, p. 2; "The ICSID Caseload – Statistics, 2011, No. 2, p. 7]. Based on the number of cases, UNCITRAL goes second. Neither version of the UNCITRAL Rules provides for a specific mechanism allowing for dismissal of frivolous claims. This does raise concerns as to the overflow of the arbitral tribunals with "patently unmeritorious claims" [Potesta M., Sobat M., "Frivolous Claims in International Adjudication: A Study of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily", p. 26 (discussing the adjudication by the Iran-US Claims Tribunal upon numerous ill-founded claims arbitrated under the 1976 UNCITRAL Rules)]. However, even in this situation the opinion was voiced that the newly formulated Article 17 of the 2010 UNCITRAL Rules may function as a filter [see Potesta M., Sobat M., op. cit. p. 27].

In light of the above, the absence of dismissal mechanisms in IIAs may be explained as it was considered more appropriate to deal with these questions in the rules of procedure and not in the treaties ensuring the investment protection. Taking this into account, the problem might not seem as dramatic as it is presented to the public, which means that the TTIP will not lose value if provisions similar to the CETA Art. x-29 and x-30 are not included in it.

Alternatively, if the EU decides to include these provisions in order to ensure one more time the effective filtering of frivolous claims by arbitral tribunal, it may be suggested, first, not to distinguish "claims manifestly without legal merit" and "claims unfounded as a matter of law" (or to distinguish, basing it on more fundamental grounds, clearer articulated) and to provide criteria allowing the identification of claims needed to be dismissed due to their frivolity. In particular, a non-exhaustive list of situations where a claim is to be regarded as ill-founded may be provided; or a guidance may be made as to what is "manifest", "lack of legal merit" etc. [The ECtHR "Practical Guide on Admissibility Criteria" may be a relevant example here. In particular, the "Guide" names four types of "ill-founded" claims which are "fourth-instance" complaints; claims submitted in a clear/apparent absence of a violation; unsubstantiated complaints; confused or far-fetched complaints. (See also: Potesta M., Sobat M., op. cit., p. 4)].

All the costs do not seem to be justified sufficiently. The Commission bases its proposition on the assumption that the losing party is always



## Inaugural AMATI Conference The Future of Mediation Training

Monday 22 September 2014 9.30am – 4.30pm  
International Dispute Resolution Centre, 70 Fleet Street, London  
EC4Y 1EU

### Programme

- |               |   |
|---------------|---|
| 09.00-09.30   | Registration  |
| 09.30-09.45   | Welcome and Introduction by Prof. Andrew Goodman, Director of AMATI   |
| 09.45-10.45   | Prof. Elizabeth Stokoe (UK) - The (in)authenticity of simulated talk: Comparing role-played and actual conversation and the implications for communication training   |
| 10.45-11.00   | Coffee  |
| 11.00-11.30   | Amanda Bucklow (UK) - Time to Ring in Changes in Mediation Training   |
| 11.30-12.00   | Discussion Groups<br>A – Setting, raising and maintaining standards (feeding into Vanenkova)<br>B - The Challenges of Assessment (feeding into Abramson)<br>C - Developing Advanced/International Training (feeding into Wijnands)<br>D - Taking Mediation Training |
|               | Forward – Pursuing the Stokoe/Bucklow ideas   |
| 12.00-13.00   | Lunch   |
| 13.00-13.15   | Plenary review of discussion groups   |
| 13.15-14.00   | Juanita Wijnands (NL) – Training Inter-cultural Mediation competencies: from Good to Mastery.   |
| 14.00-14.30   | Irena Vanenkova (RUS) - IMI Mediation Training Standards, The International Mediation Institute perspective   |
| 14.30-15.15   | Prof. Hal Abramson (USA) – Mediation Assessment and Training Assessors – What we need now   |
| 15.15-15.30   | Tea   |
| 15.30 – 16.15 | Dr. Paul Gibson (AUS) – Best practice in Mediation Training: the Australian experience  |
| 16.15- 16.30  | Prof. Andrew Goodman (UK) – Talking Together and Reaching Out: Ambitions for AMATI  |
| 16.30-17.00   | Drinks reception and networking<br>The sessions will be recorded for AMATI members out of the jurisdiction  |
- Fee: Amati members £275; non-members £385, to include papers, refreshments, lunch and reception.

the one brought frivolous claims to the tribunal. However, it is not always the case. In this respect, it would be more reasonable to choose more flexible approach allowing the tribunal to decide on the allocation of costs and in case of abuse to impose them on the losing party (as the one adopted by CETA Art. x-36) [See in details: Potesta M., Sobat M., op. cit., pp. 27-29. In particular, see the discussion of the powers of the tribunal under the ICSID Rules and CAFTA as to the allocation of costs].

### ***Allowing claims to proceed (filter)***

Some investment agreements include filter mechanisms whereby the Parties to the agreement (here the EU and the US) may intervene in ISDS cases where an investor seeks to challenge measures adopted pursuant to prudential rules for financial stability. In such cases the Parties may decide jointly that a claim should not proceed any further. The EU like many other states considers it important to protect the right to regulate in the financial sector and, more broadly, the overriding need to maintain the overall stability and integrity of the financial system, while also recognizing the speed needed for government action in case of financial crisis.

The title of the suggested provision "Allowing claims to proceed (filter)" is misleading because it refers to much broader issues than the text of the provision provides. Although the right of States to regulate in the financial sphere is indeed of great importance, it might be more correct to deal with it in one of the subparagraphs of the provision devoted to the right to regulate or to put it right after this provision: it would provide a consistent framework for the whole issue instead of the fragmentation created by their division.

### ***Guidance by the Parties (the EU and the US) on the interpretation of the agreement***

Most existing investment agreements do not permit the countries who signed the agreement in question to take part in proceedings nor to give directions to the ISDS tribunal on issues of interpretation. The EU wants to make it possible for the non-disputing Party (i.e. the EU or the US) to intervene in ISDS proceedings between an investor and the other Party. This means that in each case, the Parties can explain to the arbitrators and to the Appellate Body how they would want the relevant provisions to be interpreted. Where both Parties agree on the interpretation, such interpretation is a very powerful statement, which ISDS tribunals would have to respect. The EU would also provide for the Parties (i.e. the EU and the US) to adopt binding interpretations on issues of law, so as to correct or avoid interpretations by tribunals which might be considered to be against the common intentions of the EU and the US.

In principle, this is a useful mechanism and the inclusion of a process for binding joint interpretation in the TTIP might be useful. However, the Vienna Convention on the Law of Treaties treats the definition of the parties as a means of interpretation, but not as an amendment of the treaty. Therefore, it is not clear how such definitions will be considered by the tribunals.

Another point to consider is the amicus curiae submissions. The current trend is amici curiae are seeking to participate more regularly in international arbitrations and are no longer only non-governmental organisations. Additionally, it would be beneficial to clarify to what extent participation rights should be afforded to amici curiae.

### ***Appellate Mechanism and consistency of rulings***

No existing international investment agreements provide for an appeal on legal issues. International arbitration rules allow for annulment of ISDS rulings under certain very restrictive conditions relating to procedural issues. The EU aims to establish an appellate mechanism in TTIP so as to allow for review of ISDS rulings in order to ensure

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**Marc Wagemans**  
*in memoriam*



Dear members,

We are deeply saddened to hear that Marc Wagemans, the ex-President of bMediation and distinguished advocate, arbitrator and mediator died on 28 July 2014. He knew how to combine intellectual curiosity and rigour with a sharp and witty sense of humour. Our thoughts and affection are with his friends and family.

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consistency in the interpretation of TTIP and provide both the government and the investor with the opportunity to appeal against awards and to correct errors. In TTIP the EU intends to create a bilateral appellate mechanism immediately through the agreement.

The idea of an appellate mechanism for investment arbitration is already being intensely discussed in the investment arbitration community. In our view, it is not a bad idea. However, in TTIP the EU intends to create a bilateral appellate mechanism immediately through the TTIP agreement. In this case the appellate mechanism would only ensure uniformity and predictability of the interpretation of the TTIP, but would not reduce the overall heterogeneity and fragmentation of the interpretation of other EU agreements. In case of creation of an appellate mechanism, the better approach is to consider the establishment of an appellate mechanism which would apply to all investment treaties and not only to the TTIP.

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