Association for International Arbitration

In Touch

September 2014

CONTACT US:

AIA
146, Avenue Louise
B-1050 Brussels
Belgium

Fax: +32 2 646 24 31
Tel: +32 2 643 33 01
Email:
administration@arbitration-adr.org

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

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The Application of Proportionality Test in Recent Investor-State Arbitration Cases
by Stefan Trendafilov

What May Limit the Amount of Compensation that an Investor may Recover?
by Tatiana Proshkina

Consumer Online Dispute Resolution in Belgium: Belmbed
by Diego Leon Paez

Enforcement of Foreing Courts Decisions in Ukraine
by George Pampukha

Guide to Best Practices in Commercial Arbitration
The College of Commercial Arbitrators 3rd Edition
Book Review by Hana Spanikova

Guerrilla Tactics in International Arbitration
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The application of proportionality test in recent investor-state arbitration cases

by Stefan Trendafilov

Investor-State arbitration cases concerning indirect expropriation have always presented a serious challenge for arbitral tribunals. The reason is the ambiguous definition of indirect expropriation contained in most investment treaties. The vague and unclear definition of this concept has made it extremely difficult for tribunals to make the crucial distinction between a non-compensable State regulation and an indirect expropriation. Since no unified approach exists, different arbitral panels apply different tests and conditions. Thus, active discussions are held on international level, including the EU regarding more clear definition in investment treaties concerning indirect expropriation.[1]

A possible assistance to arbitrators may be the application of a

What may limit the amount of compensation that an investor may recover?

by Tatiana Proshkina

Compensation is the most common remedy awarded by international tribunals in investor-state disputes. As explained in the leading decision on the issue in the case concerning the Factory at Chorzów, it covers “any financially assessable damage including loss of profits insofar as it is established”.

In modern treaty-based investment arbitration, almost all bilateral investment treaties (BITs) and multilateral investment treaties contain specific provisions on the standard of compensation for expropriation. Majority of these treaties require “prompt, adequate and effective” compensation. On the other hand, investment treaties do not generally provide a relevant standard of compensation for the breaches of other

proportionality test to measure the balance between the governmental regulation and the investors' rights. This approach, first adopted in the *Tecmed case*, started to be applied, at least in parts, by several tribunals in recent arbitration cases, which will be analyzed below.[2] This view has been supported by a number of commentators and can bring positive development on the issue.[3]

The purpose of this article is to examine recent arbitral decisions that took into account the need for a balance between the governmental measure and the investors' rights and to establish whether this emerging approach can be helpful to form a basis for a more comprehensive distinction between non-compensable regulations and indirect expropriation. First, the pioneer case - *Tecmed v Mexico* - in which a serious analysis of the proportionality issue was conducted, will be elaborated on. Further, the cases following the *Tecmed* decision will also be examined.

The *Tecmed* decision

Facts

The case concerned the operation of a hazardous waste landfill in a fast growing urban area in Mexico (the municipality of Hermossilo) by Tecmed , a Spanish owned company. Following an opposition by the local communities and a political change in Hermossilo government, the Mexican agency for hazardous waste (INE) refused to renew the license of the company and instead insisted that they should close the landfill. Tecmed filed a claim before the ICSID Tribunal, invoking the dispute settlement clause contained in the BIT between Spain and Mexico. The claimant stated that the refusal to renew the license constituted expropriation under the Spain-Mexico BIT and claimed damages. Mexico on the other hand claimed that INE had exclusive discretionary powers to decide whether to grant or refuse operational permits. Moreover, the defendant claimed that INE was acting within its powers and that the decision was neither discriminatory nor arbitrary, rather a regulatory measure issued within its powers. Thus, according to Mexico, the reasons for the expropriation were environmental and for the protection of public health, rather than political.[4] The defendant also argued that Tecmed did not comply with the permit conditions.[5]

Issue

With regard to indirect expropriation, the tribunal was faced with the question whether Mexico's denial to issue a permit to a non-national to operate its property for the intended use, based on political considerations and not on state emergency, constituted an expropriation of property.

Holding of the Tribunal

The Tribunal stated that in order to assess whether the actions of INE are to be regarded as expropriatory, it will consider whether these measures were 'proportionate to the public interest presumably protected thereby and to the protection legally granted to investments (…)'.[6] Moreover, the panel explicitly referred to the concept of proportionality under the European Court of Human Rights' jurisprudence[7] on Protocol No. 1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms,**[8]*** to the effect that a measure must pursue a legitimate aim in the public interest and be appropriate to achieve its aim; that there must be a reasonable relationship of proportionality between the effect of the measure and its objective; and that if the claimant bore an 'individual and excessive burden' the measure would be disproportionate.[9] In order to practically assess the balance between the investor's rights and the regulation, the tribunal compared the financial loss suffered by the claimant and the public interest of the local community. According to treaty protections such as fair and equitable treatment or national treatment. Tribunals interpreted that the failure of investment treaties to specify the standard of compensation gives them a considerable discretion and developed a variety of approaches to compensate an investor.

However, several factors may potentially limit the amount of compensation that an investor may recover. Most commonly recognized limiting principles are lack of causation, contributory negligence and obligation to mitigate damages. They will be reviewed below.

Lack of causation

The UN International Law Commission's Articles on the Responsibility of State for the internationally wrongful act (ILC Articles) are considered by many as a codification of customary international law. Article 31 of the ILC Articles provides that "the responsible State is under an obligation to make full reparation for the injury *caused* by the internationally wrongful act" (emphasis added). Thus, there must be a link between the wrongful act and the injury. Generally the injured investor has the burden of demonstrating that the claimed compensation flowed from that conduct. However, most legal systems limit the length of the causal chain that can be potentially followed from the state action to compensate the injury. In order to describe the extent to which such cause-effect analysis can be followed, arbitral tribunals referred to various terms to qualify causation: direct, proximate, foreseeable, etc. How to measure the extent to which a particular wrongful act contributed to an injury is one of the most challenging issues before the arbitral tribunals.

The US–Yugoslavia International Claims Commission set out the widely accepted principle in the *Dorner Claim*: 'Generally, international and domestic arbitral tribunals in the determination of international claims allow compensation for indirect damages such as loss of use of property, loss of profits and the like, if such losses are reasonably certain and are ascertainable with a fair degree of accuracy. They do not allow compensation for indirect damages if they are conjectural or speculative or not reasonably certain or susceptible of accurate determination.'

The final award in *Lauder v Czech Republic case* under the US–Czech Republic BIT is a notable example in which a tribunal found that a subsequent action broke the chain of causation [*Lauder v. Czech Republic*, Final Award issued in London, in the UNCITRAL Arbitration Proceedings, September 3, 2001]. Mr. Lauder, a US national, invested in Czech private television broadcaster TV Nova through the Dutch company CME. The Czech Republic initially accepted that the claimant could invest directly in a Czech television company but subsequently required the investment to be done through a third company. Although the Tribunal found that the Czech Republic had taken a discriminatory and arbitrary measure against the claimant, it refused to award compensation for the breach. The tribunal found that the alleged harm was caused by the actions of the manager of the local TV channel. In the view of the tribunal: "even if the breach therefore constitutes one of several 'sine qua non' acts, this alone is not sufficient. In order to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage. In our case the Claimant therefore has to show that the last, direct act, the immediate cause, namely the termination by CET 21 … did not become a superseding cause and thereby the proximate cause. In other words, the Claimant has to show that the acts of CET 21 were not so unexpected and so substantial as to have to be held to have superseded the initial cause and therefore become the main cause of the ultimate harm. This the Claimant has not shown."

However, this dispute is famous for its two conflicting arbitral decisions.

the panel, the public interest did not outweigh the claimant's loss, therefore the measure was disproportionate to the deprivation of rights suffered by the Tecmed. Thus, the tribunal ruled that the actions of the Mexican authorities constituted an indirect expropriation and awarded compensation of over $5.5 Million plus interests.

Significance of the decision

The *Tecmed* decision remains the major decision in which the tribunal elaborated in detail on proportionality analysis to determine whether a governmental measure taken in the exercise of its powers reflects an appropriate balance between the interests of the host state and investors.[10] It clearly shows that the proportionality analysis can be helpful to arbitral tribunals when deciding on cases of indirect expropriation. It does not employ a one-sided approach towards the issue, rather takes into account the interests and views of both parties. The tribunals may reach far more consistent and unambiguous decisions if they search for the balance between State and investor's rights.

Post *Tecmed* arbitral decisions

Although no other tribunal so far has adopted such comprehensive approach regarding proportionality when deciding upon expropriation, there is a tendency to include this approach in the analysis. The review of the following cases confirms this observation.

***LG&E v Argentina*[11]**

The LG&E v Argentina case concerns a dispute between three US investors (LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. (collectively LG&E)) and the Republic of Argentina. The claimants held shares in three gas distribution companies in Argentina that were created during the privatization process in the early 1990s. The companies were granted license for operation until 2027.

Due to the economic crisis that hit the country during the late 1990s and early 2000s, the Argentinean government revoked the obligations it had towards the investors, which led to substantive decrease in profit. Thus, the claimants started arbitration proceedings alleging multiple violation of the 1991 Argentina-US BIT. The tribunal found breaches of the standards of fair and equitable treatment and the umbrella clause and also held that the measures enacted by Argentina were discriminatory. However, the tribunal dismissed the claim regarding indirect expropriation.

With regard to the claim for expropriation, the tribunal decided upon measuring the balance between 'the degree of the measure's interference with the right ownership' and 'the power of the state to adopt its policies', considering also 'the context within which a measure was adopted and the host State's purpose'.[12] Thus, the tribunal adopted a proportionality based analysis when deciding whether expropriation took place. However, given the fact that the tribunal found Argentina to act in the state of necessity, the threshold for finding the lack of proportionality was set very high, therefore the claim was finally dismissed.[13]

***Total v Argentina*[14]**

Total S.A. had made a number of investments in Argentina in hydrocarbon exploration, gas transportation and power generation industries. Similar to *LG&E v Argentina*, the economic crisis in the early 2000s led to the enactment of a series of measures by the government, which led to the diminishing of the claimant's profits. In arbitration before the ICSID tribunal Total claimed that the measures enacted by Argentina were equal to expropriation and that Argentina violated a

The different arbitral tribunal in *CME v. Czech Republic* subsequently examining the same facts reached a different conclusion on the merits [*CME Czech Republic B.V. v. The Czech Republic*, Final Award issued in Stockholm, in the UNCITRAL Arbitration Proceedings, March 14, 2003]. In particular the two Tribunals' findings diverge on causation for the injuries suffered by investors.

The second tribunal in Stockholm ruled that the collapse of CME's investment (a subsidiary broadcasting company) in the Czech Republic was caused by the government agency Media Council's wrongful conduct. As in the *Lauder arbitration*, the Czech Republic argued that the true cause of the harm to the CME's investment were the actions of the manager of the local TV channel. The tribunal rejected this argument on the basis of the international legal principle provided in ILC Articles pursuant to which "a State may be held responsible for injury to an alien investor where it is not the sole cause of the injury; the State is not absolved because of the participation of other tortfeasors in the infliction of the injury". The tribunal further explained that: 'it is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause … In other words, the liability of a tortfeasor is not affected vis–à– vis the victim by the consideration that another is concurrently liable.' [*CME Czech Republic B.V. v. The Czech Republic*, Partial Award, 13 September 2001].

Contributory negligence

Contributory negligence or fault is widely accepted principle of international customary law. Article 39 of the ILC Articles provides that "in the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought". It appears that this principle is not often examined in investment treaty arbitration. However, the tribunal in *MTD Equity Sdn and MTD Chili AS v Chili* employed this principle to reduce the compensation [*MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7].

In that case, a Malaysian construction company (claimant) went to Chili for a due diligence trip and just after four days has chosen a site for a housing project near Santiago. After being encouraged by Chilean officials and the receipt of the development license, claimant invested in the project. Later, claimant discovered that the project did not comply with local zoning regulations. Local authorities refused to rezone the area and the project was blocked.

The ICSID tribunal ruled that Chili had breached its obligation to provide fair and equitable treatment. However, in the view of the tribunal the claimant had failed to conduct reasonable due diligence before investing substantial sums in the project. The choice of partner, the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance of the required development permits, are risks that the claimants took irrespective of Chile's actions. Therefore it reduced the amount of damages awarded in the amount that had been invested prior to government approval and those invested after the project had been blocked by the zoning regulation.

Tribunals in *Bogdanov v Moldova* [Yury Bogdanov v. Republic of Moldova, Final award, SCC Arbitration No. V (114/2009)], *Azurix* [Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, 14 July 2006] and *Occidental Petroleum v Ecuador* [Occidental Petroleum Corporation v The Republic of Ecuador, Award, ICSID Case No. ARB/06/11, 5 October 2012] have applied similar principles and reduced the damages as a result of the claimant's own shortcomings.

number of clauses under the 1991 US-Argentina BIT. In its analysis the tribunal stated that a measure should be 'legitimate, proportionate, reasonable and non discriminatory.[15] Moreover, the tribunal held that the Argentinean regulation was 'proportionate to its aim',[16] thus adopting proportionality analysis in its reasoning.

***Archer Daniels v Mexico*[17]**

Archer Daniels Midland Co. and Tate & Lyle, two US corporations, owned a joint venture in Mexico, ALMEX, a Mexican company involved in high fructose corn syrup production. In 2002 Mexico imposed new tax on beverages that contained high fructose syrup. The claimants alleged that the measure was aimed at protecting domestic producers and resulted in effectively excluding ALMEX from the market. Thus, they started ICSID arbitration claiming that Mexico violated a number of NAFTA provisions, including Art. 1110 NAFTA concerning expropriation. The Tribunal stated that when determining whether indirect expropriation took place it is necessary to take into account whether the measure was 'proportionate or necessary for a legitimate purpose'[18].[19] This shows the tribunal support for proportionality analysis in deciding upon indirect expropriation.

The emerging application of *proportionality analysis* in indirect expropriation cases

Arbitral tribunals experience a strong need of more concrete tools to establish whether indirect expropriation occurred and the proportionality analysis seems to be a light in the tunnel. After the *Tecmed* decision, tribunals consistently employed proportionality test as an important consideration in their analysis. Although we have not yet witnessed a sophisticated and extensive analysis of the issue such as the one adopted in *Tecmed,* there is general trend of tribunals using this method. The Argentinean cases demonstrate that such approach is emerging in international investment arbitration. A more consistent and detailed examination of this concept can assist the tribunals since deciding on indirect expropriation has become an important challenge.

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[1] *See* European Parliament, Resolution on the future European international investment policy (2010/2202(INI)), (6 April 2011) ('EP Resolution 2011')
[2] *Technicas Medioambientales Tecmed S.A. v The United Mexican States (Tecmed v Mexico),* ICISD Case No. ARB(AF)/00/2, Award, 29 May 2003.
[3] See Kingsbury and Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality', in Stephan Schill (ed), International Investment Law and Comparative Public Law (Oxford: Oxford University Press, 2010) 75; Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier', 4 Law and Ethics of Human Rights (2010), at 47; Erlend Leonhardsen, 'Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration', 1 Journal of International Dispute Settlement (2011), 1.
[4] *Tecmed v Mexico* supra note 2, ¶ 96
[5] Ibid, ¶ 53, 99
[6] Ibid , ¶¶ 122
[7] *James and Others v United Kingdom (James v U.K.), 21 February 1986, Series A, No.98.4.*
[8] Newcombe and Paradell, *Law and Practice of Investment Treaties. Standards of Treatment,* Kluwer Law International, (2009) p. 364
[9] *Tecmed v Mexico* supra note 2, ¶ 122
[10] Caroline Henckels, *Indirect Expropriation and the right to regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration,* Journal of International Economic Law Vol. 15 No. 1, Oxford University Press 2012, p. 230
[11] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc v*

The obligation to mitigate damages

A respondent State will not be liable to pay damages in respect of losses which could have been mitigated by actions of the claimant [see also: The UNIDROIT Principles, Article 7.4.8 (Mitigation of harm)]. On numerous occasions international arbitral tribunals stated that a duty to mitigate loss is one of the general principles of law and which is not limited to breach of contract cases [Enron Corporation and Ponderosa Assets, L.P. v. Republic of Argentina, ICSID Case No. ARB/01/3, Award, May 22, 2007, at ¶ 387; CME Stockholm Final Award, supra n. 42, at ¶¶ 481 et seq.].

Consumer Online Dispute Resolution in Belgium: Belmed

By Diego Leon Paez

We cannot start talking about Online Dispute Resolution in Belgium without mentioning Belmed (named for Belgium Mediation). This is an online tool created by the National Government, driven by the mediation principles set by a political reform that changed the way of viewing mediation in the country. It is necessary to mention that the Belgium government was one of the first in Europe to take a lead on this matter. Government intervention was necessary to identify common problems in different commercial sectors, since mediation was governed by private organization's interest.

Belmed is a digital portal that promotes and makes ADR and ODR more accessible in Belgium. Its aim is based on two main principles. On the one hand it offers information on ADR and on the other it provides ODR for consumers and enterprises. The tool was developed in three specific phases.

At first, a feasibility study was ordered on the introduction of an online mediation tool. The study was carried out during 2005 -2006 by the Research Center on IT & Law of the University of Namur and the Brussels Management School. The research explored the legal, economical and technical (IT) possibilities of online mediation in Belgium. One of the main conclusions was the necessity to establish a private-public partnership to create an ODR successful tool.

As a second step, given the previous study, stakeholder consultation was organized with business associations, consumer associations, ombudsman services, etc. Although the enthusiasm was really high, none of the stakeholders wanted to support this project financially.

Finally, as a last phase, a European tender was launched at the end of 2009 to develop the software. Multiple companies were interested, among them IBM. In January 2010, the bid was assigned to IRIS Solutions & Experts, who finally brought the platform to life.

Thus, Belmed is working since 2011 and can be found here.

Belmed is designed specifically for consumer disputes (non-commercial disputes are excluded) and conflicts between consumers residing in one of the 27 EU member states, and an enterprise that is registered in the Belgian register for companies, or *vice versa* (disputes between consumers and disputes between enterprises are excluded). It is open for the entire European Union, but a link with Belgium should always be maintained.

With the online platform of Belmed, disputes between merchants and between consumers and merchants can be settled online and out of court with the help of an independent mediator. The platform can be

Argentine Republic (LG&E v Argentina), ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006

[12] Ibid. paras 177 and 189-195

[13] Supra note 10, p. 234

[14] *Total S.A. v Argentine Republic (Total v Argentina),* ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010

[15] Ibid, ¶ 197

[16] Ibid

[17] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v United Mexican States (Archer Daniels v Mexico),* ICSID Case No. ARB (AF)/04/5, Award, 21 November 2007

[18] Ibid, ¶ 154

[19] Supra note 10, p. 235

Enforcement of foreign courts decisions in Ukraine

by George Pampukha

The legal basis for enforcement

Foreign court rulings may be enforced in Ukraine as long as a Ukrainian court has recognized them. A court may recognize a foreign court ruling if such recognition is envisaged in a relevant international treaty of Ukraine or in federal law. In certain cases the recognition may be based on international principle of reciprocity (international comity).

Ukraine is a party to a significant number of international treaties governing the recognition and enforcement of foreign court judgments:

- The Hague Convention on Civil Procedure of 1954, which however applies only to the recognition and enforcement of foreign orders for costs and expenses of proceedings;
- The Minsk Convention on Legal Assistance and Legal Relations in Civil, Matrimonial and Criminal Cases of 1993 (along with Ukraine the parties to this treaty are Azerbaijan, Belarus, Armenia, Kazakhstan, Moldova, Tadzhikistan, Turkmenistan, Uzbekistan, Georgia, Kyrgyzstan and Russia);
- The Kyiv Convention on Settlement of the Commercial Disputes of 1992 (along with Ukraine, the parties to this treaty are Belarus, Armenia, Kazakhstan, Tadzhikistan, Turkmenistan, Uzbekistan, Kyrgyzstan and Russia).

The reciprocal recognition and enforcement of foreign judgments is also prescribed in some bilateral treaties for legal assistance and legal relations to which Ukraine is a party (mutual assistance treaties), in particular with Albania (1958), Algeria (1982), Bulgaria (2004), China (1993), Cuba (2003), Cyprus (2004), Czech Republic (2001), Estonia (1995), Georgia (1995), Greece (1981), Hungary (2002), Iran (2004), Iraq (1973), Italy (1979), Latvia (1995), Libya (2008), Lithuania (1993), Macedonia (2000), Moldova (1993), Mongolia (1995), North Korea (2003), Poland (1993), Romania (2002), Syria (2008), Tunis (1984), Turkey (2000), Uzbekistan (1998), Vietnam (2000) and Yemen (1985).

In general, the treaties prescribe the possibility of reciprocal recognition and enforcement of foreign judgments and stipulate the list of judgments that may be recognized and enforced, the requirements for the relevant application and documents that shall be added thereto, the procedure and the grounds for denial in recognition and enforcement.

If there is no treaty for the mutual recognition and enforcement of court rulings between the relevant country and Ukraine, a party wishing to enforce a court ruling has to base the application for recognition and enforcement on the international principle of reciprocity. Reciprocity's principle means that the recognition and enforcement of foreign judgments in Ukraine is possible if the Ukrainian judgments will be

consulted for free, due to public funding. The possible costs of a mediation procedure with Belmed depend on the mediation body concerned, but a mediation process is always cheaper than a court procedure. However, the bodies practicing out-of-court dispute resolution (mediation, arbitration, conciliation) can ask a fee for the handling a dispute. The amount of this fee and the way it is shared among the parties depend on the mediation body concerned.

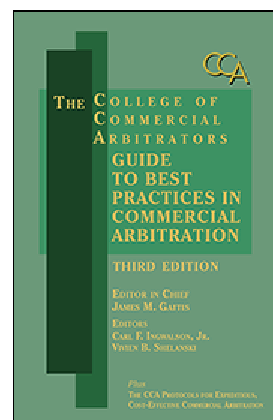
The Belgian Federal Public Services 'FPS' is in charge of this system. However, it cannot see the identity of the applicants that use it, nor does it read the applications or interfere in the ADR process. The reason is that FPS is at the same time the controlling agency of some of the arbitration/conciliation/mediation agencies that use Belmed.

Therefore, the FPS functions are only to collect statistical data (how many times the system is used, how many people clicked on the guide, how many applications for mediation were made, etc.). This data is necessary for two main reasons: First, if a great number of applications are made in a specific sector where currently no ADR agency exists, the FPS will work on persuading the affected sector to create such agency. Second, a significant amount of complaints can indicate a collective problem, which can be a trigger for a governmental body to act and seek a collective redress.

Belmed has been providing a good assistance to consumers in Belgium. However, it will soon have to be modified substantially due to the new Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013. According to that Regulation an EU-wide online platform will be set up by 2016 for disputes that arise from online transactions. Thus, this presents a new challenge for the Belgian institutions to work hand to hand with the developers of the new EU online platform in order to achieve a successful result for both Belgium and other EU countries.

Guide to Best Practices
in Commercial Arbitration
The College of Commercial Arbitrators
3rd Edition

Book review by Hana Spanikova



This book is edited by *James M. Gaitis, Carl F. Ingwalson Jr. and Vivien B. Shelanski,* prominent and experienced commercial arbitrators. With the contribution of the Fellows of the College of Commercial Arbitrators, the Guide incorporates successful practices they have developed through years of managing commercial arbitrations. The book is published by Juris Publishing Inc.

The aim of the Guide is to identify best practices that arbitrators can employ to provide users of arbitration with the highest possible

enforced in the respective foreign courts. Court practice concerning the enforcement of foreign decisions on the principle of reciprocity is still developing but there is already positive application of that principle.

For example, on 1 June 2012, Goloseevskiy District Court in Kiev granted the petition of BTA Bank for the recognition of English court order to seize assets of defendants, rendered in the case *BTA Bank v Ablyazov and others*. In this case, the court stated that the decision was guided by the principle of reciprocity “because the decisions of Ukrainian courts likewise recognized and enforced in the UK”. Evidence of such recognition and enforcement were presented by the BTA Bank together with the petition.

The grounds for denial of enforcement of foreign courts decisions in Ukraine

A petition for enforcement of a foreign court judgment will not be satisfied in the cases stipulated by international treaties or according to Article 396 of the Code of Civil Procedure of Ukraine the petition may be denied:

- if the judgment of a foreign court under the laws of the State, in which it was decided, have not came into legal force;
- if the party, against whom the judgment was made by a foreign court, was unable to participate in the trial because it was not properly notified of the proceedings;
- if the judgment had taken in the case, consideration of which belongs exclusively to the competence of a court or other authorized body according to the law of Ukraine;
- if the court of Ukraine had decided the dispute between the same parties on the same subject and on the same grounds that entered into legal force, or if Ukrainian court has already considered the dispute between the same parties, with the same subject and on the same grounds, started before the time of opening of proceedings in foreign courts;
- if it was omitted set by international treaties and CPC the term of presenting the judgment of a foreign court for enforcement in Ukraine;
- if the subject of the dispute is not subject to judicial settlement under the laws of Ukraine;
- if the decision threatened the interests of Ukraine;
- in other cases established by the laws of Ukraine.

Public policy

Article 396 of the Code of Civil Procedure stipulates that the Ukrainian court should decline the enforcement of a foreign judgment if the enforcement of such a judgment will threaten the interests of Ukraine.

The term 'interests of Ukraine' is interrelated with the term 'public policy'. The definition of 'public policy' is not clearly established under the Ukrainian law. According to paragraph 12 of the Decree of the Supreme Court of Ukraine of 24 December 1999 'On practice of consideration by the courts of applications for recognition and enforcement of foreign judgments and arbitral awards, and annulment of arbitral awards issued on the territory of Ukraine', public policy is defined as the legal order of the state and the basic principles and fundamentals to the existing state order (relevant to its independence, integrity, inviolability, main constitutional rights, freedoms, guarantees, etc.). Ukrainian courts often give wide interpretation and declining the enforcement of foreign judgments on the public policy ground.

Limitation period for enforcement of foreign courts decisions in Ukraine

It is important to take into account limitation period for enforcement of

standards of economy and fairness in resolution of business disputes. The Guide attempts to identify the principal issues that typically arise in each successive stage of arbitration and to explain the advantages and disadvantages of various ways of handling each issue.

With the 2014 publication of this third edition, the Guide has been substantially expanded and updated in order to take into account evolving case law and to address newly emerging issues relating to the management of commercial arbitration.
Twice as long as the second edition, the Guide incorporates four new chapters (Arbitrators Fees & Expenses, eDiscovery, Intratribunal Relations, Hybrid Arbitration Proceedings) and it also contains comparative tables regarding certain aspects of major international rules and international arbitration institution policies.

The guide has been revised to take into account:

v. The new 2013 CPR Administered Arbitration Rules
v. The 2013 revisions to the AAA Commercial Rules
v. Various protocols and guidelines relating to domestic commercial arbitration
v. The 2011 revisions to the JAMS International Rules
vi. The 2012 revisions to the ICDR Articles
v. The 2010 revisions to the UNCITRAL Rules
v. The 2013 IBA Guidelines on Party Representation in International Arbitration
v. The 2010 revisions to the IBA Rules on the Taking of Evidence in International Arbitration
v. Various protocols and guidelines relating to domestic commercial arbitration

This book is a practice guide, not a treatise. The primary objective of the Guide is to make clear the advantages and disadvantages of various practices and to help the reader to select the most suitable approach to a particular arbitration.

For more information, please visit the Juris publisher website.

Guerrilla tactics in international arbitration, Edited by Gunther J. Horvath and Stephane Wilske

Book Review by Faustine Fernando

International arbitration involves plenty of tactical mechanisms employed by parties or arbitrators in order to complicate the arbitration process for the counter party. The book demonstrates how the arbitration process can be slowed down or annulled. The authors are respected legal professionals from various nationalities, which provides for a global point of view.

Guerrilla tactics in international arbitration compares the tactics in different countries and shows the weaknesses of the legal systems in each region. From unethical conduct to criminal acts, the guerilla aims to frustrate arbitration. It affects the process on every stage, even behind the scene of international arbitration. The variety of perspectives shown in the book compare international law, civil law, post socialists, Asian, African, Islamic and Asian legal systems.

foreign courts decisions in Ukraine. Article 391 of the Code of Civil Procedure of Ukraine provides that a foreign judgment may be presented for enforcement in Ukraine during three years from the date of its entry into force. It may seem not difficult to remember, but it happened that the claimant does not take into account the differences between countries and fails to comply with the limitation period. The deadline of application for enforcement of foreign court decision in Ukraine and in Russia is 3 years, while in the UK is 6 years. For example, the Moscow District Court of Kharkiv refused enforcement of the judgment of the Moskovsky District court of Brest (Belarus) because according to Article 391 of the Code of Civil Procedure of Ukraine, Limitation period for enforcement of foreign courts decisions has passed.

Feature: AIA Gold Sponsor Billiet & Co

Clients look to Billiet & Co Lawyers for excellence, a creative and individual approach to solving problems, and a deep understanding of Belgian and European law.

Billiet & Co Lawyers is a member of the IPG international network of law firms and other collaboration networks. In this way they frequently assist clients in other jurisdictions, thanks to their close collaboration with local experts.

For more information: visit the Billiet and Co website.

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

A – Setting, raising and maintaining standards (feeding

One of the suggested solutions is institutional support with fighting such guerrilla tactics and trans-jurisdictional code of conduct. Internationally accepted ethical regulations may encourage attorneys to play according to the common rules and to maintain the legitimacy of international arbitration.

For more information, please visit the Wolters Kluwer publisher website.

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 10th 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).

For those interested in joining or sponsoring the Initiative, please send an email to the AIA team!

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.

Click on the icon to read the Young Arbitrators in Belgium Blog!

into Vanenkova)

B - The Challenges of Assessment (feeding into Abramson)

C - Developing Advanced/International Training (feeding into Wijnands)

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 persective

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

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.

Early registration (before 21 July 2014) will attract a 10% discount.

For registration and membership: info@amati.org.uk

YAB YOUNG ARBITRATORS IN BELGIUM

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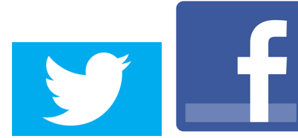

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