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AIA Upcoming Events

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

European Mediation Training
for Practitioners of Justice

LOCATION: Brussels, Belgium

DATE: September 3-15, 2012

THERE IS A LIMITED NUMBER OF PLACES STILL AVAILABLE.

REGISTER SOON!

See details below and on www.emtpj.eu

and

Intensive International Arbitration Training
Program

with particular focus on India

LOCATION: Chennai, Tamil Nadu, India

Consisting of sessions on four consecutive

Saturday's (August 25, September 1, 8 and 15, 2012)

AIA will conduct the training in association with the Nani Palkhivala Arbitration Center, India.

To register and for more information visit www.nparbitration.in

European Mediation Training for Practitioners of Justice



After two years of success, the Association for International Arbitration (AIA) is proud to announce the third edition of its European Mediation Training for Practitioners of Justice (EMTPJ).

The AIA initiated the EMTPJ project in the year of 2010, with the support of the European Commission and in collaboration with the HUB University of Brussels, Belgium and Warwick University, the United Kingdom. It presented an opportunity for professionals from around the world to get together and be trained as a new class of mediators for the first time since the adoption of the EU Directive 2008/52/EC On Certain Aspects of Mediation in Civil and Commercial Matters.

The unique feature of the EMTPJ 2012 is its ultimate goal to enhance and integrate the different mediation cultures of the EU Member States into one, legally sound method of international dispute resolution. It brings together attendees from all over the world, creating a multinational and multicultural environment that fosters exchange of different perspectives, experiences and gives possibility to form a genuine international mediation outlook. Upon successful completion of the EMTPJ, participants may apply for accreditation at mediation centers worldwide.

The EMTPJ is recognized by the Belgian Federal Mediation Commission according to the Belgian Law of February 21, 2005 and the decision of February 1, 2007 concerning the settlement of the conditions and the procedure for the recognition of training institutes and of trainings for recognized mediators. Furthermore, this year the EMTPJ has been already accredited by sixteen mediation centers around the globe, in particular, from Belgium, China, Greece, Italy, Latvia, Portugal, Romania, Spain, the UK, Ukraine.

The distinguished faculty of EMTPJ 2012 lecturers includes Mr. Eugene Becker, Mr. Johan Billiet, Mr. Philipp Howell-Richardson, Mr. Philippe Billiet, Mr. Alessandro Bruni, Mr. Andrew Colvin, Mr. Frank Fleerackers, Dr. Paul R Gibson, Ms. Lenka Hora Adema, Mr. Willem Meuwissen, Ms. Linda Reijkerker, Mr. Arthur Trossen, and Mr. Jacques de Waart.

EMTPJ 2012 is a two-week training program that will take place from 3rd to 15th of September. The program consists of 100 hours of intensive training sessions, including an assessment day. In line with previous editions, the EMTPJ 2012 aims to introduce and promote the concept of European mediators in civil and commercial matters. The course covers the following essential topics: conflict theory and mediation, intervention in specific situations, theory and practice of contract law in Europe, EU ethics in mediation, analytical study of conflict resolution methods, the stages in mediation process, and practical training sessions. Those who need to obtain points or hours, fulfilling requirements of continuing professional education, can also apply for the following sessions of the program separately:

- *Interventions in Specific Situations* by Phillipp Howell-Richardson, September 4, 2012, 1st half, 9.00-13.00 and 2nd half, 14,15-18.30;
- *The Function of Party-Experts and Party Counsels in Civil and Commercial Mediation* by Willem Meuwissen, September 12, 2012, 1st half, 9.00-13.00;
- *The Practice Part of the EMTPJ Training* (Linda Reijkerker, Jacques de Waar, Paul Gibson, Lenka Hora Adama, Alessandro Brunim Willem Meuwissen, and Phillipe Billiet), September 7-14, 2012.

The participation fee for the EMTPJ includes also a book compiling the entire training material and lunch on all days of the program. Please note that applicants from non-EU Member States may be eligible for a reduced fee.

For more details about the reduction and the possibility to attend separate sessions, please contact: administration@arbitration-adr.org.

To get more information about the EMTPJ 2012 program, schedule and lecturers, and to register for the course, please visit the website www.emtpj.eu.

Please, do not hesitate to check the video regarding EMTPJ: <http://www.advocatennet.be/videos/european-mediation-training-for-practitioners-of-justice/a2031>

Can an Arbitration Clause Lower EU Commercial Agents' "Goodwill Indemnity"?

by Koen Vrankaert

Throughout the EU, commercial agents enjoy protection through guarantees imposed by the Council Directive of December 18, 1986 on the coordination of the Member States relating to self-employed commercial agents (Directive 86/653/EEC). One contribution of this Directive is the mandatory provision of "goodwill indemnity", i.e. a sum which the principal must pay to the agent after termination of the agreement for new business opportunities that appeared due to the agent's efforts. The Belgian government has incorporated this "goodwill indemnity" provision into Article 20 of the Belgian Law of April 13, 2005 relating to commercial agency.

The Belgian Supreme Court ruled on November 3, 2011 that an arbitration clause prescribing the application of a law which does not provide aforementioned goodwill indemnity would be deemed invalid (the 2011 case). It concluded that Belgian courts had sole jurisdiction over the legal dispute involved, i.e. one concerning the goodwill indemnity after termination of the agreement.

This ruling is fully in line with EU case law and legislation. For example, in the *Ingmar* case (*Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, 2000 ICR I-9305), the European Court of Justice (the ECJ) ruled that that the guarantees provided under the Directive 86/653/EEC had to apply if the commercial agent had carried out his activity in a Member State and that in no way derogation was possible through a choice-of-law clause. ("An arbitration clause cannot deprive commercial agents of "goodwill indemnity", *AIA Newsletter*, January issue, 6.).

The Belgian Supreme Court considered in the 2011 case that the law chosen by the parties did not provide the commercial agent with a protection equivalent to what was guaranteed in Directive 86/653/EEC, i.e. one which consists *inter alia* of goodwill indemnity. However, the Belgian Supreme Court remained silent as to the validity of an arbitration clause prescribing the application of the law of another EU Member State which guarantees goodwill indemnity in line with Directive 86/653/EEC, though not to the extent as Belgian law.

On April 5, 2012, the Belgian Supreme Court was confronted with a case concerning an arbitration clause which provided for the application of Bulgarian law, which does not go beyond what is guaranteed by Directive 86/653/EEC. (the 2012 case).

The Court could not use grounds same to those applied in the 2011 case for a number of reasons.

First of all, the 2011 case concerned a commercial agency contract between a Belgian agent and a principal from a non-EU Member state. Therefore, it referred solely to Belgian law rather than the principles of EU law. In the 2012 case, both parties were from EU Member States. Given its intra-Community character, the 2012 case fell within the EU law's scope of application.

Secondly, under the relevant EU legislation and case law, "equivalent protection" and "equal protection" are not



the same. Directive 86/653/EEC only provides the minimum means of protection which the Member States must provide (Articles 17 and 18) and of which no derogation is possible *“to the detriment of the commercial agent”* (Article 19). As for the amount of goodwill indemnity, Directive 86/653/EEC leaves the EU Member States free in their choice of methods to calculate it, as long as the result remains within the framework of Directive 86/653/EEC. It is therefore possible that different Member States can protect their respective commercial agents similarly (i.e. *“equivalently”*), while the amounts of goodwill indemnity vary from large to lower sums or even nothing at all (i.e. *“unequal”*). Therefore, the aforementioned arbitration clause applying Bulgarian law to a contract with a Belgian commercial agent appears to be *prima facie* valid.

In the 2012 case, the Court did not question the validity of the arbitration clause. It is true that, under Belgian law, *“without prejudice to international agreements to which Belgium is bound, any activity of a commercial agent headquartered in Belgium shall be subject to Belgian law and to the jurisdiction of Belgian courts”*. However, under Article 2 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), Belgium is legally bound to *“recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”*. Therefore, under Belgian law, legal disputes concerning commercial agency are arbitrable.

The real question, however, was whether or not Belgian law was to be applied when the legal dispute involved the question of goodwill indemnity. Irrespective of the fact that the parties had opted for dispute resolution under Bulgarian law. If so, disputes concerning goodwill indemnity would have to be settled under Belgian law and therefore by a Belgian court (see above).

To answer this, the Belgian Supreme Court referred to the EU Rome I Convention, which has recently been replaced by Regulation 593/2008 of the European Parliament and the Council of 17 December 2008 on the law applicable to contractual obligations (*“the Rome I Regulation”*). According to Article 3 of the Rome I Convention, *“a contract shall be governed by the law chosen by the parties”*. Therefore, according to EU law, goodwill indemnity should *prima facie* be accorded and calculated under Bulgarian law. However, the Belgian Supreme Court applied Article 7.2 of the Rome I Convention, according to which *“nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applied to the contract”*. It is therefore possible that choice-of-law clauses do not apply to those matters which are governed by rules which are mandatory in nature.

The Court considered that, given the mandatory character of Directive 86/653/EEC, the Belgian laws concerning commercial agency are also mandatory in nature. It also considered that the purpose of the Belgian commercial agency law was *“to offer agents headquartered in Belgium the protection given by the mandatory rules of Belgian law, irrespective of the law applied to the contract.”* Therefore, a choice-of-law choice will be set aside if the law chosen does not give the commercial agent the

same protection as the law of the forum, i.e. goodwill indemnity calculated under Belgian law by a Belgian court.

As mentioned above, it is not yet clear if aforementioned rule applies when the parties choose to submit their contract to the law of a Member State which has implemented Directive 86/653/EEC while the forum state's commercial agency law provides a higher level of protection. There are two possible ways to deal with this. One is to allow the partners to choose the law of a State where commercial agents with a lower level of protection, as long as the minimal requirements of Directive 86/653/EEC are met. While this allows the parties more contractual freedom within the framework of Directive 86/653/EEC, this invites parties to practice *forum shopping* to the detriment of commercial agents throughout the EU. Another is to set aside the law chosen in favor of the forum state if this leads to a higher level of protection for the commercial agent. While this ensures commercial agents an adequate protection at all times, it might lead to a *“long arm effect”* for some States, whose law draws all goodwill indemnity disputes to themselves. This might in turn have consequences for free competition: principals might select their agents based on the law under which these agents fall rather than other factors.

In this case, the first approach would lead to the parties' choice of law remaining unharmed. Following the second approach, however, Belgian law would apply and a Belgian court would accord the commercial agent with a goodwill indemnity determined under Belgian law, as the amount of goodwill indemnity paid to the commercial agent is higher in Belgium than it is in Bulgaria.

Rather than giving a conclusive answer now, the Court opted to refer the aforementioned question to the ECJ, namely if, *“given the qualification of the Belgian laws governing goodwill indemnity as “mandatory rules”, the articles 3 and 7 of the Rome I Convention need be interpreted in such a way that the mandatory rules of the country which provides a higher level of protection than the minimum provided by Directive 86/653/EEC are applied to the agreement, even if the law applied is the law of another EU Member State which has also implemented Directive 86/653/EEC?”*. It will pass its judgment only after the ECJ has answered aforementioned question.

In the 2011 ruling, it has already been made clear that an arbitration clause cannot fully deprive commercial agents of goodwill indemnity. Until the ECJ has delivered its ruling, it remains unclear whether goodwill indemnity can be lowered.

Mediation in Bankruptcy

by Jean-Michel Trésor

Introduction

Mediation is generally known to be a problem-solving negotiation process assisted by a neutral party, designed to maximize collective agreement. Many of the advantages of the mediation process come from its nature as an informal means of dispute resolution. With the assistance of a mediator, willing parties craft an agreement that looks to the future, satisfies their needs, and meets their own standards of



fairness.

The drastic increase in the amount of bankruptcy filings, the need to streamline bloated dockets and hopes of reducing the increasingly high cost of litigation pushed both U.S. bankruptcy judges and bankruptcy attorneys to seek out and avoid traditional bankruptcy litigation by employing various methods of alternative dispute resolution (ADR).

Since approximately 1986 (one of the first bankruptcy courts to institute a mediation program in the U.S.A. was the Southern District of California, followed closely by the Middle District of Florida. Steven HARTWELL & Gordon BER-MANT, *Alternate Dispute Resolution in a Bankruptcy Court: Mediation Program in the Southern District of California*, 1 (1998)), U.S. bankruptcy courts have, therefore, been using mediation programs. Mediation has, ever since, proven to be a useful tool by providing a fast and inexpensive way of resolving conflicts in (complex) bankruptcy cases.

Mediation in bankruptcy – Legal Framework

The legal framework for mediation in bankruptcy is relatively new in the U.S.A. One of the reasons for this slow development in the U.S.A. was the lack of clear authorization to use mediation in the area. The early courts employing in bankruptcy grounded their authority on the competence of courts to manage their own affairs in order to achieve the orderly and expeditious disposition of their cases.

In its early stages, the adoption of ADR technique by U.S. bankruptcy courts was consequently predicated on the bankruptcy court's inherent powers under section 105 of the United States Bankruptcy Code ("U.S.B.C."), its right to promulgate procedures by local rule pursuant to Bankruptcy Rule 9069, and its authority under section 1104 and 1106 to appoint a mediator to address discrete disputes.

By passing the Authorization of Alternative Dispute Resolution in all civil actions, including adversary proceedings in bankruptcy, the U.S. legislature gave bankruptcy courts a statutory and rule based authority for the use of mediation (28 U.S. Code §§ 651-658 (2000)).

Possible Areas for Using Mediation

Although, mediation is not the solution in all bankruptcy disputes, it has been used to effectively resolve a wide variety of issues, both simple and complex. From reorganization plans to large bankruptcy cases (especially in cases of mass-tort litigation), mediation has proven to be a useful tool in a bankruptcy judge's toolbox.

Mediation can allow parties to avoid the limitations of the bankruptcy court's finite claims resolution capacity and resolve claims outside of litigation (*In re P.A. Bergner & Co. Holding Co.*: a mediator was appointed to undertake the resolution of hundreds of personal injury claims and several thousand disputed trade claims. *In re P.A. Berger*, Case Nos. 91-05501 to 05516, Order Approving Implementation of An Alternative Dispute Resolution Procedure Including Mandatory Mediation (Bankr. E.D. Wisc. Feb. 11, 1993)). It can be used (i) to resolve the interest of multiple creditors in estate assets, (ii) to negotiate the transfer of an asset, (iii) to determine the recoverability of preference and fraudulent transfers, (iv) to evaluate the surplus income, (v) in the context of the discharge of bankruptcy etc. Even when reorganization fails, mediation has proven

to be helpful in quickly and inexpensively liquidating and distributing payments to creditors.

There are also particular bankruptcy-related issues that lend themselves to resolution through mediation. The resolution of unliquidated claims, such as personal injury and product liability, to name as an example, is an area where mediation has been found to be both effective and cost-efficient. Through mediation, the debtor can avoid expensive and protracted discovery and litigation in non-bankruptcy courts that could severely delay distribution (*cf. In re P.A. Bergner & Co. Holding Co.*).

Mediation can be beneficial in a wide variety of bankruptcy-related issues, but there are also disputes in bankruptcy that are not amenable to mediation, such as issues related to motions for contempt, sanction or other judiciary disciplinary matters. In addition, mediation may also be abused by parties attempting to delay proceedings or use the sessions as a discovery device.

Arguments for & against Mediation in Bankruptcy

As earlier mentioned, many of the advantages of the mediation process come from its nature as an informal means of dispute resolution. Therefore to be successful parties must, at first, agree upon mediation.

Agreeing upon mediation reduces directly the hostility between parties, who in many circumstances need to foster and maintain continuing relationships.

Another key-aspect of mediation is the choice of the individual qualified mediator, who needs to facilitate the fair and open discussion between the parties. Mediators are not impeded by procedural or evidentiary rules. Open discussion is encouraged because of the mediator's duty of confidentiality. In addition, a mediator puts the parties on equal grounds, which fosters open discussion and increases the likelihood of successful outcome (a recent study of the University of Miami on Bankruptcy Mediation and Settlement Conferences shows that if the chosen mediator is an expert within the field, such as another bankruptcy Judge or a partner at a large bankruptcy firm, there will be more confidence in the success of mediation. However, having a bankruptcy mediator with inferior knowledge makes all parties likely to suffer, as bankruptcy tends to make everyone a loser to an extent. Jarrod B. MARTIN, *A User's Guide to Bankruptcy Mediation and Settlement Conferences*, University of Miami From the selected work of Jarrod B MARTIN, 9-12 (2009)). Even if mediation does not solve everything, having an effective mediator can help solve enough where the parties are able to work through the problems amongst themselves and avoid prolonged legal battles before the judge.

As reducing costs is particularly important within the bankruptcy context, mediation also provides for a more efficient resolution of disputes. Mediation is a nonbinding process which triggers rationality (it encourages open dialogue and forces everyone to re-evaluate their position) and helps avoid the unnecessary expense of protracted litigation. Hereby, the time and expense relating to discovery, depositions and litigation is decreased, thus, lowering the administrative costs of reorganization or liquidation. But



most importantly, it reduces the caseload of the bankruptcy courts, allowing judges to focus on other disputes.

However, mediation is not without its disadvantages. The other side of the informal and flexible nature of mediation, also in bankruptcy matters, is that parties have to agree upon mediation. Bankruptcy judges cannot order mediation unless parties agree upon it. And the contrary is true, simply because parties agree upon mediation does not mean that bankruptcy judges would necessarily grant the order. This can be the situation when the court considers that the case is not suitable for mediation.

The fact that mediation is a non-binding process, means that there is no guarantee that it will result in a final resolution. The parties may still be forced to incur litigation expenses, even after paying for mediation.

Many cases settle without mediation, and, thus, it is up to the attorney whether to forgo mediation assuming the dispute will settle. This can lead to incautiousness from the attorneys because some of them may feel not forced to assess the risk of a case because of the low cost of mediation and the knowledge that through mediation, they will still be able to get something.

Finally, there are some cases not suitable for mediation (see *supra*) and others that will never settle, either because they are too complex (like those contained in Chapter of 11 U.S.B.C. on agreement involving matters outside the debtor's ordinary course of business, see *infra*) or the parties are unwilling to negotiate (regarding this last hypothesis, the earlier mentioned University of Miami's study has also shown that the gravitas of a judge (by example another bankruptcy judge as mediator) can often be used to break up stubborn parties. Both clients and attorneys are much less likely to misbehave in front of a sitting judge for fear of having to come in front of that judge in the near future, University of Miami From the selected work of Jarrod B MARTIN, 9-12 (2009)).

But in the end, the advantages of mediation clearly outweigh the disadvantages.

Enforceability of Mediation Agreements

There is a particularity regarding the enforceability of mediation agreements in bankruptcy. There is a split in authority on the issue whether contracts subject to court approval are binding before court approval has been granted. Some supports pre-approval enforceability while other oppose it. Those belonging to the first group reason that the absence of a court approval does not mean that the parties have not come to the settlement. It only means the court has not approved it. The second group bases its reasoning on considerations of fairness to creditors not involved in the settlement.

As for other kinds of settlement, the question of existence of the settlement is within the domain of contract law. The settlement resulting from mediation in bankruptcy, however, should be written, even though oral contracts are also enforceable. Nevertheless, the U.S. Supreme Court determined that policy reasons require mediated settlement agreements to be in writing in order to be binding.

The enforceability of mediation agreement in bankruptcy can also trigger a query as regards the type of transaction the agreement pertains to. According to Chapter 11 U.S.B.C., if the substance of the agreement is within the ordinary course of business, then the debtor-in-possession

is bound by its terms. If the agreement however involves matters outside the debtor's ordinary course of business, notice and a hearing are required (Chapter 11 U.S.C. § 636 (b)(2); See also *In re United Shipping Co.*, 1989 WL 127323 : "If judicial approval is necessary to go forward, an agreement could not be binding absent the required approval").

This illustrates that a court does anyhow have the ability to disapprove a compromise, if it is not in the best interests of the estate, fair and equitable.

Quid Europe?

The success in bankruptcy mediation in the U.S. has brought many pro-mediation minded attorneys and judges in Europe to seriously take mediation into consideration while dealing with bankruptcy that can be solved through mediation.

In the Netherlands, the Amsterdam court has launched a pilot mediation program in bankruptcy-related cases. The aim is to find out if procedures initiated by or filed against the trustee can be quickly and inexpensively resolved through mediation. If costs decrease, creditors will be more likely to get paid. Mediation will also serve as a tool to prevent bankruptcy. Regarding this last point, it is very interesting to observe how mediation will be possible before a case has been assigned to a judge, because most of the time creditors are unaware that bankruptcy is imminent until the case has been filed.

Mediation can be initiated by the investigating magistrate, the trustee or any interested third party. However, the trustee would have to obtain permission of the investigating magistrate to take part in mediation. The basic principle of this pilot program is to quickly make clear for willing parties whether or not their dispute can be resolved through mediation.

Like in the U.S., the personality, professional qualities and competence of the mediator will play a key role. Mediation must be conducted by an experienced court-annexed mediator expert within the field of bankruptcy. Mediator's fees are calculated in accordance with the established rates within this pilot program. The investigating magistrate does not take part in the mediation, but has to supervise by giving his approval regarding the settlement reached through mediation. Furthermore there is a protocol that has to be followed.

The protocol of the Amsterdam court on mediation in bankruptcy issues is a seven-steps-plan as follows:

1. If the investigating magistrate considers that in a pending bankruptcy a dispute (claim for or against the inventory) can be solved through mediation, he will review the bankruptcy with the trustee. Nevertheless, the trustee or any interested third party can ask for mediation;
2. If the trustee agrees, the other party (creditor(s)) will be contacted by the Mediation Office with the suggestion to seek for a solution through mediation;
3. If both parties are willing to participate in mediation the Mediation Office will review with both parties the choice of the mediator based on a mediators' list of mediators taking part to the pilot pro-



gram, as well as the costs and further progress;

4. Only court-annexed mediators (Court of Amsterdam), with, in principle a lawyer background, can be taken into consideration. They must spend > 50% of their time practicing professional mediation and they have to be able to help willing parties to reach a solution;
5. Once the parties have chosen a mediator they will receive a standard letter from the Mediation Office with the detailed information. The parties have also to reach an understanding about the mediation costs, after which mediation will start;
6. The investigating magistrate is not a party to mediation. The trustee will be able to give an interim report to the investigating magistrate, upon request or on his own initiative. However, the trustee needs the approval of the investigating magistrate to have a valid settlement agreement. The investigating magistrate is not bound by confidentiality if and insofar this would be contrary to his legal competences. The parties and the mediator must take this into account. Mediators taking part the pilot program are obliged to crystallize a clause in the mediation-agreement such as the clause established by the Mediation Office:

"The parties are aware of the fact that the trustee needs the permission of the investigating magistrate to conclude a settlement agreement. The confidentiality does, thereby, not apply to the investigating magistrate, if and insofar this will be contrary to the Bankruptcy Code. During mediation, it will be discussed whether and which elements or proposals the trustee will review with the investigating magistrate".

7. After mediation, the parties and the mediator have to fill in an evaluation, which is submitted to the Mediation Office.

Conclusion

Over the years ADR-programs have proven to have a bright future and have kept reinventing themselves. A relatively recent example is the use of mediation in bankruptcy, that is already established among the U.S. practitioners and that has influenced bankruptcy judges and attorneys on the old continent to slowly but certainly start seeking for alternatives for dispute resolution in bankruptcy matters.

The Amsterdam pilot program is, thereby, a very promising system to effectively, rapidly and inexpensively solve bankruptcy issues and deserves, therefore, a warm welcome. It is going to be extremely interesting to see how bankruptcy mediation evolves through this pilot program as the number of bankruptcies will (rapidly) increase in the coming years, namely due to the financial crisis. As of now, the European bankruptcy practitioner has to wait the results of the Court of Amsterdam bankruptcy mediation evaluation before making judgments. But we can already come to the conclusion that practitioners seeking to side-step bloated bankruptcy dockets are relieved. On the side of the bar, mediation in bankruptcy also means solace for the crowded docket of bankruptcy courts. As for the parties, disputes are going to be resolved fast and at a fraction of the cost of litigation.

The Increasing Use of ADR in U.S. Federal Courts

by Missuly A. Clark

According to a study made by the Federal Judicial Center (FJC), more than one third of all federal trial courts authorize alternative dispute resolution (ADR) as method for settling disputes between parties. ADR is now authorized in over seventy federal district courts, and some courts even mandate recourse to ADR prior to litigation in court.

The increasing use of ADR in courts started on December 1990, when the U.S. Congress passed the Civil Justice Reform Act of 1990 (CJRA), which required federal district courts to develop cost and delay reduction plans. In response to this Act many courts adopted ADR procedures. After the CJRA had been passed, the Congress enacted the ADR Act of 1998 that mandated district courts to provide ADR services to civil litigants. Now, 20 years later, ADR is an established part of many courts.

In early years, federal and state courts used only mediation and arbitration as ADR methods. Nowadays, a variety of ADR methods have been authorized in different courts such as settlement conferences, general authorization, early neutral evaluation, *pro se* mediation program, summary jury or bench trial, mini-trial, case evaluation, and med-arb. Although these might look like a lot of options, most cases are settled through mediation instead of arbitration and the rest of these options. In a period of twelve months, 17,833 cases were referred to mediation as compared to 2,799 that were referred to arbitration.

The U.S. Courts website provides a judicial caseload statistic which shows that in 2011, an additional 294,336 civil cases were filed in different U.S. District Courts, while 268,258 civil cases were still pending from 2010. There are 94 U.S. District Courts in the 50 States, so doing the math between the number of cases and the District Courts available to hear them, there's a big workload to process. The amounts of cases that courts have to decide each day are enormous and ADR methods, such as mediation and arbitration, accelerate the judicial process. The reason why ADR is increasingly used by courts nowadays is because it provides a faster and more efficient way to solve disputes.

The report made by the Federal Judicial Center can be found at: [http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/\\$file/adr2011.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/$file/adr2011.pdf)

The Presidium of the Russian Supreme Arbitrazh Court Interprets "Sole Option" Clause

by Dmytro Galagan

On June 19, 2012 the Supreme Arbitrazh Court of the Russian Federation (the Supreme Arbitrazh Court) ruled that a "sole option" clause, which gives one party a right to recourse either to national courts or to international arbitration, whereas limiting the other party's choice only to arbitration, violates the principle of equality of parties.



In 2009, ZAO Russkaya Telefonnaya Kompaniya (RTK, the buyer), a subsidiary of Mobile TeleSystems (MTS), one of the largest Russian telecommunication companies, and OOO Sony Ericsson Mobile Communications Rus (Sony Ericsson, the seller), a subsidiary of Sony Ericsson Mobile Communications AB (Sweden), concluded an agreement for supply of cell phones. The agreement contained an arbitration clause that provided for the resolution of disputes in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators seated in London. However, the **arbitration clause did not limit Sony Ericsson's right to bring a suit before a competent court for recovery of moneys payable for goods supplied.**

Consequently, RTK filed a suit against Sony Ericsson for replacement of non-conforming goods, alleging low quality of the cell phones delivered by Sony. The Arbitrazh Court of Moscow by its decision of July 8, 2011 in the case No. A40-49223/11-112-401 **refused to hear the RTK's claim on the grounds of existence of a valid arbitration agreement between the parties.** This decision was upheld on appeal by two superior courts, the 9th Arbitrazh Appellate Court on September 14, 2011 and the Federal Arbitrazh Court of Moscow Circuit on December 5, 2011.

RTK appealed to the Supreme Arbitrazh Court of the Russian Federation, which found that an agreement between RTK and Sony Ericsson contained not only an arbitration clause, but also a prorogation clause, however, the later option was made available only for one of the parties. In opinion of the court, such prorogation clause gave Sony Ericsson an advantage over RTK, whereas equality of parties is one of the basic principles of civil law. The Supreme Arbitrazh Court referred to the Constitution of the Russian Federation, Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and practice of the European Court of Human Rights that provide for equality of procedural rights of parties as a necessary element of a right to a fair trial (citing *Steel & Morris v. United Kingdom*, *Sokur v. Russia*, *Khuzhin and Others v. Russia*, etc.). Thus, on March 28, 2012 the panel of judges of the Supreme Arbitrazh Court found such "sole option" clause to be in violation of the principle of equality of arms and sent the case for consideration to the Presidium of the Supreme Arbitrazh Court.

Lastly, on June 19, 2012 the Presidium of the Supreme Arbitrazh Court confirmed the decision of the panel of judges of March 28, 2012, **repealed lower courts' decisions, and ruled that RTK had a right to bring a suit against Sony Ericsson before competent Russian courts, since an arbitration clause could not authorize one party (seller) to recourse to a competent court, while depriving the other party (purchaser) of the same right.** The case was remanded to the court of first instance for the decision on the merits.

Such decision of the Russian Federation's highest court in commercial matters may have significant consequences for arbitration practice and drafting of forum selection clauses with Russian counterparts. In particular, lower courts are likely to follow the approach of the Supreme Arbitrazh Court and disregard "sole option" clauses, either by allowing both parties to an agreement to bring a suit before a competent national court or by invalidating an arbitration agreement. Thus, if parties are willing to maintain the validity of their arbitration agreements, they may need to provide solely for international arbitration as a

dispute resolution mechanism.

Book Review: Singapore Law on Arbitral Awards

by Sundra Rajoo

Given the rise of popularity of arbitration, the challenges international parties face in understanding the legislative and judicial frameworks of different states, the impact of their selection and the hows and would be of the enforcement of an arbitral award has become an important issue which many books on arbitration now seek to address.

Mr. Chan Leng Sun SC has written the *Singapore Law on Arbitral Awards* with precisely this objective in mind. Each chapter uses clear language and takes readers through key areas of arbitration and how Singapore deals with these areas.

Leng Sun is the co-head of the Dispute Resolution Practice Group in the Singapore office of Baker & McKenzie. Wong & Leow. He is qualified for practice in Malaysia, Singapore and England and was appointed Senior Counsel in January 2011. A former graduate of the University of Malaya (with first class honours), Leng Sun was also a former recipient of Kuok Foundation Scholarship, an Honorary Shell scholar and a Pegasus Cambridge scholar. He also holds a Masters of Law from the University of Cambridge.



On the arbitration scene, Leng Sun is the chairman of the Law Society of Singapore's ADR Committee and the vice president of the Singapore Institute of Arbitrators (SIArb). He was formerly a lecturer at the National University of Singapore and has taught at the Singapore Management University. To add to this, he has also previously served as a legal officer of the United Nations Compensation Commission in Geneva and was a SIAC-CIAC observer to the UNCITRAL Working Group on Arbitration.

In Chapter 1, Leng Sun highlights in a very structured manner the arbitration laws in Singapore and the UNCITRAL Model law. The first part of the chapter lays down the legislation which governs arbitration in Singapore, briefly explaining the Model law, pointing out similarities and deviations. The second part of the chapter gives an overview of the UNCITRAL Model Law. The complete reading of the first chapter would clarify the legislative framework of the Singaporean arbitration system.

In Chapter 2, Leng Sun defines the term "Award" and the terms "interim, partial and final awards". As there isn't any internationally acceptable definition for these terms, the author documents references from various arbitration institutions like LCIA, SIAC and UNCITRAL. The second part of the chapter deals with the tribunal's ruling on jurisdiction. Singapore arbitral legislation adopts the 'Kompetenz-kompetenz' principle where the tribunal is able to rule on its own jurisdiction. Leng Sun explains the principle in detail and discusses the effects of the *PT Asuransi Jasa Indonesia v Dexia Bank SA* (2007) case. Analytical arguments have been put across as

Possible mediation between Apple and Samsung Electronics in Australia

by Missuly A. Clark

On Monday, July 23, 2012 the Federal Court of Australia (Federal Court) began hearing a patent dispute between Apple Inc. (Apple) and Samsung Electronics Co. (Samsung). Apple sued Samsung claiming that the design of Samsung's new tablets and smart phones was similar to the iPad and iPhone devices designed by the Apple. As a response, Samsung brought a counterclaim alleging that Apple had infringed three 3G data transmission patents, while Apple argued it had offered to pay Samsung a licensing, but had been denied. The Federal Court Judge, Justice Annabelle Bennett catalogued this dispute as "ridiculous" and continued to push for a resolution between the parties through mediation, giving them a week to tell her why the dispute should not be resolved in that manner. The real question to be addressed is whether Justice Bennett should order mediation between Apple and Samsung.

This patent dispute in Australia is one of many disputes between these companies around the world and none of them have been settled through mediation. They have filed suits against each other in Europe, Asia, and America. Why should it be different now?

Federal Court judges in Australia actively manage cases so that they are quickly and efficiently resolved. A party to a dispute should expect that in the early stages of a case the judge will consider whether alternative dispute resolution (ADR), including mediation, is likely to assist. In some cases a judge may decide to order the parties to attend mediation even when they don't agree to it. As a matter of fact, under the Federal Court of Australia Act of 1976, section 53A, the Federal Court can refer parties to mediation without their consent.

This means that a Judge has all the authority to order mediation in any case, regardless of its complexity or number of parties. The types of matters eligible for mediation at the Federal Court include intellectual property cases, the category to which this dispute belongs. Parties might find mediation as a superior method for achieving quicker, less expensive and more satisfying results because the parties are more involved into finding a solution that benefit both.

A study made by the Federal Judicial Center (FJC) and the CPR Institute for Dispute Resolution reveals that sixty-three of the ninety-four federal districts in the U.S. have authorized or established at least one court ADR program. The results of this research evidence an improvement in overall case management and an increase in settlements. More and more IP cases are being successfully mediated in Courts. In Delaware, which is a leading forum for IP cases, they have mediated over 200 patent cases by early 2003 and the settlement rate approached 90% for mediation.

In summary, it seems that IP cases like the one at hand can be mediated with sufficient success and the rates mentioned above provide a good record of success. This dispute may be settled through mediation between the parties, but we will have to wait and see the final decision of Justice Bennett on this issue, which could result in either litigation or me-



to whether a negative ruling of the tribunal on its jurisdiction can be regarded as an award. And if the answer is in the negative, then would a positive ruling be regarded as an award or merely a ruling or decision? The third part of this chapter deals with Interim measures, which informs the reader that in Singapore the term 'award' should be limited to decision on substance, whereas any interim measure or decision on jurisdiction should preferably be termed as a decision. The chapter continues to explain the provisions with respect to interim measures by court and the enforcement of interim measures.

Chapter 3 deals with the form and content of awards. This chapter is more explanatory in nature as it lays down the requisites that must be present in an award. For each requirement, the author has taken assistance of the Model law and various case law both national and international. It is a very informative section and good point of reference for arbitrators.

The effect of an award being final and binding, slip rule and remission is discussed in Chapter 4. The first part of this chapter places emphasis on the finality of an award. The second and the third parts emphasise the correction and remission procedures with respect to the awards.

The chapter on Enforcement of Foreign Awards highlights the provisions of the Arbitration Act and the International Arbitration Act and lists the procedures for enforcement of awards made in Singapore and through the New York Convention. Section 33(1) of the International Arbitration Act preserves alternative means of enforcing a foreign award other than through the New York Convention. Leng Sun suggests that the enforcement through the reciprocal enforcement of judgments route is still applicable or even the possibility of a common law action being brought on a foreign award. The chapter also highlights one of the unique features of the Singaporean Arbitration system in requiring the authentication and certification of arbitral awards and agreements (which has been in effect from 1st January 2010) by the persons appointed by the Minister of Law.

The next chapter on the recourse against an award highlights that the Singaporean legal framework does not accord the right of appeal under the International Arbitration Act and only setting aside on specific grounds is allowed. Whilst there is no right of appeal under the International Arbitration Act, the Arbitration Act maintained the right to appeal on a question of law arising out of an award and must be with the parties' agreement, if not, with the leave of court. The chapter further deals with the setting aside of awards and numerous case references were given to discuss on the specific grounds.

The final chapter deals with the approach to enforcement, grounds for refusing the enforcement of an award of member states to the New York Convention and the enforcement mechanism plus judicial attitude towards enforcement of an award made in a state that is not a party to the New York Convention.

Overall, I find the book on *Singapore Law on Arbitral Awards* a handy guide, written from the eyes of a practitioner having first-hand experience of the actual workings of the arbitral framework in Singapore. I would strongly recommend it as a book that should be on the bookshelf of anyone who is involved, needs to understand and tackle practical questions on arbitration in Singapore.

diation.

SCC Arbitration Awards Yukos Minority Investors over \$2 Million

by Dmytro Galagan

On July 20, 2012 the Tribunal established under the Arbitration Institute of the Stockholm Chamber of Commerce in case *Quasar de Valores et al. v. The Russian Federation* (Claimant v. Respondent) awarded minority investors in Yukos Oil Company (Yukos), formerly one of the largest Russian oil companies, over \$2 million in compensation for expropriation of their investments.

The case was filed in 2007 by a group of Spanish investment funds, alleging that the Russian Federation had unlawfully dispossessed Yukos from its assets and expropriated them from its shareholders by means of a number of abuses of executive and judicial power. Investors were owners of Yukos American Depositary Receipts and sought compensation for their loss. The Respondent asserted that the claimants were engaged in an abuse of process, and the claim represented an attempt to overcome the Russian Federation's legitimate application of its tax laws.

On March 20, 2009, the tribunal made an Award on Preliminary Objections, which confirmed the tribunal's jurisdiction with respect to the claims of four out of the seven original Claimants to determine "whether compensation is due by virtue of claims of expropriation" under Article 10 of the BIT between Spain and the USSR. However, the tribunal refused to expand its jurisdiction on the basis of most favored nation treatment under Article 5 of the Spain-USSR BIT.

The award of July 20, 2012 states the Tribunal's conclusion that the "asset freeze, the Russian authorities' failure to consider Yukos' proposals of alternative means of paying of tax assessments, and the seizure and sale of Yukos' shares in YNG demonstrate that the Respondent initially prevented Yukos from discharging its tax debt" (Award at ¶ 129). Furthermore, even if some actions of Yukos creditors may be understandable and lawful under Russian law, while seeing in a context "the choices and actions of Yukos' main creditors clearly appear part of an overall confiscatory scheme." (Award at ¶ 147)

Also, the award emphasizes the speed of the enforcement measures: even though the tax authorities had three years, until some time in 2007, to enforce their claims, Yukos' primary assets were seized and sold at an auction in 2004. The Tribunal notes that "[h]ad Yukos been given a moment to catch its breath and to encumber or disperse of its assets in an orderly fashion, [...] it could have paid its tax bills, since its fundamental asset portfolio was sound. That is how a legitimately operating tax authority would have proceeded." (Award at ¶ 170)

Furthermore, the Tribunal reached a conclusion that "Yukos' tax delinquency was indeed a pretext for seizing Yukos assets and transferring them to Rosneft" (Award at ¶ 177) and, altogether, "the Russian Federation's goal was to expropriate Yukos, and not legitimately to collect taxes." (Award at ¶¶ 128, 177). In the end, the result of Yukos' bankruptcy was the transfer of more than 90% of its assets to State-owned entities.

For the purposes of calculation of an appropriate com-

ensation, the Tribunal determined a Yukos share price to be of \$27.76 as of November 23, 2007, the date when Yukos was removed from the company register as a result of bankruptcy proceedings. This puts the overall value of Yukos at that moment at about \$62.1 billion with the share value of the Spanish funds of \$2 million – the sum, plus interest, to be paid by the Russian Federation to the Claimants.

The arbitral tribunal was composed of three distinguished arbitrators: Jan Paulsson (chair) of Freshfields Bruckhaus Deringer LLP, Toby Landau QC of Essex Chambers, Judge Charles Brower of the Iran-United States Claims Tribunal, and delivered a unanimous award.

Earlier, on September 12, 2010, a tribunal composed of Professor Karl-Heinz Böckstiegel (chair), Lord Steyn and Sir Franklin Berman QC in case *RosInvestCo UK Ltd. v. The Russian Federation* concluded that "[T]he totality of Respondent's measures were structured in such a way to remove Yukos' assets from the control of the company and the individuals associated with Yukos. They must be seen as elements in the cumulative treatment of Yukos for what seems to have been the intended purpose. [...] [T]hey can only be understood as steps under a common denominator in a pattern to destroy Yukos and gain control over its assets" (Award at ¶ 621). Thus, the tribunal awarded the claimant, RosInvestCo UK Ltd., \$3.5 million as the principal amount of damages.

One year later, on September 20, 2011, the European Court of Human Rights (ECHR) ruled in *Yukos v. Russia* that the Russian Federation had breached Yukos' right to a fair trial under Article 6 of the European Convention on Human Rights and Fundamental Freedoms, with respect to timing of judicial proceedings, and right to property under Article 1 of Protocol I, with respect to imposition of disproportionate fines and enforcement proceedings. However, the ECHR held that Yukos had failed to prove that Russian Government's tax claims were discriminatory.

Book Review: Challenge and Disqualification of Arbitrators in International Arbitration

by Florentine Sneij

The book *Challenge and Disqualification of Arbitrators in International Arbitration* was published in 2012 by Kluwer Law International in the Netherlands. It was written by Karel Daele.

The book deals with the subject of how arbitrators are being challenged and removed. It's one of the first attempts to deal with this subject in a book-length treatment. The author provides the first in-depth analysis of the challenge mechanism under the Rules of ICSID, UNICITRAL, ICC, LCIA and SCC and of numerous relevant issues raised in national case law in different countries such as the United States, France, etc.

The book is structured in seven chapters. In the first chapter the author is giving an overview of the disclosure. First the functions of disclosure are being mentioned. Disclosure is important since it avoids, or



at least it reduces the risk that the arbitration proceeding is frustrated or even interrupted by late challenges. In this respect it's important to give much attention to this part of the arbitration procedure. There are different standards of disclosure. The book gives an overview of the different ways of treating the standards of disclosure under the different rules. Further the author is dealing with the timing of disclosure, the disclosure practice of arbitrators, the duty of the arbitrator to investigate possible conflicts of interest and the duty of the parties to inform the arbitrator of possible conflicts of interests.



However, once the disclosure has been fulfilled, it might happen that parties will seek to challenge and disqualify an arbitrator. In the chapters 2 to 7 the author addresses the aspects of challenge and disqualification. Chapter 2 is about how to make a challenge. Aspects, such as taking the initiative of making a challenge or e.g. subject of a challenge are being explained. Chapter 3 is devoted to the subject of the timing of

a challenge and concentrates on such issues as the time limits, acquiring knowledge of the ground for challenge, burden of proving the time of acquiring knowledge of the ground for challenge, the challenging party's duty to investigate and discover a ground for challenge at an earlier point in time, parties' freedom to modify the time limit for making a challenge and sanction for making a challenge outside the time limit. In the fourth chapter the author is giving explanation about the challenge procedure itself, by treating first the jurisdiction, then the procedural aspects, the challenge decision, and, finally, the outcome of the challenge procedure.

Since the aim of the author is to give an overview of the challenge and disqualification of arbitrators, the next chapters discuss in details the notion of disqualification. So does chapter 5, where more information is given about the standard for disqualification. The following chapter 6 deals with the challenge and disqualification on the ground of independence. The final chapter of the book, chapter 7, explains the challenge and disqualification on the ground of impartiality issues.

The book contains two Annexes. Annex 1: Table of ICSID rules challenge decisions. Annex 2: Extracts from the legislative history of the ICSID convention.

Further information about purchasing this book is available at the website of Kluwer: www.kluwerlaw.com/Catalogue/titleinfo.html?ProdID=0041138692

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AIA Recommends to Attend

Arbitration definitely replaced the use of litigation in those specialized disputes arising from global business transactions. Arbitration has created a niche in the modern economic environment because of the large amount of time it saves for the firms involved in the process, the predictability of resolution and awards –

as compared to litigation- and the ability to keep the proceedings confidential between the parties. Spain, a steadfast player in arbitration worldwide, seeks to consolidate its presence as an internationally recognized and reliable arbitration center.



Under this framework, The Barcelona Bar Association (ICAB) is pleased to announce the 1st INTERNATIONAL ARBITRATION CONGRESS, which will be

held in Barcelona next 18th to 20th of October 2012, under its auspices. Under the title Arbitration: Back to the Future, the Congress will focus on the latest trends and amendments in both international and domestic arbitration rules and in certain specific areas of specialization. Speakers will be composed of renowned international experts in arbitration and representatives of major international and domestic arbitration institutions, along with international practitioners in the area. In fact, amongst others, we count on with speakers from America, South America, Switzerland, France, China, Scandinavia, UK, Egypt, Belgium, Canada and Spain. Amongst others, *Club Español del Arbitraje* and major arbitration institutions will sponsor and support the event.

The Congress will cover the following topics:

1. Searching for predictability: A comparative discussion of the recent amendments of arbitration laws, institutional rules and guidelines in international arbitration.
2. International arbitration in practice: Including, a pragmatic look at challenges and future of the use of emergency arbitrators and an updated approach to company and finance disputes, to the increasing importance of arbitration and mediation in engineering projects and to the latest developments in investment arbitration.

To participate at the International Arbitration Congress it is necessary to submit the registration form at www.arbitrationcongressbarcelona.com/4/programme_321828.html

and send it by fax (+ 34 93 487 94 18) or by e-mail (internacional@icab.cat) before 12th October 2012:

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