

November 2013



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## AIA Upcoming Events

*EMTPJ 2014 Registrations Now Open!*

*First Report on the Future of Mediation in Belgium (FMB)*

*The Court of Arbitration for Sport Updates its Mediation Rules*

*Book Review: Dalhuisen on Transnational Corporation, Commercial, Financial and Trade Law Vol 3*

*Is Polish E-Commerce Ready For Change?*

*Book Review: International Investment Law: Reconciling Policy and Principle*

*Public Policy and International Arbitration in India: A Change For The Better*

*An Overview of Remitting Arbitral Awards in Belgium and Neighbouring Countries*

*International Conference on Arbitration, Vilnius*

*Launch of the Brussels Diplomatic Academy*

*AIA Call for Sponsorship Partners 2014!*

*Become an AIA Member 2014!*

*AIA Recommends to Attend: Negotiare Negotiation Services and Training*

## AIA Upcoming Events:

**Future of Mediation in Belgium (FMB) Session**  
LOCATION: Institute for European Studies (BICCS) Rome Room, Pleinlaan 5, 1050 Brussels, Belgium  
DATE: 10th of February 2014 from 2pm-5pm  
[click here to register](#)

**Seminar on Collective Redress through ADR:**  
LOCATION: Institute for European Studies (BICCS) Rome Room, Pleinlaan 5, 1050 Brussels, Belgium  
DATE: 12th of March 2014 from 2pm-5pm followed by a Networking cocktail  
[click here to register](#)

## EMTPJ 2014 Session Now Open For Registrations!



On the 18th-30th of August 2014, the European Mediation Training for Practitioners of Justice (EMTPJ) session will run for its 5th consecutive year. The EMTPJ is an 11 day intensive training course on cross border mediation in civil and commercial matters. The training is unique because it is tailored to cover both theoretical and practical elements of mediation with a European perspective.

Subjects include: Analysis of conflict theory and mediation, analytical study of conflict mediation methods, theory and practice of EU contract law in Europe, EU ethics in mediation, interventions in specific situations, theory and practice of EU Law and Mediation Acts, the function of party experts and counsel in civil and commercial mediation and international mediation.

What opportunities does the EMTPJ offer:

1. It is open to professionals from various different fields whether they have a background in mediation or not
2. It is recognised by just under 20 mediation centers in and beyond Europe
3. It offers a truly international learning environment with students and teachers travelling from all over the world to participate
4. It is based in Brussels, the heart of Europe
5. It is flexible, for those who are interested in part of the program but not everything, we offer EMTPJ continuous hours which allows participants to pick and choose subjects
6. It provides a solid basis for students to build their own mediation practice  
If you would like to receive more information and register for this years session, follow the link <http://www.emtpj.eu/2014/default.htm>.

# First report of “Future of Mediation in Belgium” (FMB) initiative

[Following the first Brainstorming event on 27/06/2013—Brussels—Palce of Justice]

## 1. Introduction

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).

Each session is moderated by members of the FMB working group, currently composed of Johan BILLIET, Philippe BILLIET, Bernard CASTELAIN, Barbara GAYSE representative of the Federale Bemiddelingscommissie- Commission fédérale de Médiation, Willem MEUWISSEN, Jef MOSTINCKX, Benoit SIMPELAERE and Ivan VEROUGSTRAETE.

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

## 2. Next meeting

The next FMB session will be held on the 10th of February 2014 (2 pm – 5 pm) at the Institute of European Studies (IES) Rome meeting room, Pleinlaan 5, 1050 Brussels). The following topics will be discussed during the next session:

Amendments to the 2005 Mediation Act:

- Should the scope of the 2005 Mediation Act be broadened to include all kinds of mediation?
- Should the term “bemiddeling” be replaced by the term “mediation”?
- Has the Romanian Mediation Act got good ideas that should also be implemented in Belgium (e.g. compulsory mediation sessions)?

Should documents issued prior to signing the mediation protocol and in relation to the mediation, also be considered confidential?

Other:

- What incentives should be implemented in order to encourage mediation?
- Should the Federal Mediation Commission be given more powers and more resources?

Feedback on the First FMB report

Should you wish to register as a permanent delegate, please visit the AIA website and fill in the [registration form](#) or send an email to Olivia STAINES for details at [administration@arbitration-adr.org](mailto:administration@arbitration-adr.org), specifying your background and indicating in which of the following stakeholder groups you would like to be registered:

Legal insurers

Sectorial

Independent mediators

Mediation providers,

Mediation training providers

ADR centres

Experts

Judges

Lawyers

In-house counsels

Ombudsmen

Business representatives

Consumer representatives

Politicians & policy makers

Other (please specify)

## 3. Brainstorming event 27/06/2013

The first FMB brainstorming event took place on 27/06/2013 at the Palace of Justice in Brussels.

This first session was introductory in character. The importance of a strong mediation system in Belgium and common future steps were discussed.

Most mediation stakeholders were present or represented at the session; e.g. the Belgian Federal Mediation Commission, AIA IVZW, Belmed, the (legal) insurance sector, independent mediators, private and public mediation providers, politicians, providers of mediation training, ADR centres, experts, judges, particular industries, lawyers, in-house counsels, ombudsmen, business organizations and consumer organizations.

The session was divided into two parts:

In the first part, Linda REIJERKERK (Netherlands), John GUNNER (UK) and Paul RANDOLPH (UK) discussed recent developments in mediation in their respective jurisdictions.

Together with the attending stakeholders, the following conclusions were made:

**It is misleading to merely place ‘mediation’ categorically within the field of ‘ADR’. Rather than an alternative to litigation, mediation should be understood as a primary way of dealing with disputes.**

This change in perspective was considered a crucial parameter for the enhancement of mediation in Belgium.

In order to effectuate this change in perspective and increase awareness, understanding and trust in mediation, more tailored training should be available for various mediation stakeholders.

Judges, lawyers, etc. should (at an early stage) be given proper mediation training. Reference was made to the Netherlands, where all judges received mediation training organized by CvC and the positive effects this had on the use of (court-referred) mediation in the Netherlands.

The group was divided on the question regarding whether

or not a similar practice to the Italian mandatory mediation practice should be introduced in Belgium.

Nevertheless, there was a consensus on the need for an introduction of a practice under which it would be mandatory for parties in litigation to be informed about the processes and the advantages of mediation.

In the second part, the following controversial statements were discussed between all participants:

Lawyers are/are not naturally adverse to mediation  
Mediation is/is not too costly  
There should be/not be limitations on who mediates  
Where should mediation be placed within ADR?

#### 4. Overview of the main discussions

Lawyers are/are not naturally adverse to mediation

The following concerns were raised within the group:

**Statement 1: "Due to the fact that most lawyers invoice on the basis of timesheets, it is reasonable to assume that lawyers are naturally more interested in (lengthy) litigation procedures as opposed to fast solutions through mediation."**

Discussion arose regarding the momentum on which most cases are deviated towards a mediation settlement attempt. Shared experiences show that mediation would most frequently be used in either an early stage (early advise to mediate) or at a late stage when parties have carried significant costs related to litigation and are (or at least one of them is) unable to continue to finance legal procedures.

Discussion arose regarding the extent to which ethical rules could be effective to overcome the fact that the lawyer-client relationship may incorporate such adverse interests.

Discussion arose regarding whether an evolution towards the introduction of 'mediation lawyers' (i.e. lawyers specialised in mediation assistance) would/could be beneficial to counterbalance the existing concerns.

No consensus was reached and the FMB working group therefore welcomes any input that offers to help address the existing concern.

**Statement 2: "Lawyers are trained to assess rights and wrongs in order to defend/advise on the legal positions of their clients. A legal defence merely aims to offer legal 'victory' to the client. An offer to mediate may subsequently be interpreted as a sign of 'weakness' and mediation may be (ab)used to conduct a trial pleading (in order to discourage the opponent) or to assess the pleading skills of the other side. This may even lead to 'fishing' expeditions regarding the strength of the opponents' case.**

Lawyers don't believe in the added value of a mediator. Indeed, how difficult could it be to 'mediate' and why

would a third party need to be involved? This may even be interpreted by the client as if the lawyer him/herself is unable to guide parties towards a solution. Moreover, the mediator would likely be a lawyer him/herself as well, resulting in the perception of the client that he/she has more expertise in interest-driven solution finding. The latter concern may be offset by proposing a 'weaker' competitor to be mediator, following which/during which the lawyer can then 'steal the show' as 'dealmaker'."

Discussion arose regarding the role of a lawyer during mediation and the extent to which a lawyer's attitude may create an obstacle to the mediation processes, in which the parties' interests are and should remain key.

Discussion arose regarding the fact that beginning (pro deo) lawyers are not sufficiently making use of mediation to deal with pro deo cases. This would create huge financial burdens on public spending.

Discussion arose regarding the idea of mediation providers (e.g. as the Hertfordshire University Mediation Program does) having to issue mediation vouchers for first time users of their services. The majority found that this would be a sound commercial decision.

The majority opined that public cost savings would be effectuated if the value of pro deo points for mediation services would be increased, as the increase of mediations would allow to save higher costs (see under title 5 below).

Consensus existed on the importance of proper mediation training for all lawyers during their law studies. The majority opined that law studies in Belgium generally lack the required level of mediation training.

The FMB working group welcomes all input that offers to help address the existing concerns.

Mediation is/is not too costly

The following concerns were raised within the group:

**Statement 1: "The bridge between 'having right' and 'obtaining right' is ever increasing (time & cost-wise) and, in the absence of proper third party funding mechanisms, justice becomes a privilege for the economic stronger party. The increase of mediation is therefore a symptom of a 'failing' judicial system (e.g. lack of party funding, judicial backlog,..) and it would be wrong to mitigate the symptom instead of curing the underlying disease. Moreover, provided this 'fall-back' role of mediation, the economically stronger party is more likely to obtain a better ('unfair') settlement even if it has only 'weak' legal arguments."**

There was a Consensus on the importance of mediation and the risk that mediation, if not sufficiently known to all legal stakeholders, would be viewed as a mere symptom of a dysfunctional

legal system. (This relates to the 'change in perspective' referred to under point 2 above).

Discussion arose regarding the way in which dispute funding should be tailored to ensure fair and equal access to justice and mediation to all parties. No consensus was reached, but when representatives of the legal insurance sector informed that they would cover mediation costs at up to 200% (as the use of mediation is far cheaper than ordinary court litigation), this caught the attention of many participants. There appeared to be a consensus to investigate the role and input of legal insurers regarding the cost aspect (linked with the use) of mediation. The FMB working group further welcomes all additional input that could be helpful to address the existing concerns.

**Statement 2:** "To some extent, mediators have adverse interests to the parties in the mediation, as most of them invoice on the basis of timesheets. This means that mediators prefer the mediation to last as long as possible and to include several follow-up meetings."

Discussion arose as to whether this is a real concern. Mediators seem to focus on a high success rate rather than on a large number of hours. Participants were however open to the idea of working on the basis of flat fees for mediations.

Neighborhood mediation seems to work well and is becoming increasingly popular. Discussion arose regarding potential discrepancies that may arise between public mediation (e.g. neighborhood mediation) operated with subsidies on the one hand and private mediation providers that seem to not always be able to find funding/subsidies for their initiatives on the other hand. The question as to whether other interested stakeholders would be willing to sponsor mediation providers was asked. Suggestions were made regarding the extent to which 'pro mediation labels' and annexation/involvement to/of business/consumer organizations may render mediation into a product in which stakeholders are willing to invest.

Discussion arose regarding the creation of a fund (e.g. comprised of contributions from those that would be condemned for reckless litigation) to cover the cost of accredited mediators. Doubts exist as to whether this fund could generate significant revenues.

Discussion arose regarding the question of whether or not it is positive if a mediator is paid by a particular sector (cfr sector mediation).

The FMB working group welcomes all additional input that could help to address the existing concern.

There should be/not be limitations on who mediates

The following concerns were raised within the group:

**Statement 1:** "Mediation is currently offered by various public and private providers, making it hard for those looking for a mediator/mediation provider to determine who to turn to.

Moreover, various sectors (e-bay, banks, insurers, etc) offer their own mediation or similar (e.g. ombudsmen, conciliation) services."

Discussion arose regarding whether there should be a central platform listing all mediation providers and helping to direct parties to find experienced mediators and mediation providers.

Discussion arose regarding the extent to which a mediator shall be independent of the parties (cfr sector mediation).

Discussion arose regarding whether or not courts should have mediation permanences (informal presence/ dealing with formal court referrals).

Discussion arose regarding the task of a judge. To what extent can/should he help/encourage/convince parties to find a solution for their dispute. Several stakeholders advocated for judges being given a mandate to actively help parties find a solution to their problem, with parameters regarding neutrality and impartiality of the judge.

Discussion arose regarding the question whether the mediator him/herself should have expert knowledge of the subject matter at hand and/or the applicable law.

The FMB working group welcomes all additional input that could help to address existing concerns.

Where should mediation be placed within ADR?

The following concerns were raised within the group:

**Statement 1:** "As mediation has not had much exposure and therefore general awareness is low, hybrid structures under which mediation is imbedded in a certain ADR mechanism (e.g. MED-ARB, ARB-MED, ARB-MED-ARB,...) are a fortiori unknown and therefore not used."

Discussion arose regarding whether ADR providers would conduct more mediations if they provide for clear procedural rules on hybrid ADR mechanisms. Fear that these procedural rules may remain unused as long as mediation stakeholders are insufficiently trained (e.g. formation of lawyers,...) on the use of ADR hybrids was highlighted. Consensus existed on this point and on the fact that hybrid ADR mechanisms are very often best placed to serve all parties interests in the case of a dispute. The FMB working group welcomes all additional input that could help address existing concerns.

5. Cost savings through mediation

During the session, reference was made to EU research regarding cost-savings through the use of mediation. This triggered great attention and the FMB working group conducted initial research on private and public costs that could be saved through systematic use of mediation in Bel-





gium where possible. (This research should be expanded on within a working group - see point 5 below - and could be presented at the next FMB meeting): Recently, the Survey Data Report entitled "The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation" funded by the European Union, highlighted the time and cost effectiveness of mediation as a dispute resolution method.

According to the statistics provided for Belgium, if the dispute is worth 200.000 €, it will take the parties on average at least 525 days to terminate it via litigation, whilst resolving the dispute by mediation would only take an average of 45 days (almost twelve times less than the first option). Moreover, the costs of litigation in this scenario would on average amount to at least 16.000 €, whilst mediation would be more than twice less costly for the parties, racking up an average bill of 7.000 €.

The directorate general for internal policies of the European Parliament made the same calculations in its report "Quantifying the cost of not using mediation- a data analysis". This report confirms that it takes a lot more time and money to terminate a dispute through litigation than it would where the dispute was resolved through mediation. Under this report, the average number of days required in Belgium to terminate a dispute through litigation is 505 days, while it takes only an average of 45 days to find a solution when parties use mediation.

The report also confirmed that mediation is less costly for the parties than litigation. The average cost of litigation amounts to 16.000 euros in Belgium, while a solution through mediation costs only 7000 euros on average. The costs included in this calculation were: the attorney cost plus, depending on which option chosen, the cost of mediation or the cost of going to court and the enforcement cost.

To make a complete assessment, one should take into account the success rate of mediation, as a failed mediation would call for litigation so the costs would inevitably rise and the entire procedure would take more time. It is therefore necessary to identify the lowest level of mediation compliance that still yields cost and time saving benefits. The break-even point was calculated in the aforementioned report on "Quantifying the cost of not using mediation".

For Belgium, already a 9% success rate is the break-even point concerning time savings, or the point at which using mediation does not create any time advantage. Concerning cost savings, the break-even point was found at a 44% mediation success rate, or the point at which using mediation does not create any financial advantage. Given the fact that the actual mediation success rate is above 75 % (some sources speak of 85%), mediation is definitely worth a try.

It is not only individuals and companies that benefit from mediation. Governments all over the world are looking for ways to finance their budget. The Belgian government has recently announced the introduction of VAT on lawyer's

fees. This may make it actually even harder and more expensive for individuals to take their case to court and find justice, increases public costs related to the pro deo system with 21% and may actually not generate much budget in the first years as lawyers could probably deduct some of their historic VAT payments. The above demonstrates that, instead of this new VAT measure (which may – at least in the beginning- merely result in higher public spending on pro deo services), lots of public costs could have been saved by inciting parties to use mediation.

bMediation (the biggest mediation center in Belgium) stated in its report "Baromètre de la médiation 2012" that, in 2010, approximately 690.00 cases were brought to litigation in matters that could have been resolved through mediation.

With the above figures, it is clear that even limited implementation of mediation could save valuable resources and costs.

## 6. Sponsoring opportunities

The first FMB session was sponsored by the law firm Billiet&Co ([www.billiet-co.be](http://www.billiet-co.be)).

All mediation stakeholders are given the opportunity to sponsor (/support) one or more of the upcoming FMB sessions. Should you be interested in becoming a sponsor, please contact Olivia STAINES at: [administration@arbitration-adr.org](mailto:administration@arbitration-adr.org). Sponsors are named in invitations for the correlating FMB session(s).

The FMB working group

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## The Court of Arbitration for Sport updates its Mediation Rules

by Professor Dr Ian Blackshaw

The Court of Arbitration for Sport (CAS), which is based in Lausanne, Switzerland and, in 2014, will celebrate thirty years of operations, introduced Mediation, as a means of settling sports-related disputes, on 18 May, 1999. At the time, Ousmane Kane, the former Senior Counsel to the CAS and, during his tenure as such, responsible for CAS Mediation, remarked as follows:



“The International Council of Arbitration for Sport took the initiative to introduce mediation alongside arbitration. As the mediation rules encourage and protect fair play and the spirit of understanding, they are made to measure for sport.”

Generally speaking, Mediation is proving to be an effective and relatively speedy way of settling sports disputes, not only because it tends to preserve on-going relationships, but also, like other forms of ADR, offers the parties in dispute a ‘win-win’ situation.

However, CAS Mediations, to date, have been few and far between, although the CAS is now promoting its Mediation service, and has recently updated its Mediation Rules, the subject of this note.

The new Rules, which are clear and self-explanatory, are effective as of 1 September, 2013, and are deemed to have been incorporated in any Mediation Agreement providing for CAS Mediation (see Article 3), although the parties in dispute may agree to apply any other rules of procedure (ibid.)—characteristic of the flexibility of the Mediation process.

As will be seen from them, CAS Mediation is generally offered for disputes falling within the purview of the CAS Ordinary Division (any sports-related dispute that is not an appeal from the decision of a sports’ governing body or the World Anti Doping Agency) and does not, in general, apply to disciplinary matters, such as doping issues, match-fixing and corruption.

However, the new Rules now expressly provide that, in appropriate cases and where the parties expressly agree, it may be possible to invoke CAS Mediation for the settlement of other disciplinary disputes (see Article 1).

However, it should be noted that, in any case, Mediation is a useful way of settling disputes relating to any commercial and financial fallout resulting from decisions in disciplinary cases, for example, loss of lucrative sponsorship and endorsement contracts, particularly where the sports person concerned has been wrongly accused of being, say, a drugs cheat. See, for example, the Diane Modahl doping case in 2001, in which she pursued her claim against the British Athletic Federation in the English Courts at considerable expense and lost!

The role of the CAS Mediator is set out in Article 9 of the Rules. The Mediator is expected to take a more active role in the Mediation, rather than purely facilitating the parties’ negotiations, and actually propose solutions to the parties for settling their dispute, but may not impose such solutions on them (see Article 9 c.).

The parties in a CAS Mediation may be represented and, in such cases, their representatives, who may or may not be lawyers, must have full authority from them to settle the dispute alone (see Article 7). Such authority is usually proved by a corresponding Power of Attorney.

The procedure and timings of the Mediation is determined by the Mediator at the outset, unless the parties in dispute decide to proceed otherwise (see Article 8). Again, this reflects the flexibility of Mediation.

Article 10 of the Rules includes comprehensive provisions on the confidentiality and ‘without prejudice’ nature of the

proceedings, both during the Mediation and afterwards in any arbitral or judicial proceedings—both of which are hallmarks of the process of Mediation. In particular, the obligation not to disclose confidential information relating to the Mediation is now expressly qualified in the following terms: “unless required to do so by applicable law and in the absence of any agreement of the parties to the contrary.” This, of course, reflects and reminds one of the general legal positions regarding disclosure of confidential information.

One final point: Article 13 of the Rules foresees and provides for the possibility of using ‘Med-Arb’ as a procedure for settling disputes. Under this procedure, in those cases where the CAS Mediation fails—in general, Mediation enjoys a success rate of 85% in appropriate cases—the parties may proceed to CAS Arbitration. ‘Med-Arb’ is a useful form of ADR in which the Mediation identifies the issues involved and the Arbitration settles them.

However, this procedure raises the controversial matter of whether the CAS Mediator should also act as the CAS Arbitrator, even where, as now provided in Article 13, the parties agree! Personally and professionally speaking, I do not generally favour such an arrangement. In the old Rules, there was no such qualification to the specific prohibition of the Mediator acting as the Arbitrator in subsequent Arbitration proceedings.

The new Rules include, as Appendix I, a new itemised Schedule of CAS Mediation Costs, which are effective as of 1 July, 2013.

Reference should also be made to the provisions of Article 14 of the Rules, which deal with advances and payment by the parties of the CAS and Mediator’s costs. In this latter connection, Article 11 of the Rules now includes a new ground (para.d.) for the termination of the Mediation where “one of the parties, or both, refuse(s) to pay its (their) share of the mediation costs within the time limit fixed pursuant to Article 14 of the Rules.”

The new Rules add some legal and procedural clarity to CAS Mediations and, as such, are to be welcomed. They may be downloaded from the CAS official website at [www.tas-cas.org](http://www.tas-cas.org).

\* \* \*

Professor Dr Ian Blackshaw is a Mediator for the Court of Arbitration for Sport and may be contacted by e-mail at [ian.blackshaw@orange.fr](mailto:ian.blackshaw@orange.fr)

## Book Review: Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law Volume 3

by Maria Karampelia

The works of Jan H. Dalhuisen are considered to be the leading texts in the area of transnational and comparative commercial law. His work is characterized by its comprehensiveness and depth, while still allowing readers to easily absorb his concepts. In Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law, he has succeeded in creating a valuable tool for legal practitioners,



offering a holistic and sophisticated guide for any issue a modern trader might confront in his daily dealings.

This is the fifth edition of the book and it is divided into three volumes, each one covering a different aspect of law. Each volume is valuable as an independent source of information and this article is a **review of the third volume**. Dalhuisen's third volume covers topics on financial

products, financial services and financial regulation.

This is the largest volume of the reworked edition and it consists of two chapters split into several parts, so as to assist the reader in finding their sought after information. The book is further supplemented with case law, legislation and word indices for easier cross-referencing. While the text may seem **comprehensive**, Dalhuisen's material actually reads as quite concise considering that it addresses numerous aspects of international financial law, ranging from the regulation of financial trading, payment systems and securitization of dispute resolution, banking supervision, financial risk, stability and the EU legislation on financial markets. The book further embraces the latest legislative developments concerning tax avoidance, banking capitalization and money laundering prevention.

Dalhuisen does not merely report or comment on the legal framework of today's commerce, but he ensures that the reader will have a broad understanding of these concepts by explaining the background and motivation of each regulatory act, as well as its practical implementation and outcomes. Dalhuisen's profound knowledge and professional experience in the banking sector allows him to harmoniously blend civil and common law concepts, analyze them in a wider context and finally provide a thorough insight to the complex law of financial markets, which is facilitated by the use of efficient writing.

Overall, this book is an essential tool for students and professionals dealing with the practice of law in the financial sector, especially considering the vast reforms of financial regulation that recently occurred at both the European and global level.

For more information visit the website of Hart Publishing, Oxford: <http://www.hartpub.co.uk/BookDetails.aspx?ISBN=9781849464536>

## Is Polish e-commerce ready for change?

by Monika Ziobro

### 1. Overview of Online Dispute Resolution and Directive 2013/11/EU

Alternative dispute resolution (ADR) is an easy, fast and cheap out-of-court solution for consumers and traders to resolve consumer disputes. A burgeoning field of ADR is online dispute resolution (ODR), which offers parties the opportunity to resolve disputes almost entirely on the Internet. On July 8<sup>th</sup>, 2013, the European Union began to harmonize these procedures.

One of the biggest steps to unify ADR and ODR methods in

relation to consumer and trade disputes was the implementation of Directive 2013/11/EU by the European Parliament and of the Council on May 21<sup>st</sup>, 2013. Directive 2013/11/EU focused on alternative dispute resolution for consumer disputes and amended the European Commission's Regulation No 2006/2004 and Directive 2009/22/EC. EU Member States are obliged to implement these procedures by July 9<sup>th</sup>, 2015.

Directive 2013/11/EU is complex and has multiple references and exceptions. It applies to disputes between consumers and traders regarding contractual obligations arising out of contracts for the sale or provision of services within all sectors of the economy—although some sectors are given exceptions. The Directive also applies to sectors on the Internet and includes disputes arising from the sale or sharing of digital content for remuneration. Additionally, the Directive deals with complaints from consumers against traders, but does not deal with complaints from traders against consumers.

Most of the Directive's provisions will enter into force on January 9<sup>th</sup>, 2016, with the exception of article 2, paragraph 3 and article 7, paragraphs 1 and 5, which will enter into force on July 9<sup>th</sup>, 2015.

### 2. E-commerce in Poland

The main factors necessary to develop e-commerce in Poland are correctly implementing the provisions of Directive 2013/11/EU, proper training for traders, and general opening for the ODR method.

Poland is preparing to implement Directive 2013/11/EU and hopes to harmonize the Directive in its entirety. By introducing strict provisions to eliminate divergences between different rules in national law, the new Directive will guarantee similar conditions for competition among traders. Additionally, the Directive will require retail websites to provide consumers with information about resolving disputes that arise due to transactions on their websites. By providing this information to consumers, the websites will enhance their credibility and gain trust from consumers.

Another way for online retailers to gain trust from consumers is by having an ODR platform that has the ability to resolve disputes between consumers and traders on the Internet, even if the consumers are citizens of different EU Member States and speak different language. This will allow Polish consumers to have increased access to products from abroad and to have confidence in purchasing products and resolving any types of disputes regarding such products. It will also allow Polish online retailers to have the ability to increase their market abroad and to satisfy international consumers.

The adoption of Directive 2013/11/EU will require online retailers to adapt their business practices to the Directive's principles and to implement adequate legal provisions. The implementation of legal provisions, however, will not be enough to ensure online retailers will secure the trust of consumers. It will be necessary for online retailers to develop simple trust by practicing proper relations between consumers and traders.

In Poland, there is currently no social awareness of ODR or the types of ODR platforms offered for resolving disputes. As a result,



the provisions of the Directive will most likely seem extremely complex to Polish consumers, online retailers, and entrepreneurs. This presents a risk that Polish consumers and retailers will not understand what is required of them or how they are supposed to adhere to the new law.

At the beginning of November the Ministry of Justice of Poland and the state officials from Poland's Government Legislation Centre held meetings to discuss the Directive and its main changes. The last day for Poland's government to implement Directive 2013/11/EU into its legal system is December 13, 2013.

### 3. Summary of Directive 2013/11/EU's Main Changes

- The retailer must ensure that the consumer is aware that an obligation to pay exists for any product the consumer purchases online on the retailer's website.
- Consumers that make purchases online will not be required to cover any additional costs that they were not informed about.
- The online retailer will be required to deliver goods to the consumer without any delay and no later than 30 days after the agreement was signed.
- The consumer is entitled to withdraw from the purchase contract without informing the online retailer of their reason for doing so, as long as the decision to withdraw from the contract is made within 14 days from the date the consumer first possesses the good. The consumer must return the good no later than 14 days from the date they informed the trader about their decision to withdraw from the purchase contract.

When a consumer decides to withdraw from the purchase contract, the online retailer must reimburse the consumer for the cost of the purchased good and the cost of shipping and delivery.

## Book Review: International Investment Law: Reconciling Policy and Principle

by Adam Miller



One of the final conclusions offered by Surya P. Subedi in "International Investment Law: Reconciling Policy and Principle," is that the traditional model of commercial arbitration for international investment disputes must begin to incorporate new developments in international law. Subedi, a barrister and professor of international law at the University of Leeds, gives particular emphasis in his book to the "phenomenal growth" of international

investment in the last decade and how that growth will ultimately affect dispute resolution.

With adept observations, Subedi explains how arbitration for international investments has gradually transitioned into more mainstream dispute settlement mechanisms in international law. For instance, there is particular analysis focusing on how investment arbitration tribunals have interpreted bilateral investment treaties (BITs) and free trade agreements by extending the scope of such agreement's application.

A significant part of the book deals with BITs and what types of protections they are designed to offer investors. Additionally, the analysis of BITs looks at whether BITs are still serving the interests of developing countries by assisting them to attract foreign investment—as they were originally designed to do—or if recent developments in international law have shifted the focus toward outsourcing the settlement of investment disputes away from developing countries. Another major feature of the book is its detail of a number of landmark decisions that have been produced by various international investment tribunals.

The rest of the book addresses other fundamental issues in international investment law, such as the protection of foreign investment in customary international law; the protection of foreign investment through BITs, which includes a helpful introduction to the origins, content and significance of BITs; an overview of foreign investment law and jurisprudence; the current issues in foreign investment law; and an overview of current challenges in foreign investment law.

As a result of its immense detail and unique examination of themes in international investment law, AIA recommends Subedi's "International Investment Law: Reconciling Policy and Principle" as a thorough and engaging book.

For more information see [Hart Publishing's page](#) about the book.

## Public Policy and International Arbitration in India: A change for the better

Deepu Jojo

In the present day the importance of arbitration cannot be understated in anyway and it has become one of the most important means of resolving disputes. It has been defined by Jean Baptiste Racine that, "the characteristic of contemporaneous international arbitration law is its liberalism" (Jean-Baptiste Racine, *L'arbitrage commercial international et l'ordre public* 3, LGDJ (1999)). States after having understood the importance that is being played by Arbitration have recognized that a liberal approach is pertinent in order to make sure that Arbitration is promoted in a country.

Public policy has been described by the English House of Lords in 1853 as "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against public good" (Egerton v. Brownlow, (1853) 4 HLC 1). The judge always keeps the sword of public policy under his robe (A.V.M Struycken, 'La lex mercatoria dans le droit des contrats internationaux', in *L'évolution contemporaine du droit des contrats*, *Revue des Journées Rene Svatier-Politières* 24-25 Octobre 1985, at 218, P.U.F. (1986)).

Public policy can be described as the limit which exists to the freedom of international arbitration. The role which is assigned to Public Policy can be aptly described as a highly relative one since Public policy of one country usually varies from one country to another based on matters such as conceptions of each state. There are many expressions which can be used to describe public policy such as *ordre public*, international public policy, *lois de po-*



lice, and rules of immediate application.

A general view of public policy has been given by the Belgian Cour de Cassation when it was stated that, "belongs to public policy a statute which concerns the essential interests of the State or the public at large, or a statute which determines, in private law, the fundamental legal requirements on which the economic or moral order of the society is based" (Cass. Belgium, 15 March 1968, 1968 (I) Pas. 884. Author's translation. This definition was inspired by Henri De Page, *Traite elementaire de droit civil belge*, Vol. I, at 102, Bruylant (2ed. 1948)).

In India, the Indian Arbitration and Conciliation Act (hereinafter referred to as the Act) has 4 distinct parts. Here Part I is applicable where the place of arbitration is in India and it allows Indian Courts to grant interim measures; Part II is applicable in the case of recognition and the enforcement of foreign awards in India which comes under the New York Convention. The concept of public policy has major importance in India and many eyebrows were raised on the International Arbitration forum when the decision in the case of *Bhatia International v. Bulk Trading* ((2002) 4 SCC 105) was produced.

This was an extremely controversial case as the Supreme Court of India had erased the distinction between Part I and Part II of the Arbitration Act. This essentially meant that when it came to Arbitrations held outside of India the provisions of Part I would apply unless the parties had expressly or impliedly excluded all or any of its provisions through agreement.

This case caused a major controversy as it was noted in Paragraph 21 of the judgment that, "...By omitting to provide (in Subsection 2 of Section 2 of the Arbitration and Conciliation Act of 1996) that Part I will not apply to international commercial arbitrations which take place outside of India the effect would be that Part I would also apply to international Commercial arbitrations held outside of India".

Indian courts, in short, had the power to treat a foreign award as if it were an award made in India, this was essentially based on the concept of 'patent illegality' which allowed arbitration awards to be set aside on the basis of an error of law. What is to be noted here is that 'patent illegality' usually only applies to Part I of the Indian Arbitration Act (which deals with Domestic Arbitrations and International Arbitrations with their seat in India), this was originally developed in the case of *ONGC Pipes*, whereby if there is violation of public policy of India the Supreme Court is entitled to set aside an arbitral award.

In the case of *Venture Global Engineering v. Satyam Computer* (AIR 2008 SC 1061), the Supreme Court of India relied on the reasoning which was provided in the case of *Bhatia* and went on to hold that the public policy provisions in Part I of the Arbitration Act of 1996 would apply to foreign awards as well. Cases such as this have effectively managed to retard the growth of Arbitration in India as foreign investors consequently grew extremely skeptical of Arbitration proceedings in India, the Supreme Court went on to hold that the courts in India would have jurisdiction to set aside a foreign arbitral award for being contrary to the public policy of India.

It is in light of all this that the 2012 decision by the Supreme Court of India in the case of *Bharat Aluminum Co v. Kaiser Aluminum Technical Services* (hereinafter called as *BALCO*) plays a critical role, as through this decision it has been held

that that Part I of the Indian Arbitration Act does not apply to arbitrations held outside of India. However, as a result, the Indian Supreme Court also held that the Indian courts were not able to render interim or interlocutory relief in assistance of foreign arbitral proceedings. The importance of being arbitration friendly has been emphasized in India through several [platforms](#).

What makes the judgment in the case of *BALCO* even more important in terms of arbitration in India is that the Supreme Court of India took a refreshing new direction in this case as opposed to the previous judgments which were not pro-arbitration. The Supreme Court went on to look at the intention and purpose behind the provisions of the UNCITRAL model law and the New York Convention as could be understood from the travaux préparatoires.

This would mean that the Supreme Court is propagating the message that Indian Courts will no longer be hesitant to be guided by the terms of the relevant international conventions and they shall be deciphered accordingly as how they are addressed internationally. This would also mean that the courts would strive to confirm Indian legislation with international norms.

The recent case of *Shri Lal Mahal v. Progetto Grano Spa* (Civil Appeal No. 5085 of 2013) also has a major role to play in improving the perception of Arbitration in India. In this case there was the initiation of arbitration proceedings by a buyer (foreign entity) against a seller (Indian entity). An award was given by the Arbitral tribunal which accepted the case of the foreign buyer and thus an award was passed against the seller.

The Indian sellers raised objections to its Enforcement and the ground raised primarily was that the Award sought to be enforced was contrary to the Public Policy of India. The Supreme Court now in the *Shri Lal Mahal*, after duly considering the *Renusagar Case*, *ONGC Case* and after overruling the *Phulchand* case sealed the issue of the interpretation of the expression "Public Policy of India" and its applicability within the periphery of Section 48(2)(b) of the Act dealing with Enforceability of Foreign Arbitral Awards.

In the case of *Phulchand Export Ltd v. OOO Patriot* it was held that a patently illegal award violates the public policy of India and thus entitled the Indian Courts to, in appropriate cases, re-look at the merits of the case even in enforcement proceedings. In the *Lal Mahal* case the expression 'Public policy of India' was given a narrower meaning under Section 48(2) of the Act rather than under Section 34 of the Act (which comes under Part I of the Act).

In further good news for the International Arbitration scenario in India, the Supreme Court also went on to hold that according to Section 48 of the Act a review of the foreign award on merits is not permitted and it is also not permitted to have a second look at the foreign award at the enforceability stage.

The court does not exercise any appellate jurisdiction over foreign awards under Section 48 of the Act nor does it make enquiries as to whether, while the foreign award was rendered, an error of law was committed. Thus the observation was made that under Section 48(2)(b) of the Act, enforcement of a foreign award can be refused only if it is contrary to (i) the fundamental policy of India; (ii) the

interest of India or (iii) justice and morality.

This welcome change in the outlook of the courts towards Public policy is a good sign as it improves the opinion about Arbitration in India and also enhances the trust which a foreign party ought to have when it comes to entering into commercial agreements with an Indian company. The foreign party should now have the confidence that in the event of a dispute, the Dispute Resolution mechanism which is opted for by the parties has an element of certainty to it, as opposed to being unjustly subjected to Public policy requirements.

## An Overview of Remitting Arbitral Awards in Belgium & Neighboring Countries

by Adam Miller

Arbitration has continued to thrive as a method for dispute resolution because it is viewed as a cheaper alternative to court litigation for achieving final, binding, and enforceable settlements. Yet, as arbitration continues to evolve as a method for dispute resolution, post-award remedies are evolving as well and are becoming increasingly utilized by parties. In particular, remitting arbitral awards back to arbitral tribunals has seen increasing use as a remedy in the past few years.

With AIA being based in Brussels, this short overview is intended to inform AIA readers of how courts in Belgium and its neighboring countries—England, France, Germany, and Switzerland—approach the remission of arbitral awards.

### Belgium

In September 2013, the Belgian Federal Parliament [enacted a new Arbitration Law](#), which allows a party to challenge an arbitral award on limited grounds regarding technical or procedural aspects of the arbitration. ([Belgian Judicial Code](#), Chapter 6, art. 1717.) If a party requests the arbitral tribunal to interpret or correct a clerical error, an error in calculation, or any similar error, and the arbitral tribunal “can no longer be reunited, the request...shall be submitted to the Court of First Instance.” (Id. at art. 1715 § 6.) Any arbitral award that is submitted to the Court of First Instance based on article 1715, can be remitted to the arbitral tribunal. (Id. at § 7.)

Additionally, the rules of the Belgian Center for Mediation and Arbitration (CEPANI), the most well known mediation and arbitration center in Belgium, explicitly acknowledges the possibility of remitting an arbitral award. CEPANI's new arbitration rules, which became effective January 2013, indicate that a jurisdiction may remit an arbitral award and that “CEPANI may take all necessary measures in order to allow the Arbitral Tribunal to comply with the decision to remit.” ([CEPANI Arbitration Rules](#), art. 33(6).)

### England

The English Arbitration Act of 1996 allows parties to “apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.” (English Arbitration Act of 1996 § 68 (1)) The Act goes on to define what constitutes a serious irregularity and then states that, “If there is shown to be a serious irregularity...the court may remit the award to the

tribunal, in whole or in part, for reconsideration.” (Id. at § 68 (3).)

Additionally, parties to arbitral proceedings may “appeal to the court on a question of law arising out of an award made in the proceedings.” (Id. at § 69(1).) When an appeal is made regarding a question of law, the court may “remit the award to the [arbitral] tribunal, in whole or in part, for reconsideration.” (Id. at § 69(7)(c).)

### France

The possibility of an award being remitted to an arbitral tribunal by a state court is not explicitly addressed in the French Code of Civil Procedure. The Code states that, “Once an award is made, the arbitral tribunal shall no longer be vested with the power to rule on the claims adjudicated in that award.” (French Code of Civil Procedure, art. 1485.) An arbitral tribunal is only allowed to “interpret [an] award, rectify clerical errors and omissions, or make an additional award where it failed to rule on a claim.” (Id. at 1485(2).) Thus, it is not an option for an arbitral award to be remitted to an arbitral tribunal by a state court in France.

### Germany

In the tenth book of Germany's Code of Civil Procedure is the German Arbitration Law 98, which states that “the court, when asked to set aside an award, may, where appropriate, set aside the award and remit the case to the arbitral tribunal.” (Germany Code of Civil Procedure § 1059(4).) Furthermore, German case law suggests that “remitting [a] matter [of fact or law] back to the arbitrators is usually the proper choice” if “a court sets aside an award because the arbitrators failed to address [the] matter.” (J. Harb, E. Poulton & M. Wittinghofer, *If All Else Fails: Putting Post-Award Remedies in Perspective*, *Global Arbitration Review: The European and Middle Eastern Arbitration Review* 2012, pg. 16.)

### Switzerland

Remitting an arbitral award in Switzerland is not explicitly addressed in the country's Federal Code on Private International Law (CPIL). The CPIL does state that an arbitral award is final when communicated and can be challenged on very few procedural grounds. (Swiss Federal Code on Private International Law, art. 190.) Additionally, the CPIL establishes the Swiss Federal Supreme Court as the only court designated to hear actions for the annulment of awards. (Id. at art. 191.) If the arbitral tribunal has erroneously denied or affirmed jurisdiction, the Supreme Court may issue a new decision to replace the award. (Id.) However, if any other type of appeal has been made, the Supreme Court may remit the award to the arbitral tribunal for reconsideration. The standard of remitting awards to the arbitral tribunal was established by case law. (P. Dickenmann, [Arbitration in Switzerland](#), pg. 899.) Remitting an award is also acknowledged in “Appendix B: Schedule of Costs” of the Swiss Rules of International Arbitration, which indicates that it is possible for a judicial authority to remit an award to the arbitral tribunal.

## The International Conference “Arbitration: the Experience of its Application in the Member States of the European Union and its Future Developments in Lithuania”



On the 21-22 November 2013 in Vilnius, Lithuania, the AIA took part in the International Conference "Arbitration: the Experience of its Application in the Member States of the European Union and its Future Developments in Lithuania".



EU2013.LT

The event was organized by the Lithuanian Arbitration Association (LIA) together with Seimas (Parliament) of the Republic of Lithuania, the Ministry of Foreign Affairs of the Republic of Lithuania and the Vilnius International and National Commercial Arbitration (Vilnius Arbitration). The event was co-funded by the European Social Fund and by the Ministry of Foreign Affairs as part of the project "Promotion of interconnectedness of Lithuania in the European Union".

The conference presentations considered the enactment of the UNCITRAL Model Laws on arbitration and conciliation in the EU, the revisions to the UNCITRAL Arbitration Rules, the new Vienna Rules, Law and practice of arbitration in Italy, recent developments of arbitration in Sweden, the tendency of using arbitration for dispute settlement in the contemporary world, arbitration in Belarus in light of current legislation and practice and Online Dispute Resolution (ODR).

The presentations were led by Dr. Peter Binder (LLM Inter-lawyer Attorneys, representing UNCITRAL), Dr. Eugen Salpius (Former President of the Chartered Institute of Arbitrators), Prof. Gabriele Crespi Reghizzi (Milan Chamber of Arbitration and University of Pavia), Joel Dahlquist (Associate Counsel Arbitration Institute for Stockholm Chamber of Commerce), Prof. Liudmila N. Galenskaya (Saint Petersburg State University), Timor Sysouev (Senior Lecturer at Belarusian State University and Managing Partner of the Sysouev, Bondar, Khrapoutski SBH Law Office) and Johan Billiet (President of the Association for International Arbitration, Partner at Billiet and Co law firm and lecturer at VUB University, Brussels).

Johan Billiet presented the topic: "Online Dispute Resolution: the Use of Online Mechanisms by Arbitration Institutions and of ODR in Cross-border Consumer Disputes". Among other key issues, the legal obstacles to the use of online arbitration, trust marks and criteria and code of conduct of E-Commerce in Belgium were discussed.

In addition, current developments by the WIPO Mediation and Arbitration Center as well as the CPR Institute for Dispute Resolution and Modria were examined. Analysis of the UNCITRAL draft rules on ODR in cross border electronic transactions and EU legislation (Directive 2013/11/EU and Regulation No 524/2013) provided a solid basis on which to contemplate how large companies use ODR in practice.

For more information about the conference content, follow this [link](#).

## Launch of The Brussels Diplomatic Academy

VUB University, Brussels



The Academy – with a clear focus on business diplomacy and international entrepreneurship - will prepare students for a career in

diplomacy and international business. In addition the Academy offers a comprehensive range of topical seminars and executive courses to diplomats and business people and is a first point of call for consultancy, research and coaching on all aspects of diplomacy and international business.

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- The combination of academic courses and input from specialized practitioners.
- A program curriculum that departs from the necessary theoretical matter and the necessary skills that makes a diplomat and business man successful.

AIA is pleased to be selected as partner of this initiative and to have an AIA representative appointed as member to the Academy's Advisory Board. The Brussels Diplomatic Academy's focus on economic diplomacy should fulfill a prominent role in future investment arbitration as well as in the peaceful settlement of disputes.

For more information, follow the [link](#)

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-Opportunity to host own AIA event (topic, time and venue to be agreed)

#### Gold

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Contact the AIA Team via [administration@arbitration-adr.org](mailto:administration@arbitration-adr.org) for details!

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