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Inside this month's issue:

AIA Upcoming Events 1

*Steps are being taken to develop
ADR and speedy judicial process
in Bangladesh* 2

*Three levels of Russian courts
review arbitrators' choice of law
determination* 2

*Trustmark Insurance Company
Co. v. John Hancock Ins. Co.* 4

*An ancient Rome way to challenge
an arbitral award* 5

*Is it a long way for Ukraine to
become arbitration-friendly?* 5

AIA questionnaire 6

AIA recommends to attend 7

Get legal advice from AIA 7

*The Results of 18th Willem C.
Vis International Commercial
Arbitration Moot 2010-2011* 7

AIA Upcoming Events

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

ADR in the Aviation Sector and the Sector of Tour Operators

Location: Brussels (exact location to be determined)

Date: 24 June, 2011

Check the program, speakers and registration form at

www.aiaconferences.com

and

Dispute Resolution in the Maritime Sector

Date to be determined

For further information regarding AIA conferences and trainings

please visit our website

www.arbitration-adr.org

AIA presents
the European Mediation Training for
Practitioners of Justice 2011



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, 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

Steps are being taken to develop ADR and speedy judicial process in Bangladesh

by A.B.M. Shamsud Doulah

"The judicial system of Bangladesh has almost reached a breaking point due to a huge backlog of thousands of unsettled cases," the Law Minister Mr. Shafique Ahmed said in Dhaka on Saturday, April 9, 2011.

"Each year cases are piling up at the courts. Nobody knows where they will end up. It takes five to ten years to settle a case at the Supreme Court," he said while addressing an event in the capital.

"The backlog of cases creates a situation in which the people concerned get frustrated. Something needs to be done to resolve the cases outside the courts," the minister said referring to arbitration and mediation processes.

His comments came at the inauguration of the Bangladesh International Arbitration Centre (BIAC) at the Bangabandhu International Conference Centre in Dhaka.

The International Chamber of Commerce-Bangladesh (ICC-B), Dhaka Chamber of Commerce and Industry (DCCI) and Metropolitan Chamber of Commerce and Industry (MCCI), Dhaka jointly set up the centre for alternative dispute resolution with support of the Bangladesh Investment Climate Fund that is managed by the International Finance Corporation.

After the inauguration, the Law and Parliamentary Affairs Minister told journalists that the government would identify what exactly causes the case backlog at both civil and criminal courts and would take appropriate measures to liberate the judiciary from procrastination.

The minister said, "In the past, Bangladeshi parties involved in arbitration had to fly to a foreign country to be assisted by an arbitration centre to settle a dispute.

Thanks to this international centre, Bangladeshi traders, industrialists and non-resident Bangladeshis will be able to have clauses written in the agreements that if any dispute arises then arbitration will be conducted in the international centre for settlement under the country's laws."

He also added that the government will initiate some changes in the civil courts, "The judicial system will get rid of the procrastination of the pending cases. Equally, we will bring some changes to the cases of criminal procedure courts,"

he said.

The Law Minister said the government would establish a mandatory time-frame for each stage of a lawsuit to be completed. "We will set the time-frame. The Law Ministry is looking into the matter. We hope we will be able to discuss it at the next Parliament session."

"We will fix the timeframe now and also say what will happen to the cases if they fail to respect the time-frame so that the delay cannot be caused intentionally," the Law Minister added.

Mashiur Rahman, Adviser of the Prime Minister of Bangladesh of Economic Affairs, Mahbubur Rahman, Chairman of BIAC, Toufiq Ali, Chief Executive of BIAC, Paramita Dasgupta, representative of International Finance Corporation to Bangladesh, Asif Ibrahim, President of DCCI, and Nihad Kabir, Vice-President of MCCI, also spoke on the occasion encouraging the steps taken to develop means of alternative dispute resolution as well as to avoid unreasonable delays in the judicial process.

Three levels of Russian courts review arbitrators' choice-of-law determination

by Dilyara Nigmatullina

(also published at www.cisarbitration.com)

Russian courts have found that an arbitral tribunal's choice of law determination is subject as a matter of procedure to state court control. Consequently, an "incorrect" determination of substantive law can amount to a violation of public policy in Russia.

On October 14, 2006, a Russian buyer, OJSC Efirnoe (hereinafter "Efirnoe") and a Ukrainian seller, LLC Delta Vilmar CIS (hereinafter "Delta Vilmar") concluded a contract of sale and delivery of products made from palm. Article 6 of the contract provided:

The parties shall try to resolve all disputes arising out of insufficient or non-performance of the terms of the contract using negotiation. In the event the parties cannot come to an agreement through negotiation, then if the seller files a



claim, the parties agree to refer their dispute to the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry to be resolved under its Rules by three arbitrators; if the buyer files a claim, the parties agree to refer their dispute to the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry to be resolved under its Rules by three arbitrators. In considering the dispute, the given arbitrators shall apply the substantive and procedural rules of law of the claimant's state.

On October 3, 2008, the Ukrainian seller, Delta Vilmar, filed a claim with the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (hereinafter "the Ukrainian ICAC") and on April 9, 2009, the arbitrators concluded that the substantive law of Ukraine applied to the case at hand.

While these proceedings were still pending before the Ukrainian ICAC, the buyer, Efirnoe filed its own claim against Delta Vilmar with the International Commercial Arbitration Court before the Russian Federation Chamber of Commerce and Industry (hereinafter "the Russian ICAC"), which ultimately rendered an award on November 11, 2009, in favor of Efirnoe. Later, Delta Vilmar petitioned the Arbitrazh Court of the City of Moscow to set aside this award.

The petitioner alleged that the Russian ICAC proceeding violated the agreement of the parties and the requirements of Russian Law on International Commercial Arbitration. In particular, it was alleged (1) that the Russian ICAC incorrectly determined the law applicable to the dispute—which should have been Ukrainian; (2) that the award was contrary to Russian public policy; and (3) that the arbitration clause was invalid.

The Arbitrazh Court of the City of Moscow was persuaded by some of Delta Vilmar's arguments and set aside the award of the Russian ICAC. According to the City Court, the Russian ICAC had failed to follow the procedure agreed to by the parties, as required by article 28 of the Russian Law on International Commercial Arbitration. Regarding the award rendered by the Ukrainian ICAC, the parties apparently agreed there to the application of Ukrainian law and the arbitrators consequently applied that law to resolve the

dispute. From the perspective of the City Court, therefore, Ukrainian law should have been applied to any further legal relationship arising out of the same contract between the same parties, including by the Russian ICAC.

However, the Russian ICAC applied the United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG"), incorporated into Russian law, to resolve the dispute. As the applicable choice-of-law is, according to the City Court, a procedural issue, the Russian ICAC's failure to comply with fundamental principles of procedural legislation violated the public policy of the Russian Federation. Efirnoe appealed, but the court of appeals, the Federal Arbitrazh Court of the Moscow Region, upheld the decision of the trial court.

Still hoping to prevail, the Russian party Efirnoe applied for supervisory review with the Supreme Arbitrazh Court of the Russian Federation. In support of its request to set aside the decisions of the Arbitrazh Court of the City of Moscow and the Federal Arbitrazh Court of the Moscow Region, Efirnoe argued state arbitrazh courts were not entitled to examine whether the Russian ICAC had correctly applied the rules of substantive law while resolving the dispute.

The Presidium of the Supreme Arbitrazh Court of the Russian Federation vacated the lower court rulings, finding that they had failed to consider that both the Russian Federation and Ukraine were parties to the CISG and, consequently, the CISG constituted an integral part of Russian and Ukrainian law. As the parties did not expressly exclude the CISG's application to their relationship, the Ukrainian ICAC and the Russian ICAC each applied the CISG, so any error was negligible.

The Supreme Arbitrazh Court relied on article 7 (2) of the CISG and concluded that the violation of public policy had to involve violation of certain fundamental principles of law and have certain legal consequences for the claimant in the form of impairment of rights and legitimate interests. However, the lower courts did not establish such violations and the claimant failed to even refer to them. Thus, the application by the Russian ICAC of Russian law—i.e. the CISG and provisions of the parties' agreement—could not be interpreted *per se* violating public policy. As result, the

decisions of the lower courts were vacated as violative of the uniformity of construction and interpretation of rules of law required of arbitrazh courts.

That being said, courts in the majority of developed jurisdictions disregard arguments that arbitrators' "incorrect" determination of choice-of-law violates the agreement of the parties. Usually such issues are regarded as substantive ones and are subject to very limited judicial review, if any. In the case at hand, the Supreme Arbitrazh Court vacated the decisions of the lower courts. The straightforward way in which to have done this would have been to find, as most developed jurisdictions do, that the determination of the applicable law constituted the substance of the parties' dispute and thereby could be subject to no judicial review. The Supreme Arbitrazh Court did not do this. Rather, it examined the merits of whether choice-of-law, indeed, had been correctly determined. Thereafter, the lower courts' decisions were annulled because application by the arbitral tribunal of the CISG as part of the Russian law did not amount to a clear violation of public policy. Thus, even though the Supreme Arbitrazh Court came to the correct conclusion, it did so for the wrong reason—it impliedly endorsed examining the substance of whether the correct law was applied. In this way, the approach taken by all the three Russian courts is consonant and unfortunately demonstrates that allegations of violation of public policy on the ground of "incorrect" determination of the substantive law still can succeed in Russia.

A side issue also dealt with by the Supreme Arbitrazh Court in this case was a motion for one of the members of the Presidium of the Supreme Arbitrazh Court to recuse himself. Delta Vilmar based its challenge on the fact that the justice in question and the presiding arbitrator at the Russian ICAC that rendered the contested award worked together at the same university. The Supreme Arbitrazh Court of the Russian Federation rejected the challenge as being insufficient to raise doubt on the impartiality of the justice.

Trustmark Insurance Company Co. v. John Hancock Ins. Co.

by Stephen H. Marcus

In Trustmark Insurance Company Co. v. John Hancock Ins. Co., 631 F3d 869 (7th Cir. 2011), the U.S. Court of Appeals for the Seventh Circuit recently issued an opinion reversing the U.S. District Court below on a significant arbitration issue involving an arbitrator's qualifications and partiality. The District Court stayed an arbitration of a reinsurance coverage dispute between two insurance companies where one member of a tripartite arbitration panel, Mark Gurevitz, had once been a member of an earlier arbitration panel in an arbitration between the two insurers where the same coverage issue had been considered. Additionally, in the first arbitration the parties had entered into a confidentiality agreement about those proceedings precluding discussions of the evidence, proceedings and award.

In the second arbitration Gurevitz and another arbitrator had ruled, prior to a hearing on the merits, that the arbitrators themselves were entitled to know and consider the evidence presented, and results reached in the first arbitration.

Trustmark then commenced a proceeding to enjoin the arbitration so long as Gurevitz remained on the panel. The District Court agreed with Trustmark and stayed the second arbitration since Gurevitz could not be a "disinterested" arbitrator because he knew what had happened during the first arbitration.

The Seventh Circuit reversed, holding that Gurevitz had no personal stake in the outcome of the arbitration. Moreover the prior knowledge that he had acquired is not a bar to sitting. "Knowledge acquired in a judicial capacity does not require disqualification." The Appeal Court pointed out that the fact that Gurevitz signed the earlier confidentiality agreement did not make him disinterested since he signed as an adjudicator. The District Court also erred in concluding that the arbitrators are powerless to construe the confidentiality agreement. "Arbitrators who have been appointed to resolve a commercial dispute are entitled to resolve ancillary questions that affect their task."

The Seventh Circuit concluded:

Arbitrators are entitled to decide for themselves those procedural questions that arise on the way to a final disposition, including the preclusive effect (if any) of an earlier award. If in doing so the arbitrators exceed their powers, the court may vacate the award at the end of the proceedings. 9 U.S.C. § 10(a)(4). But among the powers of an arbitrator is the power to interpret the written word, and this implies the power to err; an award need not be correct to be enforceable. It is enough if the arbitrators honestly try to carry out the governing agreements. The question for decision by a federal court asked to set aside an arbitration award is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract. When this arbitration resumes, the panel is entitled to follow its own view about the meaning of the confidentiality agreement; it need not knuckle under to the district judge's prematurely announced understanding.

(Citations and internal quotations marks omitted.)

An ancient Rome way to challenge an arbitral award

by Ugo Draetta



Walking through the ruins of "Ostia antica" (Ostia was the port of ancient Rome and has ruins that are worth visiting), I ran into the tombstone shown here, which arose my curiosity as an arbitrator. It shows that a certain Tilia Rufa ordered the tombstone for herself, her father Tutilio and her mother.

It also indicates the names of those who made the tombstone (Scriboni Cinnae et Fabiae).

However the full name of the person on the tombstone is carefully erased (and not recently), the only word left being "Arbitratu".

The reference to arbitration can hardly, if ever, be found on Roman tombstones, hence I became curious to investigate a bit.

The tombstone was next to an old church, still in operation, in the village of "Ostia antica". I entered the church and found an old man who had been attending the church since long ago. I asked him whether he knew why the name of the person on the tombstone had been erased, something rather extraordinary among dozens of other tombstones around.

He said that according to the legend the man on the tombstone became famous for having rendered an award ("arbitratu" .. but I do not know why the word is in ablative) in a dispute. The losing party was not satisfied with the arbitrator's decision and erased the arbitrator's name. ... an ancient Rome way to challenge an arbitral award.

Probably the story has been made up, but I found it interesting.

Is it a long way for Ukraine to become arbitration-friendly?

by Dilyara Nigmatullina

(also published at www.cisarbitration.com)

A somewhat bizarre court decision has recently been taken in Ukraine which may affect businesses' perception about Ukraine being an arbitration-friendly jurisdiction.

On 20 January 2010, a Ukrainian company Signus filed a lawsuit against Austrian Slav Handel and others (hereinafter "Signus v. Slav Handel"). Signus sought sought in the Kiev Economic Court invalidation of certain provisions of the agreement for sale of Prominvestbank shares. One of the challenged provisions was a dispute resolution clause referring disputes to LCIA for arbitration. Signus submitted its claim to the court following Slav Handel's initiation of the LCIA arbitration on December 18, 2009.

Signus requested an order preventing Slav Handel from referring disputes to the LCIA. Otherwise, according to the claimant, the LCIA could render an award that would be contrary to the Ukrainian public policy. The claimant's main concern is that had the LCIA issued an award regarding the issues examined by the Kiev Economic court, the judgment of the Ukrainian court as to the invalidity of the framework agreement would have been impossible to execute.

It should be mentioned that in Ukraine the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards entered into force as early as in 1961. Taking into account its Art. 5 (2b) whereby the recognition and enforcement of the award can be refused if it would be contrary to the public policy of the country of enforcement the court could have easily ignored the claimant's request and leave the examination of the public policy issue until the stage of the enforcement of the not yet issued award.

Surprisingly, the court was convinced by the claimant's arguments and on 9 February 2010 it granted the requested interim measure. The Ukrainian court prohibited the respondent, among others, to submit statements, pay administrative fees to the LCIA, participate in the arbitral proceedings at the LCIA and take any other actions related to the dispute pending in the LCIA. Apparently, the LCIA arbitrators were not impressed and proceeded with the case.

On 13 January 2011, Signus requested the court to stay its proceedings until the LCIA would decide on its jurisdiction over the dispute. The court rejected the claimant's motion. In doing so it referred to the article 79 of the Ukrainian Commercial Procedure Code. That provision permits the stay of the proceedings only if it is impossible to proceed with the case until there is a decision of another court regarding the issues related to the examined ones. According to the court, Signus failed to indicate in its request the reasons why it was impossible to conduct the Ukrainian court proceedings until the LCIA's decision on jurisdiction. Thus, pending case in the LCIA was considered an insufficient ground to stay domestic proceedings in Ukraine.

Despite the strong desire of some CIS countries to appear arbitration-friendly, the court practice, unfortunately, still seems to be not in congruence with such aspirations.

AIA questionnaire

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

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

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

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

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

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

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

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

You are welcome to participate !

It will take less than 5 minutes to fill in our questionnaire!

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



AIA recommends to attend

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If you are seeking advice for any legal problem connected with international arbitration, you are most welcome. AIA's international team is very committed and willing to provide you and your company with high quality legal advice in the field of arbitration. We can also collect and analyze for you the relevant case law in the field of international arbitration. You can count on our high quality and fast service.

Please email us your request at:
administration@arbitration.adr.org

The Results of Eighteenth Annual Willem C. Vis International Commercial Arbitration Moot 2010-2011

HONG KONG

ERIC BERGSTEN AWARD for the Best Claimant's
Memorandum Stetson University

FALI NARIMAN AWARD for the Best Respondent's
Memorandum University of Basel

NEIL KAPLAN AWARD for the Best Oralist
David Teslicko

DAVID HUNTER AWARD for the Law School Team
Prevailing in Oral Argument
Bond University

VIENNA

Pieter Sanders Award Best Memorandum for Claimant

First Place University of Stockholm

Second Place University of Fribourg

Third Place Harvard University

Werner Melis Award Best Memorandum for Respondent

First Place Queen's University, University of St. Gallen

Third Place King's College London, MGIMO University

Martin Domke Award Best Individual Oralist In the General Rounds

First Place Robin von Olshausen, University of Freiburg

Second Place Ethan A. Minshull, Tulane University

Third Place William Glaser, Pepperdine University;
Douglas Alexander Cordeiro, Paris II Panthéon-Assas

Frédéric Eisemann Award Team Orals

First Place University of Ottawa

Second Place University of Montevideo

Third Place University of Hamburg, St. John's University