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AIA Upcoming Events

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

The Introduction of Class Actions in Belgium

The program will include lectures regarding the political, legal and ethical context of class actions, reactions from the market and the interferences with alternative forms of dispute resolution.

Location: Palace of Justice, Court of Appeal of Brussels,
Salle des Audiences Solennelles, Plechtige Zittingszaal (Room 1.35),
Place Poelaert 1 Poelaertplein,
1000 Brussels, Belgium

Date: Friday, 25 March 2011

for further information please visit

www.europeanclassactions.eu

or contact

Philippe Billiet at events@arbitration-adr.org

and

Dispute Resolution in the Aviation Sector

Location: Brussels

Date: 10 June, 2011

For further information on conferences organized by AIA please visit our website

www.arbitration-adr.org

**AIA presents
the European Mediation Training for Practitioners of
Justice 2011**



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

Is an arbitration agreement silent on class arbitration in favor of large companies? The US practice.

by Marina D. Bousi

Class actions have frequently been characterized as a mechanism particularly preferred by consumers rather than by large corporations, such as bank institutions, health insurance, airline and telecommunications companies, etc; especially, when the latter are on the defendants' side. One of the basic rationales that justify the above mentioned premise is that corporations prefer the opponent party to be an individual claiming for a small amount of money, whether it is 10 or 100 USD rather than a group of plaintiffs who have suffered similar injuries; thereby, claiming for an enormous amount, that can stretch up to millions of USD.

In common parlance, consumers adopt class actions as a means of resolving disputes either by litigation or arbitration. However, litigation has given more and more space to arbitration as a more effective means of dispute resolution and the same has brought a shift from class action litigation to class arbitration. The majority of contracts entail a standard arbitration clause that binds parties to resolve their dispute through arbitration. Therefore it is frequent that, when a claim arises as a result of a common injury and affects consumers on large scale, they prefer to adopt class arbitration as an efficient means of resolution.

Arbitration can be initiated only upon mutual agreement between the disputing parties, as Prof. van den Berg says "no arbitration is possible without its very basis, the arbitration agreement". The same principle is applied to class arbitration. The consent should clearly express parties' intention to submit the dispute to arbitration. Therefore, an arbitration agreement that explicitly provides for class arbitration, discards any doubts on interpretation. However, problems arise when the arbitration agreement is silent over the choice of class action.

Two landmark decisions of the U.S. Supreme Court stand as a turning point for class arbitration in the United States of America. The first one is the *Bazze* case (*Green Tree Fin. Corp. v. Bazze*, No. 02-634, decision of June 23, 2003) and the second and most recent one of the U.S. Supreme Court regarding class actions: the *Stolt-Nielsen* case (*Stolt-Nielsen S.A., et al v. AnimalFeeds International Corp*, No. 08-1198, decision of April 27, 2010).

The *Bazze* Judgment

In the 2003 *Bazze* decision, the US Supreme Court reviewed a decision of the Supreme Court of South Carolina. The Supreme Court of South Carolina had to examine "whether class-wide arbitration is permissible, when the arbitration agreement between the parties is silent regarding class actions" (*Bazze v. Green Tree Fin. Corp.*, 596 S.E.2d at 351). The arbitration agreement read as follows: "[claims] relating to this contract . . . will be resolved by binding arbitration by an arbitrator selected by [us] with the consent of [you]", without any specific mention of class arbitration. The Supreme Court of South Carolina held that such arbitration agreement was ambiguous and therefore interpreted its wording as permitting class arbitration. According to the Court's reasoning, which stands at paragraph 360 of the decision: 'if [we] enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agree-

ment is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement.'

The defendant appealed to US Supreme Court raising the question, whether an arbitration clause under the Federal Arbitration Act (being the law governing the arbitration agreement) that didn't provide clearly for class arbitration could be interpreted as an acceptance for class arbitration. Majority agreed that an arbitration agreement provides broad powers to the arbitral tribunal and left the clauses' interpretation on arbitrators (*Green Tree Fin. Corp. v. Bazze*, 539 U.S. at 451).

According to the Court's decision, '...Under the terms of the parties' contracts, the question -whether the agreement forbids class arbitration-is for arbitrator to decide. The parties agreed to submit to the arbitrator "all disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract." . . . And the dispute about what the arbitration contract in each case means . . . is a dispute "relating to this contract" and the "resulting relationships". Hence the parties seem to have agreed that the arbitrator, not a judge, would answer the relevant question (*Id.* at 451-52). The United States Supreme Court remanded the case to the arbitrator to decide the arbitration clause's meaning (*Id.* at 454), i.e. whether an arbitration clause that was silent on the issue of class arbitration availability did or did not allow class-wide arbitration as a means of dispute resolution.

The *Stolt-Nielsen* Judgment

Another important decision that turned out to be a milestone in the class action jurisprudence of the United States was the *Stolt-Nielsen* case. The case reached the U.S. Supreme Court concerning the issue of availability of class arbitration. The Supreme Court reversed and remanded a decision of the 2nd Circuit of Appeals of the United States. The latter decision permitted arbitrators to certify that a certain group of people constituted a class under the Federal Arbitration Act, where the arbitration clause was silent on the issue of class arbitration.

In the procedures before reaching the Supreme Court, the defending party *AnimalFeeds* argued that an arbitration clause which does not expressly mention class arbitration as a means of resolution should be read as allowing it. The party based its argumentation on the precedent *Bazze* decision. The appellant party *Stolt-Nielsen* argued that class arbitration should be precluded, as the arbitration agreement was silent on it.

The U.S. Supreme Court held by a majority 5-3 that class arbitration was inconsistent with the FAA (in particular with its articles 9 U.S.C. §§ 1-16, which read as follows: '[A] party may not be compelled . . . to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so'). It explained that '... the FAA imposes certain rules of fundamental importance, including the basic concept that arbitration is a matter of consent, not coercion (*Stolt-Nielsen S.A., et al v. AnimalFeeds International Corp*, No. 08-1198, (2010), at 17), 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 arbitra-



tion will be concluded.' (See Gary Born, 'International Commercial Arbitration: commentary and materials', Kluwer Law International and Transnational Publishers, 2nd edition, at 688). Accordingly, an arbitration agreement which is silent on class arbitration mechanism should not be interpreted as allowing arbitration; or in other words, silence does not imply consent in the case of class arbitration (*Stolt-Nielsen S.A., et al v. AnimalFeeds International Corp*, No. 08-1198, (2010), at 23).

Conclusion

Taking into consideration the above mentioned decisions of the U.S. Supreme Court, one should connect them with the practice followed by health insurance companies, bank institutions, telecommunications companies and other large corporations, as the latter try to limit their liability against customers. It is an interesting fact that after the *Bazzele* decision, there was an increase in the class action waivers (Paul W. Taylor, 'The Future of Class Action Arbitration' (2003)). As frequently consumer contracts contain standard arbitration clauses, such typical practice has started being the case concerning class arbitration waiver clauses, i.e. clauses preventing consumers from initiating the class action mechanism within arbitration (*Daniel R. Higginbotham, 'Buyer Beware: why the class arbitration waiver clause presents a gloomy future for consumers'*, *Duke Law Journal*, Vol. 58:103, at 103, 2008). Of significant importance is also that courts seem to share the validity of class arbitration waiver clauses, appearing to leave consumers without substantial relief; especially when consumers are claiming amounts of low value against powerful companies. (With the exception of the courts of California, which regularly characterize such clauses as unenforceable (*Id.* at 115, citation 88)).

This practice followed by both corporations through adding such clauses in their consumer contracts and by courts through considering them as entirely enforceable against consumers (*Id.* at 105) has justifiably been criticized by many commentators, including the author of the present article. The criticism focuses primarily on the fact that consumers are left without an efficient means of dispute resolution against unfair and illegal activities of large companies (*Id.* at 112). Those exercising criticism propose an amendment in the legal regime posing a ban on the use of class waiver clauses as a solution (*Id.* at 116).

Consumers acting individually are often considered more fragile towards companies. However, acting as members of a certified class, they have the possibility to become more powerful to defend themselves before companies as a whole, by claiming for the same injury suffered and invoking the same rights and interests. The principles of fair and equitable justice should always be taken into account. In the *AT&T Mobility LLC v. Concepcion* case (*AT&T Mobility LLC v. Vincent Concepcion, et ux.*, No. 09-893, arguments heard on 9th November, 2010), the disputing parties presented their oral arguments before the U.S. Supreme Court. In this case, the Court will determine whether a class action waiver clause is conscionable or not. The Court's decision seems to be of great importance in the US case law. If it permits class waivers as conscionable, it will place consumer arbitrations at risk (Pamela A. MacMean; *Consumer arbitrations at risk*, January 2011); conversely, if such clauses are found unconscionable, companies may start being mo-

re reluctant to adopting them in their consumer contracts. The U.S. Supreme Court is expected to release its ruling in early 2011. According to the argument posed by the consumers' advocate, Deepak Gupta, representing the Conceptions, 'until then, the question still remains unanswered whether contract provisions from large corporations will prevail over consumer rights'.

THE ICSID CASELOAD

ICSID has made available statistics about its caseload, historically and for 2010. The document includes: i) the number of cases registered under the ICSID Convention and Additional Facility Rules; ii) the basis of consent invoked to establish ICSID jurisdiction in registered cases; iii) the geographic distribution of all ICSID cases by State party involved; iv) the distribution of all ICSID cases by economic sector; and v) the nationality and geographic region of arbitrators, conciliators and ad hoc committee members appointed in ICSID cases, among other important aspects. Next, some of the most important numbers will be considered.

Cases Registered by ICSID. Initially, the statistics refer to the number of cases registered from 1972 to 2010. This amounts for a total of 331 cases. The boost of investment arbitration is quite significant if we analyze the data of the last three decades. In the 1980s, the number of cases was 17 in total. This meant an average of 1 to 2 cases per year. In the 1990s, the number of cases was 43 in total. This is an average of 4 to 5 cases per year and an increase of 252% in comparison with the previous decade. In the 2000s, the number of cases went up to 236. This was an average of 23 to 24 cases per year and an increase of 548% compared with the 1990s. In the year 2010, the number of cases increased in 8% compared with the 2000s, with a total of 26.

Basis of Consent Invoked to Establish ICSID Jurisdiction. The main five legal sources to invoke ICSID jurisdiction in the different cases were Bilateral Investment Treaties (BITs), Investment Contracts between the Investor and the Host-State, Investment Law of the Host-State, Energy Charter Treaty (ECT) and North America Free Trade Agreement (NAFTA). Historically, BITs represented 62%, Investment Contracts 22%, Investment Law 6%, ECT 4% and NAFTA 4%. In the year 2010, BITs represented 62%, Investment Law of the Host-State 17%, Investment Contracts 14%, ECT 3%. It is worth of note that Dominican Republic-United States-Central American Free Trade Agreement replaced NAFTA on the list with a 4%.

Geographic Distribution of ICSID Cases by State Party Involved. In what part of the world are the States involved in ICSID's disputes? Historically, we found 6 regions which account for the 93% of the disputes. The regions were classified according to the World Bank's regional system. In order, we found South America (30%), Eastern Europe and Central Asia (22%), Sub-Saharan Africa (17%), Middle East and North Africa (9%), South and East Asia (8%) and Central America and the Caribbean (8%). However, the numbers changed in the last year and we found 5 regions which account for the 100% of the disputes. In fact for the year 2010, South America kept the lead with 31%, followed by Eastern Europe and Central Asia with 27% and Sub-Saharan Africa with 27% as well. Next, South and East Asia and the Pacific with 8% and,

in last place, Central America and the Caribbean with 7%.

Distribution of ICSID Cases by Economic Sector. Which are the resources and economic activities involved in investment arbitration? The statistics provide a clear picture about the different industries which have triggered the use of ICSID by investors. The classification was based on the World Bank's sector codes. The main industries were oil, gas and mining with a 25%, electric power and other energy with 14%, transportation with 11%, water, sanitation and flood protection, finance, and construction with 7% each. For the year 2010, the top industries remained leaders but there were changes in the lower figures. The first places were for oil, gas and mining with 27%, electric power and other energy with 15%, agriculture, fishing and forestry with 11%, transportation, finance, and services and trade with 8% each. The changes were in two industries that appeared with higher numbers when compared historically. They were agriculture and services and trade.

Distribution of Appointments by Geographic Region and Nationality. What about the nationality of the arbitrators, conciliators and ad hoc committee members? The statistics considered the number of appointments made in total since 1972 until December 2010 and the data was organized by regions according to the World Bank's classification. Historically, the appointments have included people from Western Europe with a total of 48%, North America with 23%, South America with 9%, South and East Asia with 8% and Middle East and North Africa with 6%. In the case of the Western Europe, the five more favored nationalities were French (123 appointments), British (101 appointments), Swiss (75 appointments), Spanish (50 appointments) and Germans (36 appointments). However, if only nationality is considered instead of a geographic region, US nationals come to the top of the list with a total of 133 appointments.

For the year 2010, the percentages changed and South America went from third to fifth place. First, it was Western Europe with 49%, followed by North America with 26%. Next, it was South and East Asia with 14%, Middle East and North Africa with 5% and South America with 3%. On the list of nationalities of the Western European region, there was a change in the third place. Now, the Germans appear ahead of the Swiss and Spanish, respectively.

Trends. The cases registered by ICSID have increased in number if the average per decade is considered. This will continue to be the case if BITs and Investment Contracts are the main legal instruments to regulate and protect foreign investment and there are resources which represent the sustainability and expansion of countries and industries. Additionally, Investment Law of the Host-State became the second most important basis of consent invoked to establish ICSID jurisdiction.

While South America has been historically the region with more State Parties involved in ICSID cases, the year 2010 showed a trend that put Eastern Europe and Central Asia and Sub-Saharan Africa close in second place. This could mean that the map of investment disputes has now three different axes with their own dynamic and particularities. This phenomenon should be properly understood.

Finally, the nationality of arbitrators, conciliators and ad hoc committee members seems to be concentrating again in

Western Europe and North America. The only exception was South and East Asia which increased its numbers when compared historically.

The Statistics are available here:

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English11>

Mediation in civil and commercial matters: an overview of the new Greek Law 3898/2010

by Niki Bouras

The 16th of December 2010, the Greek Parliament voted on a new piece of legislation that enables parties to submit their dispute to mediation at any stage and in effect comply with the provisions of the EU Mediation Directive 2008/52/EC for various civil and commercial law matters.

Whereas the Directive concerns cross-border disputes, the Greek mediation law welcomes the invitation foreseen in the preamble (8) of the Directive and applies its provisions to internal mediation processes as well. It's the first time in Greece that a formal recognition of the value of mediation in the access to justice is taking place. It's a huge step for establishing mediation in Greece.

But how did Greece choose to implement the EU Directive? Are there any substantial or particular differences, if compared with the EU Directive?

Whereas the definition of "mediation" in the Greek Law is almost a translation of the definition given in the Directive, the definition of a "mediator" does differ. Whereas the Directive in its art 3(b) defines a "mediator" as "*any third person [...] regardless of profession*", the Greek mediation law adds one more condition: "*the mediator must be a lawyer (and accredited mediator according to art. 7 of the Greek law)*". There is though one exception to this main rule. The exception refers to mediation in cross-border disputes and provides that the parties are free to choose an accredited mediator, who is not a lawyer of profession. This means that if the dispute is an internal matter, in the sense that only Greek parties are involved, the mediator must be a lawyer. From the moment the dispute has a cross-border character; the mediator can be a non-lawyer. It is worth mentioning that the definition of a cross-border dispute is the same as in the Directive.

The law also provides that the parties have to be represented by or with their lawyers in any mediation process. I believe it is fair to indicate that the Bar Associations found it a little easier to adjust to and accept the new institution of "mediation" due to those provisions.

Further, another distinctive parameter relates to the mediator's compensation, which is on an hourly-rate basis and pro-rated at a fee cap of 24 hours total, in order to ensure mediation remains a viable option for resolving disputes, that

does not burden the parties financially or in any other way and offers them the option of expedited and low-cost resolution of cross-border disputes. There is though one exception to the main rule of hourly-based compensation. That is, if the parties decide otherwise. Only time will show if this exception stays as is, or becomes the rule.

As to the enforceability of the written agreement resulting from mediation, the EU Directive in Art 6 states that the Member States "shall ensure that it is possible for the parties, or for one of them with the *explicit consent of the others*" to request the enforceability of the agreement. Undoubtedly, this is one of the key points holding the law together. If no enforceability is ensured, mediation will never become an attractive alternative to resolve disputes.

The Greek law states in its Art 9(2) that the mediator must draft a Minute. If one of the parties so wishes, the original document must be submitted to the Single-Member Court of First Instance, in the territorial area of which the mediation took place. If just one party wants to submit the Minute, (s)he *doesn't need the explicit consent of the other party* (ies). But can do so on his/her own, paying a fee in favor of public. Settlement agreements submitted to the court become enforceable as equivalent to a judicial court order.

The confidentiality and the special provisions that "stop the clock" in relation to the applicable statute of limitations, when submitting to a mediation process are secured in the new law and are of course important aspects to ensure that mediation can become a popular choice for resolving disputes out-of-court.

Art 5-7 in the law are concerning the training bodies, the certifying body and the accreditation system. It allows for the establishment of local mediation providers (which would be private, non-profit corporations jointly formed by a local Bar Association and a local Chamber of Commerce) and are accredited by a Mediation Certification Committee, under the auspices of the Ministry of Justice. Mediators are certified following examinations before the relevant Committee. But, how exactly the bodies are formed and which procedures are needed in order for accreditation obtained in another EU country, are yet to be decided, written and published in the Presidential Decree to come. One could fear that this is not the main priority of the competent Ministry; on the other hand, one can hope that in a country where the judicial system is so overloaded with cases and one is lucky if a case given today is scheduled to the year 2013, mediation has already been delayed enough.

The 16th of December was a great day in the history of mediation in Greece. But, as soon as the Presidential Decrees are being formed and published – and the law can actually be enforced – will be an even greater day. I will keep you all informed...

Reform of French Arbitration Law

by Edouard BERTRAND

By a decree dated January 13, 2011 the French Government has reformed its French Arbitration Law. For the most part, the new rules will take effect on May 1st, 2011.

The new arbitration law is not based on, or an adoption of the UNCITRAL Model law. It is built upon the framework and the concepts of the law which had been in place since the reform of 1981. It incorporates developments and innovations adopted by the jurisprudence of French courts or sug-

gested by modern thinkers.

Its purpose is to modernize and clarify the functioning of arbitration, so as to make it more effective.

It maintains the distinction between domestic and international arbitration, the latter being defined, as was the case before the reform, as arbitration involving the interests of international commerce. International arbitrations conducted in France are therefore subject to different rules than domestic arbitrations.

The section on international arbitration deals with the conduct of international arbitrations in France and the enforcement and recognition in France of international arbitral awards rendered in France or abroad.

I Regulation of international arbitrations in France

The mandatory rules applying to international arbitrations are extremely limited: The arbitral tribunal must guarantee the equality between the parties and due process (« le principe de la contradiction »)

- (i) The arbitral tribunal must settle the dispute in conformity with rules of law, as chosen by the parties or otherwise determined to be applicable by the arbitral tribunal, save that the arbitral tribunal may act as amiable compositeur, if so appointed by the parties.

Except for these two mandatory rules, international arbitrations benefit from a very liberal regime.

Arbitration agreements are not subject to form requirements. The parties can freely appoint the arbitrators or establish the rules for the appointment of the arbitral tribunal, directly or by reference to rules of arbitral institutions or to procedural rules. They can freely opt for an even number of arbitrators.

Arbitration agreement can similarly establish the rules of procedure to be followed by the arbitral tribunal. In the absence of contractual stipulations, the arbitral tribunal determines the applicable procedural rules directly or by reference to rules of arbitral institutions or to other procedural rules.

Except if the parties otherwise agree, the rules set out in the decree apply. However, it can be realistically expected that parties will not often derogate from these rules. In practice, they should be therefore considered as binding most of the time. Some of the most important rules are the following:

a/ In relation to the arbitration agreement

- (i) The arbitration agreement is separable from the underlying agreement. Thus, if the latter is of no effect, the arbitration agreement remains unaffected;
- (ii) If a claim is brought before a French court in respect of a matter covered by an arbitration agreement, such court must decline its jurisdiction, unless the arbitration tribunal is not formed and if the arbitration agreement is manifestly null or inapplicable;
- (iii) Until the arbitration tribunal is formed, parties may request



provisional measures from a French court.

NB : In my view, although the decree does not expressly say so, these rules apply equally, if the arbitral proceedings are conducted or are to be conducted outside France.

b/ In relation to the formation of the arbitral tribunal

- (i) In case a difficulty arises in connection with the appointment of the arbitral tribunal, the President of the Civil Court of Paris in his capacity of supporting judge (« **juge d'appui** ») has jurisdiction to make the appointment or otherwise resolve the difficulty, unless an appointing authority is chosen by the parties;
- (ii) The supporting judge may not refuse to make an appointment, unless the arbitration agreement is manifestly void or inapplicable;
- (iii) If there are more than two parties and no agreement is reached regarding the appointment of the arbitrators, the appointing authority or the supporting judge must appoint the arbitrators (this is a codification of the Dutco jurisprudence);
- (iv) The decision of the supporting judge cannot be appealed, unless the decision is one refusing to make an appointment on the ground that the arbitration agreement is manifestly invalid or inapplicable;
- (v) Before accepting their appointment, arbitrators must disclose circumstances which may affect their independence or impartiality. They must also do so without delay, if they learn of such circumstances after their appointment;
- (vi) The revocation of an arbitrator can be made only by the unanimous consent of the parties, or, failing such consent, by the appointing authority or the supporting judge as the case may be.

c/ In relation to the arbitral proceedings

- (i) The duration of arbitral proceedings is not subject to mandatory time limits;
- (ii) Parties and the arbitrators must act with celerity and loyalty;
- (iii) There is no obligation of confidentiality (the reverse is true in domestic arbitration);
- (iv) The arbitral tribunal has exclusive jurisdiction to rule on its own jurisdiction. This is the codification of the negative effect of the *compétence-compétence* principle;
- (v) A party which fails without good reason to timely complain of an irregularity before the arbitral tribunal, is deemed to have waived its right to avail itself of such irregularity (this principle would also apply to arbitrations conducted outside France);
- (vi) The arbitral tribunal is empowered to order any provisional measure it deems opportune and may apply penalties to parties which do not comply with such measures, except provisional attachments or provisional liens, for which State courts have exclusive jurisdiction;
- (vii) A party may request the supporting judge to order a third party to produce any document in its possession, provided it has been invited to do so

by the arbitral tribunal. This is an important innovation of the decree.

d/ In relation to the arbitral award

- (i) The deliberations of the arbitral tribunal are secret;
- (ii) The award must succinctly expose the arguments of the parties and must state the reasons for the decision;
- (iii) The award is *res judicata*;
- (iv) It may be declared provisionally enforceable.

II Review and enforcement of awards

a/ Awards rendered in France

1/ They can be appealed before the court of appeal.

The grounds for appeal are limitatively the following:

- ⇒ the arbitral tribunal mistakenly retained or declined its jurisdiction. This concept broadly covers the arbitrability of the dispute, the existence, scope and validity of the arbitration agreement, the determination of the parties as to which the agreement is effective;
- ⇒ the arbitral tribunal was irregularly composed;
- ⇒ the arbitral tribunal did not rule within the scope of its remit;
- ⇒ due process has not been respected;
- ⇒ the recognition or enforcement of the arbitral award would be contrary to international public policy.

2/ The parties may waive the right to appeal an arbitral award.

This is an innovation introduced by the new rules. It applies even if one or all the parties have their domicile in France.

3/ If a party wishes to enforce in France an award rendered in France, it can do so only after obtaining an *exequatur* order from the President of the territorially competent civil court.

The *exequatur* order is necessary even if the right to appeal the award has been waived. It can be appealed only on the grounds available for an appeal against the award.

4/ If a party appeals an award before the other party obtains an *exequatur* order, such other party is entitled to seek an *exequatur* order directly from the President of the court of appeal and thus benefit from the automatic enforceability effect attached to the *exequatur* order (see point c. 2/ below).

5/ A party may seek the revision of an award by the arbitral tribunal, in case of fraud, production of falsified evidence or retention of decisive evidence by another party.

b/ Awards rendered outside France

Like awards rendered in France, an *exequatur* order is required to make them enforceable in France.

Exequatur orders may be appealed only on the grounds which are available for the appeal against an award rendered in France.

In my view, the Hilmarton doctrine which allows French courts to recognize and enforce awards which have been annulled abroad is still valid, because the annulment of an award in the country where the arbitration has taken place is not listed in the grounds permitted for resisting the enforcement of foreign awards. Given that the Hilmarton doctrine was recently reaffirmed in the Putrabali case, one would assume that if it had been the intention of the Government to abandon this doctrine, it would have made this clear in the decree.

c/ Common rules

1/ An application for an exequatur order may be dismissed only on the ground that the award is manifestly contrary to the international public policy. An order dismissing an application for exequatur can be appealed.

2/ An award becomes automatically enforceable upon the issuance of an exequatur order, notwithstanding any appeal. However, the President of the court of appeal has the right to stop the execution of the award or to subject it to conditions, if pursuing the enforcement would gravely affect the rights of one of the parties.

This is an innovation of the new rules. Its purpose is to enhance the effectiveness of arbitral awards.

Conclusion

The new arbitration regime is clearer and more extensive in terms of issues covered than the regime it has replaced. Compared to other reforms recently enacted, it comes out as an arbitration-friendly, competitive and state of the art regime.

However, it is not meant to be comprehensive. There are still a number of issues which are left for courts to decide. This will give flexibility and allow the arbitration regime to evolve in accordance with the needs of the users of international arbitration.

THE USE OF THE INTERNET IN ADR PROCEDURES

by May-Britt Kollenhof-Bruning

Professor Richard Susskind in his book titled "The End of Lawyers?" Identifies ten different technologies which will fundamentally change the face of legal services around the world one of them is Online Dispute Resolution (ODR). It is quite meaningful for ODR that its significance is recognized by this particular author, who is widely recognized as a visionary in legal world.

At the end of the nineties eBay.com began a pilot project of resolving disputes using online mediation. Today eBay has resolved million of disputes with the help of internet. This form of negotiation and dispute resolution via the internet is called Online Dispute Resolution. Apart from E-commerce, ODR is also increasingly used in traditional legal ADR-

procedures to resolve disputes which involve personal interaction. In this note I will discuss a number of trends that play a vital role in the growth ODR and examine various possibilities of using ODR in conflict management systems with the help of case studies.

Objective

We can observe the common usage of alternate dispute resolution (ADR) and on-line dispute (ODR) resolution for resolving disputes in today's world. Some of a few reasons for these common practices are globalization and digitalization. The growth of technology has changed the nature and the quality of our social interactions. The growth of internet has made the world smaller and as Coupland predicted in 1991, the current 'Einstein generation' is shifting its social face-to-face contacts increasingly to the realm of a virtual world. Resolving conflicts with the help of internet is one of the aspects of this current and future reality. Some other reasons for the growth of ODR are increasing litigiousness under legal system of nations around the world and inaccessibility of legal resources for the parties in dispute. Inaccessibility for the parties in dispute is due to the high costs involved in legal representation, the user's lack of information (the so-called information gap) and a lack of confidence.

Therefore, there is a need for more accessible, effective and fair alternatives to deal with complaints and traditional (legal) procedures and these needs can be gratified by the usage of ODR in legal landscape.

In the following case studies I will explain various areas of application and examine the methods to substitute or supplement ODR with traditional legal procedures or alternative dispute resolution proceedings.

Case Study 1: Computer-assisted negotiation in B-t-C complaints

Businesses that deal with large volumes of complaints use a form of ODR technology that conducts online negotiations. The following example of eBay.com is regarding the common problems surfacing in E-commerce e.g., a buyer has ordered and paid for a product but has not received it or the product is significantly different than described.

The procedure contains the following steps:

Step 1: The buyer registers a complaint at the webpage. Before the complaint is considered, the system provides the complainant with a self-help 'education' tool to ensure the understanding of the mechanism and gives a sense of legitimacy to his/her claim;

Step 2: If the complainant decides to proceed with the claim, the system forwards the reported problem to the seller. The system gives both parties the opportunity to share their view on the disputed issues and to suggest possible solutions to the problem;

Step 3: Parties try to resolve the dispute in direct negotiation

in the secured online discussion-room and attempt to reach a mutually satisfactory solution;

Step 4: At any time during negotiations either party may request the help of a mediator or a mediator is also automatically assigned in cases where the seller does not respond within the pre-defined time-frame

Step 5: If the parties do not reach an agreement they can opt for other venues such as submitting the dispute for binding adjudication.

Results: According to E-Bay and Juripax's figures the vast majority (80-85%) of issues are resolved by the system or in direct negotiations. It appears that the "structured" process as well as the availability of "redress" options may be the determining and trust-engendering factors for parties to make an effort to resolve issues amicably.

Illustration

A buyer ordered and paid for a product but has not received it. The participants are asked to suggest possible solutions. They can choose from a list of solutions (the most common ones related to this problem) or make their own suggestions.



Case Study 2: Online preparation of labour cases

Numerous mediation and arbitration service providers use a hybrid form of ODR in labour disputes, applying online intake to prepare effectively for face-to-face mediation. ODR is used here to support traditional offline procedures.

The procedure contains the following steps:

Step 1: The case manager selects suitable cases and accordingly contact the parties (e.g. employer and employee) involved in the dispute. He/she explains the procedure and asks for the key (contact) information required to set up online communication.

Step 2: The case manager sets up a digital file and the system invites the participants via e-mail to take part in the procedure. Participants are asked to register and fill out an intake questionnaire. The content of the online intake is based on the best legal practices prevalent in those kinds of disputes. This means that the practical experience (known methods and information) and the relevant legal context are integrated concisely into the system.

Step 3: Once both parties fill out their respective online

forms, a mediator is assigned to review the submission prior to the first mediation session with parties.

Results: Compared to the average length of a face-to-face procedure in labour disputes (8-10 hour meetings) online preparation of labour cases saves 30% to 40% time and expenses. One of the most interesting findings of above mentioned online programme is that it reduces the perception of bias and power imbalances and enables participants to take decisions on their own.

Illustration

Integrating mediation experience and techniques encourages a consensus-based (and less legal-based) dialogue. In the following example, we ask each party to rate the overall quality of the working relationship in an employment dispute. Assuming that the employee gives a score of three, he/she is asked to substantiate this score (and explain why the score is NOT lower). As such we encourage to reflect on the positive aspects of the relationship.



Case Study 3: Fully online mediation in divorce cases

After a successful pilot in 2009, the Dutch Legal Aid Board included the online mediation in family law cases in their legal-aid services offerings. This enables the mediators to manage the divorce process confidentially and lets the couples control their personal issues. It constitutes an effective platform to resolve issues ranging from property, assets and debts to children access/custody or spouse support, expeditiously and inexpensively.

ODR is used to facilitate online negotiations and conduct mediations. There are several benefits of using ODR for divorce procedure such as, the online intake, the mediation conducted via a secured discussion forum (including a collaborative agreement-creation tool), a digital file and an integrated client feedback survey.

The primary communication method applied is delayed and text-based. The participants take part in the delayed negotiations at different times which minimises the chances for immediate reaction as dialogue tends to be more reflective and less emotional. Disputing parties can also explore the commonly available communication methods such as Skype, chat or web-conferencing, depending on the specific stage and circumstances of their disputes.

Results: Settlement rates range between 75-80% and more than 80% of the users expressed their approval to use ODR for future disputes.

Conclusion

The technology of ODR has proved to be effective in resolving disputes expeditiously. There are numerous disputes that can be effectively resolved with the help of internet. The integration of legal practices and internet can result in the optimization and reproducibility of existing procedures for the providers (70% to 80% are routine cases, that are not outside the norm). This allows providers to optimize their service provision and improve their competitiveness. In the long run users would benefit as ODR provides easier and cheaper access to justice.

ODR may not provide a human face, but it does offer many other opportunities to give users a voice and a sense of justice.

For more detailed information please visit www.juripax.com

Book review - Alternative Dispute Resolution in Practice

The book titled *Alternative Dispute Resolution in Practice* was published in January, 2011 under the auspices of the Insurance Institute of London. Written by a notable team of experts in the field of ADR and insurance, it examines several types of ADR as an efficient means of resolving insurance - and reinsurance-related disputes. The book is a practical, reliable and up-to-date guide (not a legal text), particularly useful for professionals with experience in the insurance industry, but for entrants to the profession as well. Being produced under the auspices of the Insurance Institute of London, it is primarily tailored to serve the insurance market world, taking as a starting point the London experience as well as the law and procedure of England and Wales.

The book comprises nine chapters, each of them drafted as a stand-alone section. In the first four, a range of ADR concepts is introduced and presented under the legal framework, within which these processes operate. The following Chapters are designed to help professionals and organizations from the insurance and reinsurance sectors to use these ADR concepts, in order to resolve their disputes amicably, so that insurers and insured are able to maintain good business relations in the long-run. Given the fact that the insurance and reinsurance industries are the major users of litigation, arbitration and ADR worldwide, the book is intended to provide all practical information to assist their users in resolving disputes efficiently, economically and constructively.

It is evident that ADR processes have become a mains-

stream dispute resolution mechanism in many jurisdictions around the world. The book explores the reasons behind it, beginning with a brief history, development and spread of ADR in the United Kingdom, the United States and the European Union. Particularly for the case of the UK, the book considers in details the impact of the Woolf Reforms named after Lord Woolf, which placed ADR at the centre of dispute resolution process in England and Wales. Summaries of all significant cases in the English jurisprudence are provided.

There is a variety of means, via which insurance and reinsurance disputes can be solved; for example litigation, mediation, arbitration, expert determination, etc. However, light is shed in particular on the mediation and arbitration process and their importance in the relevant sector. Concerning the arbitration mechanism, the basic UK legal framework is examined, with emphasis on the Arbitration Act of 1996 and the ARIAS rules of procedure and is further combined with the US arbitration practice. As for the mediation practice followed in resolving insurance and reinsurance disputes, the contributors of the book examine the role of claims handlers as participants and negotiators in the process, providing at the same time the most recent publically available statistics on the number and success rate of mediations taking place in the UK (according to the 2010 audit).

The book proceeds to refine an organization's approach towards and its use of ADR, which can have an impact on its ability to manage conflicts effectively, economically and compatible to its profile and culture. Insight is provided into how a claims and a legal department of an organization can efficiently collaborate to ensure the systematic and consistent usage of ADR, with the objective to save legal and other claims handling costs. The conclusion is that small changes to the way, in which the claims department operates, have the potential to achieve material enhancements in the handling and economics of contentious claims.

The readers of this handbook are provided with various ADR/mediation clauses in use for commercial and (re) insurance issues. Since parties should be very careful, in order to select the most appropriate clause for their contract, guidance is given on how an ADR clause may be drafted effectively. Nevertheless, the importance that parties give to the dispute resolution provisions is frequently low, the latter being considered as minor terms and conditions appearing at the end of the contracts or sometimes not appearing at all. The contributors of this book suggest how ADR procedures have the potential to assist the parties involved in a dispute to resolve it amicably and maintain a long-lasting business relationship, leading to a "win-win" outcome.

Further information about this book is available at the Institute's website: <http://www.iilondon.co.uk/a-studies.asp>, under the reference number 263. Copies of the book can be ordered from this website.

AIA recommends to attend

On February 10, 2011 the International Chamber of Commerce will host at its headquarters in Paris the 2nd Annual International Mediation Conference titled "Win-Win Strategies: Tools for corporate dispute management". Notable speakers from leading international companies and law firms will discuss the economic benefits of developing in-house dispute management systems for business-to-business conflicts. The Conference's objective is to reveal the business value of implementing such systems and clarify the importance of negotiating dispute resolution clauses, when companies draft their contracts. The participants will have the opportunity to conduct clause drafting exercises for international contracts within small working groups. The Conference will highlight the merits of mediation and various other amicable dispute resolution techniques to avoid and de-escalate such disputes. Attendees will be presented a case study and introduced to tools for early case assessment. Panelists will close the Conference with an outlook on the future of dispute resolution in the following ten years.

Further information about the Conference program and registration forms can be found at the ICC's website: <http://www.iccwbo.org/events/registrationrol.aspx?CodeICMS=S1127>.

The University of Dundee's Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP) is a centre of excellence for the study of law, policy, economics, management, dispute resolution and leadership for the international energy and natural resource sectors. CEPMLP organises a range of professional training seminars, delivered by highly experienced sector specialists and industry leaders. CEPMLP will host 'Oil, Gas and Minerals: International Arbitration and Advocacy Skills' in Singapore between 18th and 22nd April 2011. The seminar focuses on arbitration for the oil and gas industry with perspectives from legal experts, trial and in-house counsels, international arbitrators and academics. This five day course is designed for professionals interested in commercial and investment arbitrations relating to the natural resource industry. Discounts are available for early and multiple bookings. For further details and to register please email c.seminars@dundee.ac.uk.

Please visit www.cepmlp.org/online for further information on all of our arbitration courses.

CALL FOR PAPERS:

Upcoming Conferences of AIA on Class Actions, Dispute Resolution in the Aviation Sector and Dispute Resolution in the Maritime Sector

Alongside with its upcoming conferences, AIA has planned to publish three books throughout the year 2011. Therefore the association is hereby sending out a call for papers regarding class actions, dispute resolution in the aviation sector and dispute resolution in the maritime sector. The expected papers shall be 10 pages long at minimum, written in English language, and shall cover one of the following topics:

Class actions

(Deadline for submission: 1st March 2011)

- ⇒ Papers on various national class action systems;
- ⇒ Papers on interrelation with arbitration;
- ⇒ Papers on interrelation with mediation;
- ⇒ Papers with critical comments on class action systems.

Dispute resolution in the aviation sector

(Deadline for submission: 1st March 2011)

- ⇒ Papers on dispute resolution in passenger rights;
- ⇒ Papers on dispute resolution in package travelling;
- ⇒ Papers on consequences of class action/ collective redress mechanisms;
- ⇒ Papers with critical comments on passenger right system, package travelling system and class action system.

Dispute resolution in the maritime sector

Papers on dispute resolution-related topics in the maritime sector.

Please submit your paper and any question you may have to:

administration@arbitration-adr.org

We look forward to reading your papers!

