Association for International Arbitration
In Touch

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arbitration-adr.org

CONTACT US:
146, Avenue Louise
B-1050 Brussels
Belgium
Fax: +32 2 646 24 31
Tel: +32 2 643 33 01
Email:
administration@arbitration-adr.org

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Inside this month's issue:

Sempra v Argentina: State of Necessity and Manifest Excess of Powers

Sempra v. Argentina has been a highly debated case. The recent decision on the Argentine Republic's Request for Annulment of the Award made on June 29th 2010 is not an exception. In fact, this decision will be at the center of debate for a while. The Committee found that the Award must be annulled in its entirety on the basis of manifest excess of powers (Article 52(1)(b) of the ICSID Convention) in respect of the failure to apply Article XI of the USA-Argentina BIT. The approach to the state of necessity and the role of international customary law were of great importance in the final decision. The basics of the case and some of the most relevant arguments of the decision are important to consider.

Background of the Case
In 1989 Argentina introduced a privatization program in order to revitalize its economy and put an end to an ongoing economic crises. An important facet of this program was the introduction of a legal and regulatory framework by way of the Convertibility Law, introduced in 1991, together with an implementing decree, fixing the Argentine peso (ARS) to the US Dollar (USD) at the exchange rate of one to one.

In 1991, the natural gas industry was restructured, and the government-owned company Gas del Estado was privatized. A number of companies were formed for the purpose of distributing gas to residential and commercial users. Sempra invested in two of these gas companies by acquiring an indirect shareholding in Sodigas Pampeana's and Sodigas Sur's shares, which are the holders of two Argentine companies that had been granted licenses for the distribution of gas.

In December 2001 a financial crisis erupted in Argentina, and in the period 2001-2002 the Government of Argentina undertook a number of measures, which, in the view of Sempra, constituted a wholesale abrogation and repudiation of significant rights and entitlements under the licenses and other entitlements under the regulatory environment that had been established within the framework of the Argentine privatization program. Essentially, these rights concerned the licensee's entitlement to the calculation of tariffs in USD and their semi-annual adjustment on the basis of the US Producer Price Index (PPI). In January 2002, the Emergency Law was enacted, the currency board system was abrogated, the Argentine economy was pacified – including public service agreements and licenses – and all contracts and relationships then in force were, according to the Emergency Law, to be adapted to the new context.

The Tribunal and the Award

On the basis of the above-stated circumstances, Sempra filed, on 11 September 2002, a Request for Arbitration under the ICSID Convention, invoking the US-Argentina Bilateral Investment Treaty. On 31 December 2003, Argentina filed objections to the Centre's jurisdiction and the competence of the Tribunal. On 11 May 2005 the Tribunal issued its Decision on Jurisdiction, wherein it held that the dispute fell under the jurisdiction of the Centre and within the competence of the Tribunal.

A merits phase in the arbitration followed, and the Award on the merits was dispatched to the Parties on 28 September 2007. In the Award, it was held that Argentina had breached the fair and equitable standard and the Umbrella Clause of the BIT. The Tribunal held that the measures taken by Argentina had beyond any doubt substantially changed the legal and business framework under which the investment was decided and implemented and as a consequence, the fair and equitable treatment standard of the BIT had been breached. On these bases, Sempra was awarded damages.

The Annulment

On 25 January 2008 Argentina requested the annulment (and stay of the enforcement) of the Award. In its application, Argentina sought annulment of the Award on four of the five grounds set out in Article 52(1) of the ICSID Convention, specifically claiming that (i) the Tribunal was not properly constituted; (ii) the Tribunal manifestly exceeded its powers; (iii) There had been a serious departure from a fundamental rule of the procedure; and (iv) the Award had failed to state the reasons on which it was based. Several issues were considered by the Committee but the decision was focused on the ground of manifest excess of powers.

The main point of analysis was the relationship established between Article XI of the BIT (state of necessity under the BIT) and Article 25 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (state of necessity under customary international law). The Tribunal had concluded that: "*Article XI is not self-judging and that judicial review is not limited in its respect to an examination of whether its invocation, or the measures adopted, were taken in good faith. The judicial control must be a substantive one, and concerned with whether the requirements under customary law or the Treaty have been met and can thereby preclude wrongfulness. Since the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conductive in the case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under Article XI given that this Article does not set out conditions different from customary law in such regard.*"

The Committee assumed a very different reasoning:

First, the Committee accepted that it may be appropriate to look for customary law as a guide to the interpretation of terms used in the BIT. However, it does not follow that customary law establishes a binding "*definition of necessity and the conditions for its operation*" (in this case, Article 25 of the ILC Articles). While some norms of customary law are peremptory (jus cogens), others are not, and States may contract otherwise. Second, the Committee concluded that Article XI of the BIT differed in material aspects from Article 25. It mentioned that it was clear from a comparison of the two articles that Article 25 did not offer a guide to interpretation of the terms used in Article XI. The most that could be said is that certain words or expressions were the same or similar. The Committee presented the following analysis: "*Article 25 is concerned with the invocation by a State Party of necessity "as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State". Article 25 presupposes that an act has been committed that is incompatible with the State's international obligations and is therefore "wrongful". Article XI, on the other hand, provides that "This Treaty shall not preclude" certain measures so that, where Article XI applies, the taking of such measures is not incompatible with the State's international obligations and is not therefore "wrongful". Article 25 and Article XI therefore deal with quite different situations. Article 25 cannot therefore be assumed to "define necessity and the conditions for its operation" for the purpose of interpreting Article XI, still less to do so as a mandatory norm of international law.*" Third, the Committee concluded that invocation of a state of necessity under the terms of a bilateral treaty needed not necessarily be "*legitimated*" by a "rule" of international law. In fact, there may be no rule governing such questions. Fourth, the Committee stressed that while there may be certain norms of international law, including customary law, which would render it unlawful under international law for States to agree to adopt a provision inconsistent with those norms, this is not such a case. In short, jus cogens do not require parties to a bilateral investment treaty to forgo the possibility of invoking a defense of necessity in whatever terms they may agree. The Committee mentioned that "even if it be the case that "international law is not a fragmented body as far as basic principles are concerned", it does not follow either: (i) that "necessity is *no doubt* one such basic principle" in the sense that it must be interpreted and applied in exactly the same way in all circumstances, or (ii) that international law will become "fragmented" if States contract otherwise". Fifth, the Committee considered when analyzing the two articles that there is a preceding question: whether there is wrongfulness. The Committee mentioned that it is true the BIT does not prescribe who is to determine whether the measures in question are or were "necessary" for the purpose to be invoked, but if the measures in question are properly judged to be "necessary", then there is no breach of any Treaty obligation.

The Committee concluded that the Tribunal had failed to conduct its review on the basis that the applicable legal norm is to be found in Article XI of the BIT, and that this failure constituted a manifest excess of power within the meaning of the ICSID Convention.

Comment

This case has raised very interesting questions and many more will turn up. For instance, what does « necessity » mean in the context of investment arbitration? When customary law does not apply, how is the factual analysis about necessity made if the parties did not provide a way to do so beforehand? What is included in the draft of a BIT's state of necessity clause after this decision? What is to be done with the clauses that are already in force? Certainly, this decision will spur the discussion on the balance between the protection of investment for exporting-investment states and the possibility of importing-investment states to act under necessity, which is a vital issue for the success of the investment arbitration system.

The decision is available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550_En&caseId=C8

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When: Wednesday, September 22, 2010
Where: Guoman Charing Cross Hotel – London, England, UK

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REVISED UNCITRAL RULES - A STEP FORWARD IN INTERNATIONAL COMMERCIAL ARBITRATION

On June 25, 2010, the United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Revised Arbitration Rules. The decision to adopt the Revised Arbitration Rules was made after almost four years of discussions.

The original UNCITRAL Arbitration Rules were adopted in 1976 and have been used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions. The Rules are recognized as of one of the most successful international instruments of a contractual nature in the field of arbitration.

In 2006, the Commission decided that the UNCITRAL Arbitration Rules should be revised to meet the changes in arbitral practice over the last thirty years. The revision is aimed at enhancing the efficiency of arbitration under the Rules and does not alter the original structure of the text, its spirit or the drafting style. Mandated by the Commission, the UNCITRAL Working Group II (International Arbitration and Conciliation) had a close collaboration with the intergovernmental and nongovernmental interested organizations, starting its work during the 43th session in September 2006. The work lasted for seven subsequent sessions. The final session took place in New York from February first to fifth, 2006. The Draft of Revised Rules has been discussed and adopted in final form by the UNCITRAL Commission during its 43th sessions, which took place during 21st June to the 9th July 2010 in New York.

The UNCITRAL Arbitration Rules, as revised, will be effective as of August 15th 2010. The revised Rules include more provisions dealing with, amongst others, multiple parties arbitration and joinder, liability, and a procedure to object to experts appointed by the arbitral tribunal. A number of innovative features contained in the Rules aim to enhance procedural efficiency, including revised procedures for the replacement of an arbitrator, the requirement for reasonableness of costs and a review mechanism regarding the costs of arbitration. They also include more detailed provisions on interim measures. It is expected that the Rules, as revised, will continue to contribute to the development of harmonious international economic relations.
Main amendments:

Article 1: There are no more provisions which would oblige parties to conclude the arbitration agreement in writing. According to the current provisions of the article, it is sufficient that the agreement of the parties solve the dispute in front of an arbitral court, without the form of the agreement being specified.
Article 2: The provisions regarding the notice of arbitration, as well as the following communication, have been adapted to the modern ways of communication. Thus, "the receiving of notice, communication or proposal may be transmitted by any means of communication that provides or allows for a record of its transmission".
In the same context, amendments aiming to clarify the applicable rules to the compulsory mailing have been made to the article (when to use a specific address, to whom to send it, etc.).
Article 4: A new provision was included regarding the form and content of the notice of arbitration.
« Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:
(a) The name and contact details of each respondent;
(b) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraphs 3 (c) to (g). »

Also, the Commission has provided that if the respondent will present claims against any party other than the claimant in his response to the notice of arbitration, his response may include a notice of arbitration against the third party. This amendment of the article allows the respondent to present claims against parties other than the claimant without it being necessary to wait until the constitution of the arbitral tribunal.
Article 6: New provisions have been inserted regarding the designation by parties of an appointing authority, which plays an important role in the designation of arbitrators, their challenge and removal, as well as revising the fees and expenses of arbitrators. Also, the time limit during which the General Secretary of PCA has to appoint an appointing authority in the case when the parties do not agree upon this issue has been reduced from 60 to 30 days.
Article 7: A new paragraph has been added that creates a mechanism involving the appointing authority in the cases when a party does not participate in the appointing procedure of the arbitrators and the case does not require a third member of the tribunal:
"Notwithstanding paragraph 1, if no other parties have responded to a party's proposal to appoint a sole arbitrator within the time limit provided for in paragraph 1 and the party or parties concerned have failed

to appoint a second arbitrator in accordance with articles 9 or 10, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in article 8, paragraph 2 if it determines that, in view of the circumstances of the case, this is more appropriate."

Articles 11-13: Many innovations have been added regarding the challenge and disclosure by of arbitrators. Besides explaining the means of disclosure and challenge of arbitrators, the revised rules offer a model of statements of independence and impartiality (in the annex to the Rules).

Article 16: Article 16 deals with the Exclusion of Liability. Among the new provisions included, the most important is the one related to the fact that the parties waive any claims against arbitrators and the appointing authority regarding any act or omission in connection with the arbitration.

Article 17: Article 17 includes a new paragraph related to the possibility to join the arbitration proceedings as a party. "The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such party is a party to the arbitration agreement."
According with the revised Articles 20 and 21, it will be allowed to consider the notice of arbitration as presentations of claims, and the response to the notice of arbitration – as statement of defense, as long as each of them will comply with the requirements of the form and content provided by the Rules.

Article 26: This Article provides that a party requesting interim measures could be liable for any costs and damages caused by the interim measures in the case if the tribunal will decide afterwards that such measures shouldn't have been approved.

Article 28: Article 28 allows the use of modern means of communications, such as videoconferences, for witness or experts' hearings.

Article 41: Lastly; Article 41 has included a new mechanism of revising the fees demanded by arbitrators in order to avoid exaggeration. Thus, the new provisions mandate that the appointing authority decide upon the calculation method of the arbitration fees, which becomes compulsory to the arbitral tribunal. Also, during 15 days any party can address the appointing authority with a demand to revise the expenses, which shall be decided within 45 days if the proposal of expenses made by the arbitral tribunal was in accordance to the provisions of the Rules.

The Revised Rules are available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf

Mediation in Greece, 2010

Even though the beginning of mediation can be traced to ancient Greek culture, it is fair to state that it has not developed much since then. As one of the few countries in the EC, Greece has still not implemented the new EU Mediation Directive (52/2008/EC). In mid July 2010, the Ministry of Justice finally announced the new measures which should introduce mediation as an actual tool to solve disputes concerning civil and commercial matters. Now it remains to be seen if the Greeks are ready to turn the traditional "battle" in the courts into an out – of – court "win-win situation". The new law concerning mediation is expected to be voted on at the end of the summer 2010.

ADR methods in Greece, present time (July 2010)

Several attempts have been made through the years to introduce alternative dispute resolution (ADR) methods in Greece. Unfortunately, arbitration must be considered the only method which is actually working at the present time. Even though certain articles in Greek legislation (i.e. concerning consumers' rights, bankruptcy a.o.) contain dispositions providing for mediation in specific cases, the ADR mechanisms – in general – never had their breakthrough. At present time the existence of mediation is very limited. According to the Greek Code of Civil Procedure (GCCP), Articles 209 – 214, the Judge of the District Court has competency to conduct mediation. The Articles are hardly ever used. In another attempt to deal with the enormous amount of cases, waiting to be heard in court, Article 214A in GCCP was introduced. From September 2000 onwards it became compulsory that suits concerning disputes in private law which by reason of their subject matter fall within the jurisdiction of the multi-member court of first instance in ordinary proceedings, and in respect of which conciliation is permissible under substantive law, may not be heard unless there has been a prior attempt to find an out-of-court settlement. For a more detailed description of the above mentioned articles see:
http://ec.europa.eu/civiljustice/adr/adr_gre_en.htm

Unfortunately this article did not have the anticipated effects, since only 3-4 % of civil cases before the multi-member court reached an agreement out of court. The intention behind the article was good, but in reality it is only functioning as a procedural prerequisite for the hearing of actions in court. A statement that: "An attempt of an out – of – court – settlement, according to article 214A has taken place without success", would be written in the suit, whether one had actually taken place or not. But why is that? Can it really be true that people all over Europe are mediating, but Greeks are not able to? Is it not in everyone's interest to save financial as well as personal resources, not to mention the waiting time, which is often 2-3 years, just to reach a decision in first instance?

The "out – of – court - settlement" mentioned above could be attempted with or without the use of a third, independent person. When using a third person appointed by the parties, one could argue that it resembles mediation. But, firstly, the third person involved has never been trained especially to mediate, and secondly, the third person involved plays a much more active role than an educated mediator. The intention of Article 214A was good though, and a step in the right direction. The construction of the rule could be part of its ineffectiveness. Fundamental values were missing in order to be in "the spirit of" mediation. The rule is built upon the communication between the lawyers and the ratification of the judge – if an agreement was reached. *Conciliation between lawyers differs substantially from mediation between the parties*, even though the lawyers are representing the parties. And even more importantly, confidentiality was not protected sufficiently. Who would provide

or reveal any information if it can be used against you, in case an agreement is not reached? If an agreement is reached, it can be ratified by the Judge, after verifying that the formalities are correct.

Mediation, on the other hand, is not just about formalities. It is not about lawyers and judges playing the main role. It is about the parties and it is their values, thoughts, disagreements, misunderstandings, their feeling of "satisfying justice" and self-determination which ought to be in focus. The parties are the "*main players*". The lawyers are assessors.

The new meditation law (it is expected to be voted on at the end of this summer)

So what are the main characteristics of the draft law on Mediation, which is intended to adapt our National Legislation to EU Mediation Directive 52/2008/EC? For sake of brevity it is impossible to describe the new law in detail, but an attempt is made to sketch out the fundamentals:

⇒ It will apply to any mediation concerning civil and commercial matters which takes place in Greece, regardless of whether a claim is a cross – border one or not.

⇒ After determining a definition of mediation, the legislator defines the mediator, who in Greece, in contradiction to other member states, must *be a lawyer*. Only lawyers can be accredited as mediators, and this will be done by a competent Accreditation Body. The Accreditation Body will be established by the Greek Bar Association, which will be designated by the Assembly of the Presidents of all the Greek Bar Associations. One could argue that allowing only a certain group of professionals to obtain the title of "mediator" could be an asphyxiating element in the whole concept of mediation. Other professions could most definitely obtain "mediator skills" and use their professional knowledge and experience equally, e.g. judges, business managers, psychologists, etc.

⇒ Further, the Greek Draft Law on Mediation provides the mandatory presence of lawyers attending together or instead and in place of their respective client (s) involved in the mediation process. This could unfortunately lead to at least two disadvantages. Not only does the cost of the process increase, but the risk of the lawyers being the main players (once again), is increasing as well. One could argue that the spirit of mediation is being compromised, in order to fulfill other interests. A non-compulsory model would in my opinion have been a better choice.

⇒ The fundamental principle of confidentiality is secured in the new law. All persons participating in the mediation must, in writing, undertake the obligation to respect the confidentiality of the procedure. No one involved in the mediation process can be heard as witnesses nor can they be obliged to make deposition on what occurred during the mediation process. They have no obligation to bring in subsequent trials or arbitrations data accruing out of, or related to, a mediation process, except if this is imposed by public order rules, especially to safeguard the protection of underaged persons or in order to prevent harm to the physical or mental integrity of a person.

⇒ The enforceability of the agreement is secured by submitting the minute drafted by the mediator and signed by the parties, their lawyers and the mediator, to the One Member Court of First Instance.

⇒ The Greek Draft Law on Mediation does not provide explicitly whether *a mediation clause* contained in a contract can constitute the basis of a relevant plea, as is the case, for instance, regarding an arbitration clause.

⇒ As to the prescription of the claim(s), the new law provides that the signing of an agreement for submission of a dispute to mediation interrupts the prescription from the day the "participation – agreement" is signed. Therefore, there is no risk of the claim becoming time-barred due to the time spent in the process of mediation.

⇒ As to the cost of mediation, the draft law provides that the minimum hourly rate of the mediator's fee will amount to two hundred (200) Euros, for 24 hours at maximum, including the mediator's preliminary preparation of the mediation process. The parties and the mediator are free to agree on a higher fee for the mediator. The minimum fees for the parties' lawyers are set at half of the hourly rate of the mediator's fee. In case of successful outcome of the mediation process the lawyers are entitled to additional fees. The mediator's fee is paid in equal shares by the parties, unless they have agreed otherwise, while each party bears the fees of his or her lawyer.

Will mediation succeed in Greece?

With the implementation of the EU-Directive on mediation, there may be light at the end of the tunnel for the more than 1, 5 million cases waiting to be heard in court. Mediation in Greece could definitely get its break-though. Even though the new law could have implemented a way that would be even more attractive for the parties, it is still less expensive and time consuming than a traditional "battle in court". Furthermore, mediation has another characteristic advantage, which must be considered of great importance. The parties have an actual opportunity to keep their collaborators, business partners, customers etc. once the dispute is solved in a mutually satisfying way. Especially in a country which, at the time of speaking, is facing a huge financial crisis, mediation, as a method of solving disputes, it is simply too precious not to be used. If companies are able to turn a dispute into a "win win situation", they will be able to end the disagreement – not the business relationship.

The practical measures necessary to "welcome" the institution of mediation in Greece have been taken. The law will be voted on shortly, training of mediators will begin and mediation will hopefully become a natural way to solve disputes. But is this enough? The difference between introducing mediation in Greece and introducing mediation in Greece successfully is very simple. In the first case, you implement the directive and take the necessary measures in order for the new institution called mediation to be functional. In the latter, you do all the above but adopt the philosophy or "spirit" of mediation as well. Only if we understand and believe in the intentions of mediation and its fundamental values will mediation become a success.

By Nikki Bouras, Attorney

MEDIATION IN ROMANIA

Ever since *the Romanian state* made its first steps on the road of democracy by the historical event of the (at least 'so-called') Revolution from December 1998, it *started to return the real estate properties (houses, but especially pieces of land)*, which had been confiscated by the communist regime who led the country during the 5th-9th decades of the 20th century, *to their initial owners*. Unfortunately, this whole process happened very fast, so many of these procedures and ownership documents that have been consequently issued, were far from correct. In fact, *many disputes between many of the new owners arose*.

Most of these owners, some of them successors of the former ones, are peasants with very low economic potential and therefore they avoided so far - as much as possible - to clear (solve) these conflicts by *the classical judicial procedure*, since taxes and fees for such procedures are unaffordably high for them.

Now *they can afford to solve their problems regarding the identification and separation (divesture) of their properties (legacies), not only for less money, but also in total mutual agreement,* so that no extra cadastral expertise, for instance – which is also required by the classical judicial procedure , being also very expensive - should be needed.

After the signing of the mutual agreement by all parties, the latter (or the Mediators, on their behalf) submit it to the local court, in order to check its validity, and after that the court issues a *Decision which subsequently serves as an ownership document for each one of the parties involved in the conflict and the mediation process .*

This is in brief one of the domains in which Mediation plays a very important role within the activity of the Romanian Mediators. Due to the economic crisis, *many Romanians, individuals, freelancers and companies cannot pay their credits or debts to the banks or utilities existing on the Romanian market.* Therefore, *mediation can help them to renegotiate the payments in terms of amounts and periods of time*. Mediators started to help individuals and even companies who lately couldn't afford to pay for their water/electricity consumptions or get their credits repaid by mediating their disputes with the respective suppliers or banks, who have finally understood that there is no other way to retrieve their losses other than by accepting new conditions of payment according to the financial possibilities of their debtors at this time.

In this instance, *Mediation helps the debtors not only to pay back their debts, but also avoid judicial taxes which under the circumstances of a classical trial are summed up to the invoice they finally must acquit*. The local court can also issue a Decision that certifies and approves the mutual agreement between debtor and creditor, which was reached by the parties due to the intervention of the Mediator. The *respective judicial decision closes or prevents practically the classical trial and obliges the parties to respect the conditions of their mutual agreement that has been consented by both the Mediator and the Court.* Considering the *confidential and intimate nature of Mediation*, *the Romanian high-class* has also started to prefer this alternative (extrajudicial) method , especially in such delicate cases like the ones regarding *alamony, child support, and other issues related to this sort of dispute*. The mutual agreement can also be approved by the court together with the issuing of the civil sentence (decision) regarding the divorce itself. Other similar aspects can also be discussed and improved during additional extrajudicial sessions of Mediation.

Business people, who also have to deal with the severe effects of the present economic crisis, also need Mediation within their relationship with their: 1)Associates (associate partners, sharers), especially when they want to separate and dissolve their companies; 2)Employees, when they have to deal with the dismissal of some of their personnel; 3)Suppliers to whom they have to pay the costs of the delivered merchandises or beneficiaries from whom they have to collect the same sort of debts.

As it follows, I shall refer to three other circumstances in which Mediation is – as I have realized – more than necessary and useful in Romania :

1) Mediation between those Romanians who intend to file actions against Romania at the European Court of Human Rights and the Romanian state itself, since the latter one has lost many cases of this sort in the very last years; in this case Mediation *would shorten (practically prevent) the whole procedure from the European Court of Human Rights, which is known that it lasts months and years of judgment until a Decision, which in many cases is not the best, nor most satisfactory for both parties involved in the process, is made*.

2) Mediation between individuals and former state companies *who*, due to the mistakes that have been made by the state in its hurry to return the confiscated properties to their former owners or their successors (as I above described) – *happen to 'occupy' the same property (piece of land)*, both parties having their own legal arguments for availing themselves of the respective property; in this case it is recommended to *cede each other – after a fair negotiation – the proprietorship over the respective piece of land*, which in most cases, due to the infrastructure that had already been built by the state company on it, proves to be totally useless for the individual who claims it.

3) Commercial Mediation between Romanian state or private companies and economical agents from other countries, Members or non-Members of the EU; in this case, too little has been done thus far, in spite of an obvious necessity of Mediation, especially *due to the legislative differences between the states (and their commercial, administrative and judicial customs), differences, which makes the classical judging of such disputes sometimes impossible*. That's why the principles and criteria of Mediation are similar, if not identical, in most countries where it has been implemented. *The classical procedure should be prevented and a fair decision (which in this case belongs to the parties) should be made.*

By Catalin-Alexandru Grigoras,
Communication & PR Specialist
within the Mediation Bureau of Corina Andrei (Romania)

The Scientific-Methodological Center for Mediation and Law

The Association of International Arbitration is excited to profile a growing leader in the global mediation community. The Scientific-Methodological Center for Mediation and Law in the Russian Federation was founded in 2005 with support from the state, legal community, and public organizations. Since then, the Center has become a leading organization in the promotion and development of mediation in the legal sphere and beyond, facilitating panels with mediation centers around the globe, and strategically partnering with some of the most expert voices in the field.

In the development of the Center's growth, it has come to encompass professionals in a diverse range of specialties. The Center deals with commercial, corporate and intercorporative disputes, but also with family relations and public law, in addition to some less discussed aspects of ADR, like tourism and travel. The broadness of this range has allowed them to get involved in the creation of Russia's legislative framework for mediation. This legislature is going to be adopted next January, potentially priming Russia for ascent to the forefront of ADR in Eastern Europe. If the legislature is successful in its comprehensive undertaking, it will be thanks to the enormous research and energies of the Center.

Before working on national legislation, the Center developed training programs for professional mediators. These courses placed the Center at the vanguard of ADR education within legal academia years before the movement gained legislative momentum. It launched this education campaign for budding professionals in 2006, bringing its own course "Introduction to Mediation," into law schools all over Russia. It also developed government-licensed programs for the training of professional mediators, boasting a comprehensive course offering, including school mediation among more general courses. This was novel four years ago, but now the Center enjoys name recognition within the academic press, having partnered with MCUPK Publishing to produce its specialized series, "Mediation and Law," featuring many works by international authors.

Its message on how mutual understanding provides a "modern environment" for growth, and can aid in successful public-private partnerships has found a growing audience. The Center's network of academics, professionals, and policy advisors has attracted attention in other countries of the former Soviet Union with its magazine, the only of its kind published in Russian. Founded in 2006, the magazine targets what the Center calls "a wide readership," geared towards the professionals influencing international policy, specifically "lawyers, businessmen, politicians, public servants, social workers."

While its accomplishments within Russia and Eastern Europe are formidable, it is the Center's smooth facilitation of global partnerships that has made its research more global than its tremendous resonance with Russian-speaking countries alone might suggest. It calls the U.S.'s Center for Mediation in Law a partner, creating a flow of ideas spanning over 2,500 professionals and three continents. In recent events, like last May's Russian-Dutch project on judges, the Center brought experts to Moscow, making it home to some of the newest scholarship in the field. September's Family Mediation training, for example, boasts the U.K.'s Lisa Parkinson. We look forward to watching the Center as it grows in global influence and excellence in education of dispute resolution.

Contact them:
Center for Mediation and Law
26, building 13-14, 1 Bolshoy Tishinsky pereulok Moscow
123557
Russia
Phone: +7 (495) 253-01-30 (from 10 a.m. till 8 p.m.)
Fax: +7 (495) 253-11-11
E-mail: office@mediacia.com

EUROPEAN ENERGY OMBUDSMEN GROUP

AIA would like to showcase a new and exciting ADR organization, whose members resolve disputes, in last resort in their organizations, in the energy sector in Europe. The European Energy Ombudsmen Group (EEOG) is the first and only independent, not-for-profit body of ombudsmen and mediators from Europe's leading utility companies.
The EEOG was initiated two years ago to promote mediation in the energy sector. It's main objective is to ensure that consumers' rights are efficiently safeguarded by promoting mediation between companies and consumers in the energy sector while fostering good customer service practices, and to contribute to the improvement of relationship with consumers.

Goal
The EEOG encourages the development of good practices in customer service and procedures in regards to claims, as well as the continuous sharing of information relevant to the energy sector and relating to consumer protection on a voluntary basis, whilst respecting commercially sensitive information that is legally protected in compliance with European legislation. The EEOG also promotes the creation of new ombudsmen positions in European energy companies and collaboration to enlarge the ombudsmen community.

Members
The members of the EEOG represent energy companies with a mandate of impartiality. They have the common desire to resolve consumer complaints from a neutral point of view.
Current EEOG members include GDF SUEZ, ENDESA, E.On, Vattenfall, Energy, EDF and all power companies operating in the UK under The Ombudsman Services Ltd.

Why mediation?
The benefits of mediation are numerous and more and more

people are learning first-hand why mediation is so popular and effective. Mediation is particularly well-suited for disputes in the energy sector because of the unique provider-consumer relationship.
Mediation is fast (approximately 2 months) and incredibly flexible. It avoids the need for an appeal before judicial authorities, which in comparison, is a long-winded process entailing numerous burdensome formalities that take their toll on each party involved and may damage the contractual relationship.
It is affordable. In the EEOG, mediation for the client is free and does not require the presence of a legal representative. The cost of mediation for the organization is significantly less than the usual cost of entering into legal proceedings.
Mediation in the energy sector helps to protect the consumer by resolving disputes that are unlikely to be handled by the Courts on account of the disproportion between the claim value and the cost of entering into legal proceedings. Generally-speaking, consumers who participate in the mediation process show high levels of satisfaction with the agreed solution. It is a fair, efficient and free process which helps to avoid unnecessary litigation procedures.
Mediation is particularly appropriate and beneficial in the energy sector because it affects two parties united, in general, by a long-term ongoing supply agreement and adapts to the fact that both parties, subsequent to the mediation process, probably seek to re-establish mutual trust and maintain a harmonious contractual relationship.
AIA looks forward to watching EEOG grow as ADR becomes more and more widely used and appreciated in the energy sector and beyond.

Brussels I Regulation News

AIA would like to bring to your attention new advancements in commercial arbitration that were discussed on the side at our conference on the UNCITRAL Model Rules in June. After the release of the Green Book in the spring of 2009, the Commission of legal affairs of the European Parliament adopted a report on the implementation and the revision of Regulation Brussels I on June 23, 2010. The report says there is no current need to revise the rules because « the question of arbitration is treated adequately by the New York Convention of 1958 and the Geneva Convention of 1961 on international commercial arbitration... ». The Commission of the legal affairs of the European Parliament has acted as proposed in the submission by AIA in relation to the Green Paper released in connection with the review of Regulation 44/2001. To view AIA's submission, please visit http://arbitration-adr.org/activities/profwork/pdf_files/response_on_green_paper_Brussels_I_regulation.pdf

The new report proposes removing the power of member state courts to declare arbitration clauses invalid in such circumstances and would also prevent them from interfering with arbitration tribunals' freedom to determine the scope of their own jurisdiction . The report recommends that, "not only arbitration proceedings, but also judicial procedures ruling on the validity or extent of arbitral competence as a principal issue or as an incidental or preliminary question are excluded from the scope of the Regulation."

An amendment to Brussels I (or, Council Regulation (EC) No 44/2001) which determines which member states courts have jurisdiction to hear civil and commercial cases, is expected next year. The European Commission has appointed a group of experts to examine whether arbitration should be included in the revised scheme.

The Chairman of the AIA Conference, Mr. Edouard Bertrand, has commented on this news. For further reading on this matter, please visit Mr. Bertrand's blog: http://avocats.fr/space/edouard.bertrand

Alassini, et al. v. Telecom Italia, et al.: Mandatory Mediation

The Court of Justice of the European Union has for the first time ruled on the application of the statute (Article 34 of Directive 2002/22/EC) that mandates conciliation of disputes prior to submitting the disputes to a court of law. The issue in *Alassini was w*hether it is possible to bring judicial proceedings without first attempting settlement.

The decision, laid down on 18 March 2010, said the directive must be interpreted to not preclude "legislation of a Member State under which the admissibility before the courts of actions relating to electronic communications services between end-users and providers of those services, concerning the rights conferred by that directive, is conditional upon an attempt to settle the dispute out of court." The Court went on to hold that "the principles of equivalence and effectiveness or the principle of effective judicial protection" do not preclude national legislation that imposes prior implementation of an out-of-court settlement procedure either, (provided that the settlement procedure does not result in a binding decision, cause substantial delay or give rise to costs).

See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0317:EN:HTML