Association for International Arbitration
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Inside this month's issue:

AIA Upcoming Events

The Association for International Arbitration is proud to invite you to its upcoming conferences on

ADR in the Aviation Sector and the Sector of Tour Operators

Location: VUB University, Pleinlaan 2 , 1050 Brussels

Date: 24 June, 2011

Check the program, speakers and registration form at

www.aiaconferences.com

and

Dispute Resolution in the Maritime Sector

Date to be determined

For further information regarding AIA conferences and trainings

please visit our website

www.arbitration-adr.org

AIA presents the European Mediation Training for Practitioners of Justice 2011

EMTPJ® European Mediation Training for Practitioners of Justice

After Last year's success, AIA is proud to announce the second EMTPJ course. EMTPJ is a two-week training program in cross-border civil and commercial mediation, sponsored by EU commission and organized by the Association for International Arbitration (AIA).

This year the course will take place from 5th to 17th September in Brussels, Belgium. It will be a 100 hour training program including the assessment day, which will cover the following essential areas: the stages in mediation process, analytical study of conflict resolution, theory and practice of EU and mediation acts, theory and practice of negotiation in mediation, International and cross – border mediation, the role of experts and counsel in civil and commercial mediation, the role experts and counsel in civil and commercial mediation, theory and practice of contract law in Europe, interventions in specific situations and EU ethics on mediation.

For additional information and the registration form please visit: www.emtpj.eu

Report on the AIA's conference on the introduction of Class actions in Belgium

by Ewa Kurlanda & Philippe Billiet

On 25th March 2011, companies, in-house counsels, lawyers, ADR practitioners and academics gathered at the Brussels Palace of Justice to discuss the Belgian class action Bill with a large and varied audience. The conference encompassed all areas of this hot topic and is certain to play an influencing role in the further development of Belgian class action policy discussions.

The concerned class action Bill is a work in progress and this conference offered an optimal opportunity for several stake-holders to express their ideas and concerns in order to influence future amendments to the Belgian class action Bill.

The conference was attended by the Belgian Ministers of Justice, Climate, Energy and Consumer Affairs, the European Commission, the Belgian bar associations, the creators of the Bill, representative bodies from the market (industry & commerce, banking, insurance), the Belgian and European consumer association, media and many other stakeholders.

Stefaan De Clerck, the Belgian Minister of Justice, welcomed the participants and charismatically demonstrated that the enactment of the Belgian class action Bill will likely be a key point on the agenda of the next Belgian government. He illustrated the backdrop to this piece of legislation and emphasized its importance. To further the drafting of the Bill, he welcomed ideas from various market players, including the AIA. Within this context, AIA will create a working group on the 'best' interface between ADR (arbitration & mediation) and class litigation. (N.B. Should you want to become involved as a member of this working group, please send an email together with your CV to administration@arbitration-adr.org).

Dr Hakim Boularbah and **Andrée** Puttemans, the expert panel that was asked by the government to develop the current draft of the Belgian class action Bill, provided a detailed analysis of how the proposed system would work. The Université Libre de Bruxelles professors illustrated the background and inspiration of the current draft, namely, Dutch and Quebec law, the latter being an interesting evolution based on the US system but tailored to a civil law jurisdiction. Guidelines were set out to underline the importance of various pointers, such as efficiency of the procedure, accessibility and respect for the rights of those accessing this form of group justice, for example by evaluating in detail the opt-in and opt-out procedures along with court assessment and compliance with the five principles agreed by the EU College of Commissioners, which include the issue of adequate financing.

Emmanuel Plasschaert, Joan Dubaere and Patrick Hofstrossler, the appointed representatives to the French and Dutch bars in Brussels, elaborated on the anticipated practical effects for lawyers of the proposed Bill. In doing so, they pointed out various ethical consequences.

Philip Walravens, lawyer at and co-founder of Legal 500 law firm Verhaegen Walravens who was involved in several leading multi-party cases in Belgium, demonstrated how the incorporation of the proposed class action system could meet the needs of parties in a wide variety of multi-party claims.

The floor was then given to Filip Kubik, the appointed representative of the European Commission. Mr Kubik evaluated the European *lege ferendae* regarding the introduction of an European collective redress mechanism. His talk proved that, depending on the outcome of the ongoing public consultation stage, new collective redress initiatives in the area of competition law can be expected.

A very thorough and interesting talk was afforded by reputed Stanford Law School lecturer Dr Deborah Hensler, who has been conducting extensive research on US class actions for over two decades and is now delving in the European system. Dr Hensler presented a comparison with the US practice and global evolutions in class treatments and provided the listener with insightful pointers, for example by dispelling myths concerning the American litigation system, and, what follows, class arbitration developments on the New Continent.

In the afternoon, a panel presentation was appraised by The Federation of Belgian Enterprises (Charles Gheur), the Brussels Enterprise Agency (Bruno Wattenbergh), and The Union of Independent Undertakings (Antoon Schockaert), Brussels Enterprises Commerce and Industry (Theo De Beir), which was then charismatically and enthusiastically debated by the Belgian Consumer Organisation Test Achats represented by Ivo Mechels, who accentuated the Ryanair, Dexia and Fortis cases to illustrate on injunction procedures and then went on to assess current tools used by Test Achats to promote class actions on the basis of names cases. The debate went on to include the insurers association (Sarah Snoeck) and the banking sector (Ben Knüppe and Dr Ianika Tzanikova). Dr Tzanikova of the University of Tilburg assessed the effect of the landmark Morrison case and its effects on

both the legal, as well as capital markets in the US based on the article by US class action lawyer Olav Haazen, "*Collective redress as a trump card*" and emphasized the positive influence of class actions in the banking sector.

It became evident on the basis of the findings of the mentioned stakeholders that undertakings, commerce and industry shy away from the introduction of class actions, while the consumer organization finds in the proposed Bill the necessary tools to enforce consumers' rights.

The latter part of the conference was dedicated to the interface between ADR and the proposed class action system. Willem Meuwissen, a well- and widely known mediator and mediation trainer presented the mediator's role in procedures relating to class treatment, whereas the final and concluding portion of the day was given to Philippe Billiet, lawyer and arbitrator in Belgium, who methodologically presented the differences between the US class action system and the proposed Bill. Broad reference was given to case law, which is conflicting and which adds complexity to the issue. Mr Billiet also highlighted the level to which the current draft anticipates on possible pitfalls relating to the arbitration – class litigation interface and proposed suggestions to amend the Bill with regard to its various provisions. This talk inspired questions and comments particularly from the American guests and a vivid discussion followed. All listeners were provided with material which afforded extensive further reading on the topic.

The questions and comments which ensured following the closing of the presentations made it apparent that the topic is the subject of debate and even one of relative controversy, judging from the often widely differing opinions given by the speakers. It is a subject well worth investigating and debating for the purposes of promulgating this aspect of justice as a further alternative to court action. The issue has room to grow and the conference gave ample space for essential insight into negotiations and talks which will follow on the national and intereuropean arena.

More information, slides and speeches presented during this conference will soon be available on AIA website www.arbitration-adr.org

Arbitration and Class Litigation: to what extent does the Belgian Class Action Bill anticipate on Pitfalls under the US System?

by Philippe Billiet

Introduction

Currently, class actions are still rather 'unknown' in civil law countries, especially as compared to certain common law jurisdictions. However, a recent evolution is taking place in Europe, under which several (civil-law) Member States, including Belgium, have expressed their intentions to incorporate national collective redress mechanisms. The ways in which these Member States have adopted/intend to adopt collective redress mechanisms vary in scope and conditions.

In developing collective redress mechanisms, most commentators in Europe agree that the US class action system is a 'bad practice' and as such not to be duplicated in Europe. Their main concerns refer to arbitration being used as a tool to set aside class treatment and the lack of rules that govern the arbitration –class litigation interface. The latter resulted in differing case law and a decrease of legal certainty in the US.

In this article, the author will briefly present the US class action –arbitration interface and will analyze to what extent the current draft of the proposed Belgian class action Bill anticipates on pitfalls that may exist in the US.

The arbitration - class litigation interface in the US

Individual arbitration in the US is regulated by the Federal Arbitration Act and by further State-law rules. This type of arbitration is well-developed and commonly used. Class arbitration, on the other hand, is a relatively recent phenomenon in the US. However, the number of class arbitration cases is expanding at a rapid rate, especially since recent evolutions in case law and the adoption of institutional rules on class arbitration by AAA and JAMS. Practice learns that most class arbitration cases are between domestic parties and within the context of consumer disputes, employment disputes or competition law.

Most US courts are 'easy' to move to enforce arbitration agreements (e.g. in contracts of adhesion), even if the arbitration clause is in small print and incorporated in inconspicuous locations in standard form contracts, employee handbooks or related documents, flyers included in the post with bills or other statements, packaging that arrives with a computer, or medical consent forms. With regard to the binding effects of those arbitration clauses that co-exist with class litigation and especially if they were entered into prior to the dispute at hand, numerous claimants have tried to argue that, despite the undisputed validity of these clauses, arbitration cannot be undertaken as it would deprive them of their right to proceed by way of a class action in the ordinary court. Generally, this argument has not been successful. Indeed, according to most courts, the mere fact that a suit is designated as a class action does not exclude it from being referred to arbitration.

Class arbitrability

The assessment whether a class action can be arbitrated is to be made by the arbitrator. When assessing class arbitrability, the arbitrator must make a distinction between;

(1) Situations where an arbitration agreement exists au thorizing class arbitration;

(2) Situations where an arbitration agreement exists that prohibits all class action or only class litigation; and

(3) Situations where an arbitration agreement exists that is silent on the point of class arbitration.

(1) Situations where an arbitration agreement exists that authorizes class arbitration

Under the US system, if an arbitration agreement authorizing class arbitration exists, such agreement should be respected. Indeed, parties' consent to their agreement urges to enforce the agreement in accordance with its terms.

It must be noted that the consent should clearly express the parties' intention to submit the dispute to arbitration, therefore an arbitration agreement that provides for class arbitration should discard any doubts on interpretation.

In practice however, these agreements rarely exist, as arbitration provisions tend to be used by companies for other purposes, i.e. in their attempts to set aside class treatment.

(2) Situations where an arbitration agreement that prohibits all class action or only class litigation

US companies have often used and continue to use arbitration provisions as a tool to set aside the US class litigation system. In order to also try to avoid any class action, they formulate the concerned dispute resolution clause in such a way that it also excludes any form of class arbitration treatment of disputes with their counterparts.

Most courts used to enforce these class-treatment waivers, guided by the strong pro-arbitration policy of the Federal Arbitration Act. However, since recent years evolutions have taken place in US case law. Current case law demonstrates that class arbitration can be validly excluded, unless such clause violates public policy and/or unconscionability (material or procedural) exists.

Under the current practice, if a company attempts to impose on its customers a dispute resolution agreement that precludes the use of class actions in any forum, such agreement will likely be considered unenforceable, either on the basis of the unconscionability theory, or because it contravenes the terms, legislative history or purpose of a specific statute and/or public policy. Nevertheless, a grey zone of differing case law still exists, e.g. because public policy and unconscionability are concepts that are interpreted differently from place to place and from court to court and are subject to evolution.

(3) Situations where an arbitration agreement exists that is silent on the point of class arbitration

Before the US Supreme Court issued a number of landmark decisions, US courts were divided into those that were not in favor of arbitration (the 'Naysayers') and those that were (the 'proponents'). There was also no set rule as to who decided on class arbitrability. On occasion it was the arbitrator(s), and at others it was the judge(s).

In the 2003 *Green Tree decision*, the US Supreme Court reviewed a decision of the Supreme Court of South Carolina, which had to examine "*whether class-wide arbitration is permissible, when the arbitration agreement between the parties is silent regarding class actions*". There was no specific reference to class arbitration. The Supreme Court of South Carolina held that such arbitration agreement was ambiguous and therefore interpreted its wording as permitting class arbitration. The defendant appealed to the US Supreme Court, raising the question as to whether an arbitration clause under the Federal Arbitration Act (being the law governing the arbitration agreement), which didn't clearly provide for class arbitration, could be interpreted as an acceptance for class arbitration. The majority opinion in this case concluded that an arbitration agreement provides broad powers to the arbitral tribunal and leaves the clauses' interpretation to arbitrators. Subsequently, the United States Supreme Court remanded the case to the arbitrator to decide the arbitration clause's meaning, i.e. whether an arbitration clause that was silent on the issue of class arbitration availability, did or did not allow class arbitration as a means of dispute resolution.

After the Green Tree decision, it was also to be determined which court review practice should be adopted after the arbitrator renders its decision on the point of arbitrability and/or renders its class arbitration award. This resulted in diversity between maximalist review and minimalist review tendencies.

A second landmark decision was rendered in the *Stolt-Nielsen case* in 2010. The Supreme Court ruled that "*the Federal Arbitration Act imposes certain rules of fundamental importance, including the basic concept that arbitration is a matter of consent, not coercion*, *and parties are generally free to structure their arbitration agreements as they may see fit. Just as they may limit by contract the issues which they will arbitrate so too may they specify by contract the rules under which that arbitration will be concluded*." Consequently, an arbitration agreement which is silent on a class arbitration mechanism should not be interpreted as allowing class arbitration. In other words, silence does not amount to the required consent for class arbitration.

The Belgian draft class action Bill: Proposed interface between class litigation and arbitration

Article 6 of the Draft Bill and the explanatory memorandum to the Draft Bill explain that as soon as someone could be considered a member of the Class in the litigation forum, such person can no longer initiate the same individual claim in an arbitration procedure. This clarifies that;

1. Being a member of the class litigation precludes the right to initiate the same individual claim again in arbitration proceedings. This is, in fact, the normal application of the '*non bis in idem*' principle, meaning that one cannot bring the same claim twice before an adjudicator. However, the formulation used in the current draft suggests that the forum of litigation should prevail over the forum of arbitration.
2. Where a valid arbitration clause exists, the party can still become and remain a member of the class litigation, until and unless such party would have "*initiated*" its individual claim in the arbitration forum. Indeed, when parties previously entered into an arbitration agreement this previously engaged arbitration clause would not *per se* amount to the parties' 'opting out' of class litigation.

These findings are also demonstrated by Article 8 of the proposed Bill and the explanatory memorandum to it, which provides that "*the aggrieved person who initiates an indivi-*

dual claim against the same defendant(s) as to the class action, for the same damage and the same cause, is presumed, at the lapse of the option term, to have expressed its will not to take part of the Group/Class if, within such term, this person did not submit conclusions at the clerk office to waive its individual claim." The proposed draft mentions "*clerk office*", which suggests that this article would only refer to ordinary court proceedings. However, it clearly results from the explanatory note to the draft Bill that the referred term "*individual claim*" entails also arbitration procedures.

Therefore, the mere fact that a party had previously entered into an arbitration agreement should not *per se* exclude such aggrieved party from becoming a member of a Class in the litigation forum. Indeed, under the current draft of the Bill, the determining factors of knowing whether or not such party opted out of class litigation, is to (1) verify whether such party initiated its claim in the arbitration forum, and (2) to verify whether, after having initiated its claim in the arbitration forum, such party did or did not submit a conclusion to waive its individual claim prior to the end of the option term.

In such way, the creators of the Draft Bill anticipated on certain companies using arbitration clauses as a tool to prevent class litigation, as under the proposed draft, it would not be possible to preclude class litigation by means of a previously agreed arbitration clause.

On the other hand, if parties want to arbitrate their dispute, it seems that a mere agreement to arbitrate would not suffice to effectively opt out of class action litigation, but that, in order to effectively opt out, it is necessary that the party opted out by initiating its claim in the arbitration forum prior to the lapse of the option term. Moreover, with regards to the requirement to "*initiate*" the claim, the author warns for legal uncertainty surrounding default award or situations where the defendant in class litigation is the claimant in the arbitration forum.

The Belgian draft class action Bill: Impossibility to file class arbitration?

None of the Articles of the Draft Bill provide for a written legal basis for class arbitration in Belgium. It is therefore not clear to what extent the 'class-certification judge' or a consensus with the class representative(s) or any other cause could form a sufficient basis for class arbitration proceedings.

The Belgian draft class action Bill: Suggestions for further amendment

It seems that, just like the legislator in the US, the Belgian Legislator would not issue legal rules on the possibility and conditions for class arbitration. The US practice, as demonstrated above, shows us that this choice results in differing case law and related legal uncertainty.

At the same time, class arbitration is not to be overlooked or excluded. The market's willingness to use class arbitration is demonstrated by the fact that, since the adoption by AAA and JAMS of procedural rules on class arbitration in the US, both arbitral institutions administered numerous class arbitration cases and continue to receive an ever increasing demand to provide class arbitration services.

The author therefore advocates adding to the class action Bill provisions explicitly enabling class arbitration and setting out conditions. Arbitration has nowadays become a fully-fledged alternative to litigation and, as such, should be able to play an equal role in class treatment.

One should also recognize that there exist a number of typical reasons why parties prefer to go for arbitration as opposed to litigation, such as e.g. the rapidity of the procedures in the alternative forum, the reputation of the appointed arbitrator(s), the expertise of the arbitrator, the neutrality of the alternative forum, lower costs, etc.

Excluding the arbitration forum from class treatment would make that the class action Bill may overcome practical issues (e.g. requiring individual mandates) in the forum of court litigation, while leaving the same issues existent for those groups of parties which prefer their claims to be dealt with in the forum of arbitration. Moreover, such choice would be a missed opportunity to further deal with the existing judicial backlog.

For these reasons, and in light of the above-mentioned US practice and the pitfalls identified under it, the author advocates including in the class action Bill:

1. An explicit possibility for the certifying judge to allow class arbitration treatment. This task should, at least for the time being, be reserved to the trial court, in order to adhere to some maximalist ideology tendencies that may still exist in Belgium. The certifying judge could, for instance, appoint a 'delegate judge' to report to it on the developments of the class arbitration procedure. This delegate judge would then have a function similar to the function of a monitoring trustee under the practice of arbitration commitments (i.e. a type of behavioral remedy in EU merger review).
   When enabling the trial judge to allow class arbitration, the legislator may want to distinguish between the following situations:

⇒ Situations where an arbitration agreement exists authorizing class arbitration (-> *this agreement should, in principle, be respected*);

⇒ Situations where an arbitration agreement exists prohibiting class action/class arbitration (-> *This agreement should be considered null and void, at least to the extent that it would try to exclude class treatment in both the litigation forum and the forum of arbitration*); and

⇒ Situations where an arbitration agreement exists which is silent on the point of class arbitration (-> *Here, the certifying judge should, in principle, have the possibility to permit class arbitration treatment if the class representative enters into a class arbitration agreement with the opponent*)

As under the amended draft it would be up to the certifying judge to rule on the matter of class arbitrability; this would create an exception to the principle of the arbitrator's competence to rule on its own competence (kompetenz-kompetenz doctrine). Therefore, should the Belgian legal landscape be/become such that it is ready to adopt a minimalist approach to class arbitration, the Belgian Legislator may want to allocate the competence to conduct class arbitrability assessments with the arbitrator (with possibly setting a certain level of court review afterwards), in such way to exclude the maintenance of an unnecessary exception to the

commonly known and accepted principle of competence-competence.

2. For where class arbitration is applied, the Belgian Legislator may want to incorporate a provision in the class action Bill, ensuring that a written form of the arbitration agreement will exist. Such provision would facilitate international recognition and enforcement of final class action awards under the auspices of the New York Convention.

3. For where class arbitration is applied, the Belgian Legislator may want to incorporate a provision in the class action Bill, clarifying that the class will be represented by the class representative(s). In this way the Belgian Legislator would adhere to the commonly accepted consensus-requirement for arbitration procedures.

Conclusion

The creators of the Belgian class action Bill have delivered a high standard of work in drafting the proposed class action instrument for Belgium. It seems that this instrument anticipates on existing pitfalls in the US that are in relation to arbitration.

However, it is unfortunate to find that the current draft of the class action Bill is silent on the point of class arbitrability or may even exclude the arbitration forum from class treatment. This choice demonstrates a strong maximalist approach towards arbitration, supporting the (mistaken) belief that arbitrators would not be sufficiently capable of handling class arbitrations.

Undeniably, there seems to be no valid reason as to why a maximalist approach should be supported. Indeed, practice indicates that parties often prefer to have their disputes be dealt with through arbitration instead of ordinary court litigation. These parties have particular reasons to do so and their choice helps to deal with the judicial backlog.

The class action Bill should consequently be further amended to exclude the situation where an existing problem would be solved in one forum of court litigation but remains extant in the forum of arbitration.

UNCTAD: Latest Developments in Investor-State Dispute Settlement 2010

by Ricardo Molano

The United Nations Conference on Trade and Development (UNCTAD), published in March 2011 the International Investment Agreements (IIA) Issues Note No. 1, which presents some important figures about Investor-State Disputes and the major jurisprudential developments for the year 2010. Some of the statistics and cases are considered below.

Number of Cases

In 2010, the number of known treaty-based investor–State dispute settlement (ISDS) cases filed under international investment agreements (IIAs) grew by at least 25, bringing the total number of known treaty-based cases to 390 by the end of 2010. This constitutes the lowest number of known treaty-based disputes filed annually since 2001. Since most arbitration forums do not maintain a public registry of claims, the total number of actual treaty-based cases could be higher.

Arbitration Rules

Of the 25 new disputes, 18 were filed with the International Centre for Settlement of Investment Dispute (ICSID) or the ICSID Additional Facility, four under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), and one with the Stockholm Chamber of Commerce (SCC). For two of the new cases, the applicable arbitration rules are unknown. This follows the past trend, with the majority of cases accruing under ICSID (in total now 245 cases) and UNCITRAL (109). Other venues are used only marginally, with 19 cases at the SCC, six with the International Chamber of Commerce and four ad hoc. One further case was filed with the Cairo Regional Centre for International Commercial Arbitration. In six of the total of 390 cases, the applicable arbitration rules remain unknown.

Countries Involved

In 2010, Uruguay and Grenada saw their first claims, with one case each. Other claims were filed against Bolivia (3), Venezuela (3), Kazakhstan (2), Peru (2), Turkmenistan (2), Zimbabwe (2), Canada (1), Guatemala (1), Lithuania (1), Mongolia (1), Poland (1), Romania (1), Slovak Republic (1), Tanzania (1) and Uzbekistan (1). In total, over the past years (1987-2010) 83 governments have responded to investment treaty arbitration: 51 developing countries, 17 developed countries and 15 countries with economies in transition. Most claims were filed against Argentina (51 cases), Mexico (19), Czech Republic (18), and Ecuador (16).

Concluded Cases v. Pending Cases

The number of concluded cases was 197 by 2010. Out of these, 78 were decided in favour of the State (approximately 40 %) and 59 in favour of the investor (approximately 30%). 60 cases were settled (approximately 30%), and for 29 cases the current state of affairs or the outcome is unknown, and 164 cases were still pending at the end of 2010.

Substantive Issues

The UNCTAD Note includes several cases relating to substantive issues. The list includes the fair and equitable treatment standard (FET), the prohibition of unreasonable or discriminatory measures and the treaty-based emergency exception and customary law defence of necessity. The cases and main arguments are mentioned below:

On the fair and equitable treatment standard, a few tribunals have noted the close link between the FET standard and the notion of legitimate expectations as well as the need to balance investors' expectations with the right of host States to regulate in the public interest.

In Lemire v. Ukraine, the tribunal noted that actions or omissions of the respondent State are "contrary to the FET standard if they frustrate legitimate and reasonable expectations on which the investor relied at the time when he made the investment." However, the tribunal also stated that the protection of foreign investors should be "balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest." The tribunal reached this conclusion by emphasizing that, while the main purpose of the BIT is the stimulation of foreign investment and of the accompanying flow of capital, "...this main purpose is not sought in the abstract; it is inserted in a wider context, the economic

development for both signatory countries." In this regard, the tribunal noted that "[e]conomic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, the object and purpose of the Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy."

The tribunal in AWG v. Argentina also emphasized the relevance of the legitimate expectations of investors in applying the FET standard. The Tribunal stressed that "it was not the investor's legitimate expectations alone that led tribunals to find a denial of fair and equitable treatment. It was the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not treated the investors fair and equitably." Furthermore, in light of the BIT's basic goal of fostering economic cooperation and prosperity, the tribunal noted that one must not look single-mindedly at the claimants' subjective expectations but examine them from an objective and reasonable point of view. The tribunal also concluded that "in interpreting the meaning of fair and equitable treatment to be accorded to investors, the Tribunal must balance the legitimate and reasonable expectations of the Claimants with Argentina's right to regulate the provision of a vital public service."

On the prohibition of unreasonable or discriminatory measures, the tribunal in AES v. Hungary, dealing with Article 10 (1) of the Energy Charter Treaty (ECT), emphasized the existence of "two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy." On the first element, the tribunal concluded that Hungary was principally motivated by the politics surrounding so-called luxury profits (by electricity generators), and that it is a perfectly valid and rational policy objective for a government to address luxury profits. On the second element, the tribunal noted that, as renegotiations with the electricity generators failed, the Hungarian parliament voted for the reintroduction of administrative pricing (that had been the practice until the accession of Hungary to the EU), which the parliament considered to be the best option at that moment. The tribunal concluded that both the 2006 Electricity Act and the implementing Price Decrees were "reasonable, proportionate and consistent with the public policy expressed by the parliament." On these grounds, the tribunal concluded that the respondent did not breach Article 10(1) of the ECT. As the tribunal did not find any other treaty violations, it dismissed the case.

On the treaty-based emergency exception and customary law defence of necessity, at issue in several arbitrations involving Argentina's economic crisis of 2000-2001, the tribunal in Suez and Vivendi v. Argentina emphasized the four strict conditions reflected in Article 25 of the International Law Commission (ILC) Articles on States Responsibility: (1) the act (in violation of international law) must be the only way for it to safeguard an essential interest from grave and imminent peril; (2) the act must not seriously impair an essential interest of the State toward which the obligation exists or toward the international community as a whole; (3) the obligation in question must not exclude the possibility of the defence of necessity; and (4) the State must not have contributed to the situation of necessity. The Suez tribunal rejected the respondent's plea of the defence of necessity because the respondent's measures in violation of the BITs were not the only means to satisfy its essential interests, and because the respondent itself contributed to the emergency situation that it was facing in 2001-2003.38 Accordingly, Argentina's violation of the FET standard could not be justified and the country was found to have violated the BITs.

During 2010, two ICSID ad hoc Committees were asked to annul two previous awards that had dealt with the treaty-based emergency exceptions and the customary law defence of necessity. The ad hoc Committee in Sempra v. Argentina annulled the tribunal's award on the ground of a manifest excess of powers owing to the failure of the arbitral tribunal to apply the proper law. According to the ICSID ad hoc Committee, the tribunal had adopted Article 25 of the ILC Articles as the primary law to be applied, rather than Article XI of the underlying BIT. Interestingly, in a dictum, the ad hoc Committee admitted the "possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers", whereas past practice has excluded the erroneous application of the proper law as a valid reason for annulment.

Similarly, the ICSID ad hoc Committee in Enron v. Argentina annulled the tribunal's award on the grounds of a manifest excess of powers and failure to state reasons with regard to both treaty-based exceptions and the customary law defence. Specifically, the ad hoc Committee concluded that the tribunal had exceeded its powers since it had not applied Article 25 of the ILC but instead applied an expert opinion on an economic issue. In other words, the tribunal had exceeded its powers as it had not properly developed the legal test for the necessity defence (and the related emergency exception), relying exclusively on the conclusion of the expert economist. In addition, the ad hoc Committee found that the tribunal had also failed to state reasons for its decision as the basis on which several findings of law were made was "entirely unclear".

Procedural Issues

The UNCTAD Note included several cases dealing with procedural issues. The list includes the legality of the investment for purpose of establishing jurisdiction and the definition of investment for purpose of establishing jurisdiction under article 25 of the ICSID Convention. The cases and main arguments are mentioned below:

On the legality of the investment for purposes of establishing jurisdiction, in RDC v. Guatemala, the tribunal was confronted with the respondent's argument that the claimant's investment was not a 'covered investment' under the United States-CAFTA-Dominican Republic Free Trade Agreement (FTA) or the ICSID Convention because the investment was illegal and did not create rights protected under do-

mestic law. The tribunal rejected this argument noting that in line with a long line of case law, the language 'conferred pursuant to domestic law' in the underlying agreement "is not a characteristic of the investment to qualify as such but a condition of its validity under domestic law." The tribunal added that even assuming that the relevant actions were not 'pursuant to domestic law', "principle of fairness should prevent the government from raising 'violations of its own law as a jurisdictional defense when [...it] knowingly overlooked them and [effectively] endorsed an investment which was not in compliance with its law."

The tribunal in Hamester v. Ghana emphasized the existence of the following general principles applicable independently of any specific language in the underlying treaty: "An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law."

In Anderson v. Costa Rica, the tribunal emphasized the importance of the requirement that investments subject to treaty protection be 'made' or 'owned' in accordance with the law of the host country. The tribunal noted that the inclusion of such specific provision in the underlying Canada-Costa Rica BIT "is a clear indication of the importance that they attached to the legality of investments made by investors of the other Party and their intention that their laws with respect to investments be strictly followed. The assurance of legality with respect to investment has important, indeed crucial, consequences for the public welfare and economic well-being of any country." In the particular case, as the deposits from the claimants were made to financial intermediaries that were operating without the necessary authorization by the Costa Rican Central Bank, the tribunal found that such investments were not made "in accordance with the law of the host country". Accordingly, the BIT was inapplicable and the tribunal lacked jurisdiction.

On the definition of investment for purposes of establishing jurisdiction under Article 25 of the ICSID Convention, the tribunal in Saba Fakes v. Turkey noted that "while Article 25 (1) of the ICSID Convention provides for an objective definition of an investment, this definition is comprised of three criteria, namely (i) a contribution, (ii) a certain duration, and (iii) an element of risk." The tribunal noted moreover that "neither the text nor the object and purpose of the Convention commands that any other criteria be read into this definition." Accordingly, the claim was dismissed for lack of jurisdiction of the tribunal and the Centre over the dispute. This approach distances itself from the so called Salini test at least to the extent that it expressly excludes the relevance of the investment's "contribution to the host State's economic development".

Furthermore, in Global Trading v. Ukraine, the ICSID tribunal dismissed the investor's claim on an expedited basis as 'manifestly without legal merit' under Article 41(5) of the ICSID Arbitration Rules. The tribunal concluded that the sale and purchase contracts entered into by the claimants are "pure commercial transactions that cannot on any interpretation be considered to constitute 'investments' within the meaning of Article 25 of the ICSID Convention."

Final Comments

UNCTAD reached the following conclusions:

ISDS developments in 2010 display a number of interesting features. While investors keep using international arbitration as a means for resolving disputes with their host countries, the 25 new disputes in 2010 constitute the lowest number of known treaty-based disputes filed annually since 2001. Moreover, 2010 has seen a significant number of ISCID annulment decisions showing the increased use of this mechanism in reviewing arbitral awards.

These developments expose important aspects of the relationship between States, investors and tribunals in the ISDS context. It appears as if States were increasingly engaging pro-actively in the process, amongst others, with a view to managing and controlling cases early in the process or to questioning the tribunal's reasoning once a case is concluded. This is supported by the increasing use of mediation and other alternatives to arbitration,77 suggesting that States strive for a stronger role, re-asserting themselves in the ISDS context.

Specific procedural, jurisdictional and substantive questions arising in ISDS cases are paralleled by important developments regarding the design of new IIAs. As one can observe an emerging trend to re-balance the network of more than 6,000 IIAs, 78 issues of investor responsibility are also gaining ground. All of these developments are embedded in and often emphasize the significance of broader systemic issues, such as how to ensure coherence and build an international investment regime that fosters responsible investment and ensures sustainable development.

The UNCTAD Note is available at http://www.unctad.org/en/docs//webdiaeia20113_en.pdf

Training Program for Professional Mediators in Russia

by Dilyara Nigmatullina

On March 1, 2011 the Russian Ministry of Justice registered the Program for Mediators which finalized the formation of the legal basis for the integration and development of the mediation institute in Russia. The attendance of the special mediators' training arranged in accordance with the program as prescribed by the Government of Russia became one of the requirements imposed by the Russian Mediation Law for those who wish to act as professional mediators. The Program was prepared and approved by the Ministry of Education and Science and the Ministry of Justice further to the Regulation of the Government of Russia of De-

cember 03, 2010 N 969 "Regarding the Program for Mediators".

Being an additional educational program of professional retraining, the Program for Mediators was created to serve as a model for further elaboration and approval of specialized educational programs by the mediation centers. The program is planned for 5 years, but it can be completed within a shorter period of time. It requires a full-time course of study and it comprises three educational programs: the basic course, peculiarities of mediation, the mediation trainers' training. Each of the courses is terminated with the final assessment that can be held in written or oral form as well as in the form of tests, after which the mediation center issues an appropriate certificate under its seal.

The Program for Mediators contains the outline plan for each of the three programs. Thus, the basic course should consist of 120 hour training and comprise three modules: the introduction into mediation, mediation as a procedure and the meditative approach. The introduction into mediation in its turn is expected to address such topics as alternative dispute resolution: system and principles, mediation as a means of alternative dispute resolution, mediation as an interdisciplinary area, principles of mediation, mediation instruments, perception and communication in mediation. Within the module on mediation as a procedure the emphasis is made on such issues as a mediator and mediation procedure, preparation for mediation procedure, mediation procedure: objectives and tasks of a mediator at each stage of mediation procedure and the result of mediation procedure. Finally the last module of the basic course on meditative approach should contain discussions regarding information in mediation, interaction of worldviews in mediation process, working with parties' interests, involvement of parties' representatives, experts and others in mediation procedure, the peculiarities of resolution of family, labor, economic disputes with the help of mediation, carrying forward mediation and the code of ethics in mediation. The successful completion of the basic course entitles a person to act as a professional mediator but not to train mediators.

The second educational program, peculiarities of mediation, comprises 312 hours of training and 10 modules: working in the zone of conflict (with the focus on the notion and classifications of conflicts, dealing with aggression in mediation, the emotional burnout syndrome and its prevention, anti-stress techniques and dealing with objections in mediation), commercial mediation, mediation in a multiparty conflict and at project monitoring, peculiarities of mediation in resolution of family disputes, mediation in an extremely aggravated conflict, intercultural peculiarities and mediation, peculiarities of mediation in resolving civil and intellectual property disputes, mediation in administrative disputes and judicial mediation, mediation in the restorative and juvenile justice, peculiarities of mediation in resolution of labor disputes. Completion of the second program allows acting as a wide profile professional mediator. However, it still does not authorize a person to train mediators.

In order to successfully integrate and develop mediation, Russia is in need of professional mediation trainers who will be able to teach the elements of mediation within the system of university and additional education and what is even more important to instruct and train future professional mediators. The third educational program, the mediation trainers' training, comprises 4 modules: the elements of the mediation training, teamwork at the mediation training, a game interaction at the mediation training, and an individual work of a mediation trainer. The first module should deal with the outline and aims of the training, a methodology of the training, a motivational component of the training and dualism of skills and abilities. The teamwork module should address static and dynamic approaches to groups taken as developing systems, the dynamics of teamwork, the management of team interaction and means of creation and support of the job climate within a team. Within the module on a game interaction at the mediation training the program provides for discussing forms and ways of teamwork, role games, an exercise and a directed discussion as ways of training and, finally, the multidimensionality of brainstorming. The module on an individual work of a mediation trainer should address such topics as verbal and non-verbal communication, a work on feelings and emotions in mediation, a work on objectives in mediation, a work on an individual style of a mediation trainer and a supervision of the trainer's work.

From now on mediation centers in Russia, including those that have already been providing mediation trainings will have to adapt their programs to the one prescribed by the Russian Government.

Continuing Mediator Education

Nowadays on a very quickly changing mediation landscape where all EU member states are on the point of complying with the EU directive on May 21, 2011 at the latest permanent education is a must.

In 2010 AIA launched the Project - European Mediation Training for Practitioners of Justice. Striving to constantly move forward AIA is planning to organize this year an additional intensive seminar for experienced mediators.

The seminar will follow the September 2011 EMTPJ course. Further information about this seminar will be published on the EMTPJ website www.emtpj.eu

AIA questionnaire

The right to apply for the annulment or the setting aside of an award: pros and contras

In its recent reform enacted in January 2011, French law has adopted the rule that parties may at any time by common agreement forego the right to seek the annulment of an award before French courts.

Doing so, French law has followed the examples of Belgian, Swedish and Swiss law with the exception that the right to forego annulment proceedings does not depend on where the parties reside. Thus a party residing in France would be entitled to make use of such a right.

The option to forego annulment proceedings is generally presented as an arbitration-friendly measure. Yet, to AIA's knowledge, there is no empirical data showing the extent to which this option is in practice used by parties.

AIA believes that it would be a helpful contribution to the study of international arbitration to gather data on what people in the field have done or might do with this option.

AIA has prepared a short questionnaire which it would like everyone interested to consider and answer. The questionnaire can be found through the link mentioned below.

The consultation will be open until the 1st of June 2011.

Participating persons will remain anonymous. The results of the consultation and their analysis will be communicated through Linkedin, AIA's Newsletter 'In Touch' and AIA's website.

You are welcome to participate !

https://spreadsheets.google.com/viewform?formkey=dHFkRFU0UXRwSERTalZ0dUdzaFd0cFE6MQ

CALL FOR PAPERS:

Upcoming Conference of AIA on

Dispute Resolution in the Maritime

Sector

(Deadline for submission: 1st May 2011)

Papers on dispute resolution related

topics in the maritime sector.

Please submit your paper to

administration@arbitration-adr.org

Free access to CDR website for AIA members

AIA is delighted to share a good news with all its members!

AIA came to an agreement with the Commercial Dispute Resolution magazine (CDR) regarding the full free access to the CDR website for AIA members.

CDR is a unique, dedicated magazine for commercial litigation and arbitration professionals around the world.

Published by Global Legal Group, *CDR* brings you incisive analysis of the latest trends in dispute resolution practice.

CDR covers key areas of dispute resolution, including:

⇒ Commercial litigation practice across major global jurisdictions

⇒ Arbitration and alternative dispute resolution

⇒ Competition litigation- both at national and EU level

⇒ Class actions and collective redress

⇒ Litigation funding

⇒ White-collar crime, regulatory investigations and disputes

⇒ Advocacy and the judiciary

CDR also covers issues that enhance your business and specialist awareness of the

⇒ Legal technology and strategy

⇒ Insight into specialist areas like IP, product liability, financial and property litigation- and others

⇒ Business and professional development for litigators

⇒ Plus all the major people and firm moves and professional appointments you need.

CDR is an excellent resource for dispute resolution experts at the top of their profession.

For the next two months, you will be able to access the website free of charge. After this period, you will simply need to register, still free of charge, on CDR website with your email address to access it for another two months.

After this four month period, those that wish to still have access will be eligible for a discounted subscription, which will include the full range of subscriber benefits including a quarterly hard copy of the magazine.

If you are a current member of AIA request the User Name and Password to access for free the CDR website at administration@arbitration-adr.org