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We're proud to inform you in this newsletter about all the latest developments in the field of ADR. The first AIA Brussels Arbitration School was a huge success. We will therefore have another session in February 2015. This follows the request of many interested persons that are currently on a waiting list.

AIA Brussels Arbitration School (ABAS)

1 week intensive training on Belgian Arbitration Law, including references to EU arbitration

DAILY PROGRAM:

Date	Timing	Names of modules
Monday 9th February 2015	**10.00-12.30**	• Introduction (10 - 10.15) • Overview of arbitration procedure (10.15 – 11.15) • Liability risks of the arbitrator and existing insurance tools (11.30 – 12.30)
		• Comparing arbitration with other ADR tools (14.00 -15.00)

	14.00-17.30	• Arbitration and EU law (15.15 – 16.15) • Overview of arbitration forms and styles (16.30 – 17.30)
Tuesday 10th February 2015	**10.00-12.30**	• Overview of arbitration costs (10.00 - 11.00) • The arbitration clause / agreement to arbitrate, with elaboration on hybrids (11.15 – 12.30)
	14.00-17.30	• The request for arbitration and notifications (14.00 -15.00) • Constitution of the arbitration panel and terms of reference (15.15 - 16.15) • The arbitrability of disputes (16.30 - 17.30)
Wednesday 11th February 2015	**09.00-12.30**	• The arbitrators competence (10.00 – 11.00) • Arbitration and third parties (11.15-12.30)
	14.00-17.30	• *Evidence in arbitration (14.00 - 15.00)* • *In limine litis* arguments & consequences (15.15 – 16.15) • Expert interventions (16.15 – 17.30)
Thursday 12th February 2015	**10.00-12.30**	• Interim measures (10.00 – 11.00) • Challenging the arbitrator (11.30 – 12.30)
	14.00-	• Interrelation with public tribunals (14.00 – 15.00) • Types of awards and dissenting

	17.30	opinions (15.15 – 16.15) • Drafting and registration of awards (16.30-17.30)
Friday 13th February 2015	**10.00-12.30**	• Annulment proceedings (10.00 – 11.00) • Exequatur proceedings (11.15 – 12.30)
	14.00-/	**Meeting the Belgian arbitration & conciliation centers + certification ceremony**

FEE*:
Professional/Private practice/Company Standard
Full package - 800 EUR
1 day - 200 EUR (depends on places available)

AIA Members
Full package - 400 EUR
1 day - 100 EUR (depends on places available)

*excl. VAT

Registration form

Please send an email for details. Seats are allocated on a first come, first served basis.

We are also on socal media!

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NEW YEARS RECEPTION

The Association for International Arbitration will be presenting its 2015 AGENDA in January. Please check our website for updates regarding this reception!

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ADR News

The Association for International Arbitration introduces a new segment in its newsletter where it will cover all the latest and most recent news in the field of ADR worldwide!

- New bi-annual journal from the Bahrain Chamber for Dispute Resolution (BCDR) that delivers, both online and in print, expert commentary on the latest developments and thinking on arbitration in the Arab world. Written both in English and Arabic – the journal includes leading articles (with English abstracts for Arabic articles), case law (with English headnotes and translations of Arabic decisions), legislation and arbitral rules
- On 19 November Cietac unveiled its revised arbitration rules, which will take effect from from 1 January 2015
- Following the fourth round of negotiations on the International Energy Charter at the end of October 2014, the parties have now finalised the text of this new political declaration.
- The American Arbitration Association (AAA) updated its consmer arbitration rules to require pre-registration of consumer arbitration clauses and the payment of an annual fee for the ability to use its arbitration service
- TDM Special Issue on the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) - Call for papers

ADR professionals and experts are kindly invited to submit news related to ADR tropics to AIA.

Sign up to become a member of AIA!

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Law jobs online

Membership of AIA takes the form of yearly subscriptions. All members benefit from a number of advantages available on the website!

The annual membership fee is 200 EUR, or 150 EUR for members under 40 years of age (VAT excluded). Fill in our online form at the bottom of our Membership page by clicking the signup button below.

EMTPJ 2015 Session

Now Open For Registrations - 25% early bird discount!

On the 17th-29th of August 2015, the European Mediation Training for Practitioners of Justice (EMTPJ) session will run for its 6th consecutive year. For more information about the EMTPJ please visit our website.

Don't miss this opportunity and register now! Please, send the AIA team an email for preliminary registration.

We encourage mediators who can demonstrate 200 hours mediation experience and 20 mediation cases, to apply for the AIA's Qualifying Assessment Program (QAP) which will take place at the end of the EMTPJ 2015 session on the 30st of August 2015. Please visit our website for details.

CALLING ALL EMTPJ ALUMNI

You are an EMTPJ alumni and you:

1. Want to provide feedback on the EMTPJ?
2. Would like to share your mediation experience since the EMTPJ?
3. Would like to have a profile visible on the EMTPJ website?

If so: visit and read our EMTPJ Alumni page, then fill in

our online feedback questionnaire and send it to emtpj@arbitration-adr.org with a picture of yourself if desired.

We will provide the following starring system:

- 1 Star = EMTPJ graduate
- 2 Star = 50 mediations+
- 3 Star = 100 mediations+

AIA recommends to attend:

- International Congress on "*Dangerous Dialogues & Courageous Conversations" on A*pril 23-26, in Bucharest
- 7th Global IP Convention, 15-17 January 2015, Mumbai
- Business mediation summit, 29 January, Brussels
- CIArb 2015 Diploma Course in International Commercial Arbitration from 3 - 11 January 2015 at KLRCA`s new premises in Kuala Lumpur, Malaysia

Interview with Pascal Claeys on ``approaches regarding the expert`s role in an arbitration proceeding and a judicial procedure``.

Why is the question of evidence and fact finding important in arbitration ?

These issues are particularly important in arbitration as the outcomes in most cases are highly dependent on factual determinations and so it is not uncommon for arbitral tribunals to hear expert evidence, but, the arbitrators' approaches regarding appointment of the expert and assessment of his evidence may vary, often reflecting the common law and civil law disposition of it's members. Indeed, the situation varies from judicial procedures in which rules are set out to conduct evidence and fact finding and arbitration procedures in which arbitral rules rarely articulate the principles on evidence, it is considered part of a tribunal's inherent jurisdiction to consider such matters.

What are the key aspects of the methodology by which the legal systems resolve disputes in factual questions and conflicting evidence ?

The key aspects of methodology in cases where there is a dispute on the facts are the burden of proof and the standard of proof, which need to be considered in conjunction with evidentiary policy choices, such as the tribunal's independent fact-finding powers and their discretion as to what kind and amount of evidence to admit. The commonly accepted view as to the burden of proof is enshrined in the various Roman law maxims which may be synthesised in the following statement: the claimant must prove the claim but the defendant must establish the validity of the defenses, counterclaims or set-offs. The standard of proof, deals with the degree of conviction that the adjudicator must have to be

satisfied that the burden of proof has been accomplished. Here, common law and civil law traditions diverge, common law systems speaks of the balance of probabilities whereas the civilian legal systems speak of the satisfaction of, or the inner conviction of the adjudicator.

Since there are no prefixed rules on evidence and fact-finding in international arbitration how is the standard of proof principle generally applied ?

The standard of proof is seen as being more problematic as it not only may have issues of characterisation in terms of procedural (common law) versus substantive law (civil law), but it might also reflect subjective standards of the arbitrators. The arbitrators are often selected for their specific knowledge and it flows naturally from their selection that they may employ their expertise fully, but the tribunal should still make the parties aware they may make contrary submissions and present evidence accordingly. The common law systems are said to rely heavily on oral testimonies (general witnesses and experts) while the civilian systems are seen as giving much more weight to the contemporaneous key documents. In this context, modern arbitration seeks to combine the best features of both forms of evidence. The advantage of the oral evidence is that questions can be asked and themes explored at the request of opposing counsel or the adjudicator. However, the disadvantages are the fact that some people may be more eloquent and have the ability to withstand the tricks of cross-examinations and might therefore have their testimony preferred even though they are not more truthful. Nonetheless, despite these concerns, in many instances, the oral evidence will be the key to resolving contentious factual questions.

What is the role of the experts in judicial proceedings, and how are they appointed ?

A tribunal will often need the input of experts in order to resolve complex factual disputes. In the common law tradition, experts are party-appointed and are simply a specialised form of witness whose evidence is subject to cross-examination by opposing counsel. In the civilian tradition, experts are tribunal-appointed and are not witnesses in the normal sense but court experts. Choosing an appropriate expert is critical, the key attributes are experience, sound expertise and credibility. There are broadly two types of experts, expert witnesses, appointed by the parties or the tribunal, and expert assistant, appointed by the tribunal. The court expert remains purely advisory and he will not be informed about the goal or the results of his given task. Unfortunately, there is no collaboration between the judge and the court expert

Can arbitrators appoint an expert ? When such experts are appointed in arbitration proceedings what is their role ?

In arbitration proceedings an expert witness or assistant may be unnecessary as the decision-making body is already strengthened by it’s technical competences. For an arbitrator, the power to appoint will either be express or implied. Only if the positions of the different parties to the dispute aren’t reconcilable and the arbitrators are unable to neutralise this incompetence, the arbitrators will appeal to an expert appointed by themselves, he will then assist the arbitrator by advising him and highlighting the inconsistencies between the diverging viewpoints. The tribunal-appointed experts are presumed to be more independent and impartial, and will be subject to cost control.

However, concerns here are the lack of control by the parties and communication with the parties, and particularly the concern that too much of the effective decision making is in fact undertaken by the expert. In the context of the rights an duties of the tribunal, the expert provides reasoned opinions for the benefit of the tribunal but does not have determinative power over any factual matter. An arbitrator's duty to complete the mandate requires the arbitrator to make a determination even if a tribunal-appointed expert is involved, he may only seek assistance from the expert where it is required.

Can the parties to an arbitration procedure appoint experts ?

Again, this may be unnecessary as the arbitration clause will lead to an appropriate expert as arbitrator, the parties may have already appointed their expert in the capacity of the arbitrator. The key problem with party-appointed experts is thought to be lack of impartiality, and a particular difficulty that arises is also when both parties appoint equally truly expert and honest people, but who conflict in their views, how is a non-expert adjudicator to make a choice, they are also extremely costly. Nonetheless, in each case, the expert must present an honest and objective view, even the party-appointed expert, who is part of a team.

What should the content of an expert report be ?

In arbitration there are only suggestions as to what material should be included in reports, it is the case for instance of the IBA Rules of Evidence 2010 which in it's article 5.2 sets out a list of what expert reports should contain. Other than his opinion and the data he relies on, there are a number of other documents concerning his mission, identity, independence and integrity. For court experts, the civil justice council expert witness protocol suggests that experts should not be asked to and should not amend, expand or alter any part of their reports in a manner which distorts their true opinion but may be invited to amend or expand reports to ensure accuracy, internal consistency, completeness and relevance to the issues and clarity. In both cases, the most significant aspect of the report is the reasoning including any assumptions, the evidence on which it is based, the degree of certainty and an explanation of why contrary opinions are not preferred.

Is there a code of conduct for expert evidence in arbitration and domestic litigation ?

There is a model code of conduct which aims to cover both party-appointed and tribunal-appointed experts, which sets out the functions and duties of the experts, the substance of the statement of independence, the way in which he must attest to his qualifications, his availability, the contact with the parties, the expert's accountability with regard to methodology, testing, experimenting, findings and reasons, and finally his obligations of confidentiality. Another way to achieve the same outcome would is through terms of reference or specific questions in a brief.

Do you have any recommendations ?

I believe that many useful instructions can be extracted from the arbitration proceeding and can be transposed, by applying minor modifications, to the approach and role of the court expert in a classical, judicial procedure.

Portugese Arbitration and preliminary ruling of the European Court of Justice

by Duarte G. Henriques

Mr. Henriques is a lawyer and arbitrator at the Institutionalized Arbitration Centre in Lisbon. He is also arbitrator at independent Film and Television Alliance - Portugese Panel Kuala Lumpur Regional Centre for Arbitration - Panel of arbitrators Chine International Economic and Trade Arbitration Commission - Panel of Arbitrators appointed to the WIPO list of arbitrators, Appointed to the Permanent Arbitration Court at the Croatian Chamber of Economy British Columbia International Commercial Arbitration Centre

The Portuguese Arbitration legal framework allows us to perceive three basic kinds of arbitration. Besides the conventional arbitration, there are some areas where arbitration is compulsory – for instance, disputes arising out of Industrial Property Rights, when reference medicines and generic medicines are at stake, are subject to compulsory arbitration. A third kind may be pointed out and highlighted here, if not for other reasons because it represents a unique species in the realm of arbitration: arbitration in tax matters against the Portuguese State. In fact, under certain circumstances, any taxpayer in Portugal may have his or her disputes related to tax matters against the Portuguese tax authorities resolved by arbitration. The recourse to arbitration in these cases is similar to the investment arbitration scenario: the Portuguese State has made a permanent standing offer to arbitrate certain disputes related to tax matters. This is a “tertium genus” of arbitration - half voluntary, half compulsory - and is administrated by a permanent body (the “CAAD – Centro de Arbitragem Administrativa”). However, compulsory arbitration regarding reference medicines and generic medicines disputes may be referred to “ad hoc” arbitral tribunals.
On the other hand, regarding the issue of preliminary rulings, the role of the “arbitral tribunals” for the purposes of Article 267 of the Treaty on the Functioning of the European Union has been thoroughly discussed.

While it has long been understood that a conventional arbitral tribunal is not a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU (Case Denuit and Cordenier, 27 January 2005, case c-125/04), the Court of Justice has recently broadened the scope of the factors that must be taken into account to determine whether a body making a reference is a “court or tribunal”. As is well established, such factors include whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, for instance, the Belov case [2013] C-394/11). Notwithstanding the fact that arbitration in tax matters is patently voluntary to the taxpayer, in a recent tax matter arbitration case, the Court concluded for the existence of all of the above-mentioned factors, including the compulsory nature of arbitration. Indeed, in Ascendi (Case C 377/13 of the EUCJ), the court noted that, although the taxpayer is not bound to arbitrate tax disputes, ‘where the taxpayer applicant submits its dispute to tax arbitration, the Tribunal Arbitral Tributário [CAAD] has, in accordance with Article 4(1) of Decree-Law No 10/2011, compulsory jurisdiction as regards taxation and customs matters.’ Accordingly, the EUCJ held that the “CAAD” is a “court or tribunal” for the purposes of the preliminary ruling under Article 267 of

the TFEU.

By contrast, one may ask what the decision of the EUCJ would be if a compulsory arbitration were to be conducted by an ad hoc arbitral tribunal. One need not wait because the EUCJ has already decided this case. In fact, in Merck Canada (Case C 555/13), a case related to reference medicines and generic medicines, the EUCJ addressed the issue of whether a “non-permanent” body of arbitration is still a “court or tribunal” for the purposes of Art. 267 of the TFEU. The court noted that the arbitration is compulsory (it ‘does not stem from the will of the parties’ but is established by Law) and, additionally, that the final award is not subject to an appeal. It further noted that ‘arbitrators are subject to the same obligations of independence and impartiality as judges belonging to the ordinary courts.’ Furthermore, the Court noted that, while the “Tribunal Arbitral Necessário” (compulsory arbitral tribunal) ‘may vary in form, composition and rules of procedure, according to the choice of the parties’ and that ‘it is dissolved after making its decision’, it is no less true that the ‘tribunal was established on a legislative basis, that it has permanent compulsory jurisdiction and, in addition, that national legislation defines and frames the applicable procedural rules.’ Hence, the Court concluded that the requirement of permanence was also met and, therefore, that the “Tribunal Arbitral Necessário” is a “court or tribunal” for the purposes of Art. 267 of the TFEU.

Two conclusions arise from these experiences, one less clear than the other. What seems very clear is that a conventional arbitral tribunal will hardly ever – if not never - meet the requirements of the case law established by the Court for the purposes of Art. 267 of the TFEU. The other, less clear, conclusion seems to be that the main factor for such purposes is the determination of whether or not the arbitration is “compulsory” or “established by Law”, the other factors being left to a second step in the test. In any event, developments in the EUCJ case law in this matter deserve full attention.

Support the Federation of Belgian Arbitration Centers In Belgium (FBA) Initiative!

The FBA initiative is an initiative that aims to provide a joint communication platform to all arbitration institutes.

Contact us to stay informed about the latest updates on FBA.

new: BLOG on future of mediation in Belgium

FMB is a project supported by the Association for International Arbitration. Why it is necessary to create a place where ideas may be exchanges is because we observe that years after its

adoption, the Mediation Directive (2008/52/EC), has not yet solved the `mediation paradox`: the disconnect between the benefits of mediation and its current very limited use in Member States. Despite its proven and multiple benefits, mediation in civil and commercial matters is still used in less than 1 per cent of the cases in the EU. In that context, the initiative aims to offer a unique opportunity for all parties concerned to contribute to identifying best practices, possible legal amendsments, ans setting out an action plan for the enhancement and promotion of mediation in Belgium.

To read the first FMB report click here.
To read the second FMB report click here.

The new FMB session will take place **15 May 2015.**

Partner AIA in the spotlight: **Institute of Arbitration**

The **Institute of Arbitration** (IA) in Brussels (Europe), like many arbitration centers, has adopted a set of procedural rules, brought together under what are now well known as the Standard Dispute Rules (SDR), effective as of 15th of April 2013 and applicable to all domestic, international and offshore arbitrations. Unlike many centers, these rules clearly distinguish themselves by providing for the fundamental right of all litigants to challenge an unfavorable decision, award in this case. Another, distinguishing aspect of the Institute's work in the field of alternative dispute resolution, and that keeps it current with our technological era is, it's Online Dispute Resolution platform.

The Standard Dispute Rules (Part III E) provide for, and organizes, an internal procedure of appeal. Indeed, article 23 of the SDR stipulates that "either party has the right to appeal against an award within a term of the 30 days… except if the parties, after the dispute arises, have expressly excluded the appeal level and in this case the award in first instance is not by default". Article 24 further specifies that the seat of the appeal before three different arbitrators is the same as in the first instance. These provisions are particularly innovative considering one of the main features of arbitration is the finality and enforceability of the award rendered, the very limited grounds on which an "appeal" may be made before the state courts, and in that case the commonly limited revisional powers that the judge has. Indeed, such procedures before the state courts must be defined as revision procedures rather than appeal procedures. Some would say such an appeal procedure defeats the point of arbitration, the benefits of the finality are the procedure's rapidity and avoidance of further costs, two aspects that often serve as justification for choosing arbitration. However, the question may be asked differently, is it more important to seek some potential saving of time or should we look again at whether the present procedure could do more to ensure that the right solution is achieved ? It seems that, on the long term, it is preferable to make sure the award is right for it to be swiftly executed. An internal appeal procedure may even be a time saving tool, where an award will be challenged for execution, in the sense that the second instance would be a another, and

probably shorter, arbitration procedure rather than a lengthy judicial proceeding. It seems that such a solution would thus preserve the fundamental right of appeal and the principles of due process of law, as well as preserve, in fact, increase, the benefits and efficiency of arbitration.

If ODR has the same virtues and is the way forward, is another debate. The IA offers services of online negotiation, conciliation, mediation and arbitration. In principle ODR mechanisms are expected to facilitate access to justice. Indeed, ODR is thought to be a process which allows for greater flexibility and that could resolve disputes quickly and more efficiently with more creative solutions than the traditional methods. Flexibility and convenience supposedly come from the fact that it is a written based system, and does not require physical presence at a prefixed time and date.. Negotiation is the most commonly practiced form of dispute resolution ; negotiation is by all means the most basic form of interaction and may be defined as any type of communication between two or more people. With the beginning of the internet, communication, and thus negotiation, has somewhat moved off court corridors and law firms on to the internet. Conciliation and mediation, are processes of negotiation carried out with the assistance of a third party, at varying degrees. Some may admit that e-mediation and e-conciliation are a good alternative where there is no adjudicator and the parties cannot communicate face-to-face, for instance where parties are emotionally charged or where there is an important power imbalance. Arbitration, is, of the 3 methods, the heaviest one in terms of logistics, and the one which reassembles the most judicial proceedings. E-arbitration has to encompass everything from the online arbitration to the online arbitral award. The validity of online arbitration is not an issue in virtue of the principle of party autonomy, consensus is the only requirement. About the awards, it has been posited that the New York Convention was adopted when the drafters could not have foreseen that an award could take a different form than a physical one – arbitration agreements and arbitral awards should therefore satisfy the formal requirements of the said convention. However, research has shown that the reliance on text was considered to be one of the drawbacks. Especially for e-arbitration, no rules yet govern these proceedings and the parties, the arbitral tribunal, the experts and witnesses would have to make use of electronic devices to take part in the proceedings. This takes great sophistication in software, some that may not be appropriate yet. As of today, an ODR platform is an interesting tool to deal with simple fact patterns and small claims, in other words, basic arbitration processes. This actually allows for greater focus on big cases, that require larger immobilization of arbitration providers. In such cases, arbitrators and legal fees are still to be paid but important costs are saved logistically speaking, ODR thus proves to be a benefit in these limited classes of dispute.

These two aspects, an appeal level and a fully multilingual ODR platform, of the Institute of Arbitration's initiative in alternative dispute resolution illustrate it's cutting-edge dynamic and puts it at the forefront of development in this field.

Click here for more info

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