Association for International Arbitration
In Touch

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arbitration-adr.org

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Inside this month's issue:

AIA Upcoming Events

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

Seminars on International Arbitration

AIA in collaboration with the BICCS of the Vrije Universiteit Brussel will organize lectures and seminars on diverse topics of integral importance in the field of international arbitration. Sessions will be arranged on consecutive Fridays in the months of April and May, 2012 from 16:00 to 19:00 (see details below)

and

Confererence on

Arbitration in CIS countries: Current Issues

LOCATION: Brussels, Belgium

DATE: June 21, 2012

See details below and on www.aiaconferences.com

and

European Mediation Training For Practitioners of Justice

LOCATION: Brussels, Belgium

DATE: September 3-15, 2012

See details below and on www.emtpj.eu

AIA UPCOMING EVENTS

1. Seminars on International Arbitration

The Association for International Arbitration (AIA) in collaboration with the Brussels Institute of Contemporary China Studies (BICCS) of the Vrije Universiteit Brussel (VUB) will organize lectures and seminars on diverse topics of integral importance in the field of international arbitration. Sessions will be arranged on consecutive Fridays in the months of April and May, 2012 from 16:00 to 19:00 at VUB Campus, Pleinlaan 5, 1050 Brussels, Belgium.

The first of these sessions is organized on April 20, 2012 and will be conducted by Mr. William E O'Brian Jr., an exponent in international business transactions, who will deliver a lecture on "Choice of law in arbitration". The participants will be provided with the opportunity to ask questions and initiate discussions upon delivery of the lecture;

Following this, on April 27, 2012 Mr. Philippe Denis, a reputed expert in arbitration law will conduct an interactive seminar on "International usages and UNIDROIT principles in international arbitration";

Subsequently, on May 4, 2012 Mr. Christian Leathley, a specialist in international commercial and investment arbitration, will conduct a seminar on "Investment Arbitration in Latin America: Regional Considerations";

Finally, on May 11, 2012 Mr. John Barnum, a renowned legal counsel specializing in international arbitration and commercial litigation will deliver a lecture followed by a questioning session on "Choices, Strategies and War Stories in International Commercial Arbitration".

Registration form: request at events@arbitration-adr.org

2. Arbitration in CIS Countries: Current Issues

On June 21, 2012 the Association for International Arbitration will host an international arbitration conference on Arbitration in CIS Countries: Current Issues. Speakers from various CIS jurisdictions will discuss a range of issues related to arbitration in the region. The participants will particularly focus on Russia, Kazakhstan and Ukraine.

Conference speakers include:

⇒ Vladimir Khvalei, Partner, Baker & McKenzie, Moscow; Vice-President of the International Court of Arbitration of the ICC
⇒ Maria J. Pereyra, Counsellor, Legal Affairs Division, WTO
⇒ Natalia Petrik, Legal Counsel, the SCC
⇒ Timur Aitkulov, Partner, Clifford Chance LLP, Moscow
⇒ Roman Zykov, PhD, LL.M, Senior Associate, Hannes Snellman (Helsinki, Moscow)
⇒ Valery Zhakenov, Partner, BMF Group LLP; Head of Arbitration Court under Chamber of Commerce and Industry of the Republic of Kazakhstan
⇒ Andrey Astapov, Managing Partner, Astapov Lawyers International Law Group
⇒ Yaraslau Kryvoi, Dr., Senior Lecturer at the University of West London
⇒ Iegor Sierov, LL.M, Associate, ARBITRADE Attorneys-at-law
⇒ Dmitry Davydenko, PhD , Director of the Institute of Private International and Comparative Law (Moscow, Russia); Senior Associate, Muranov Chernyakov & Partners, Moscow
⇒ Dilyara Nigmatullina,LL.M, Manager, Association for International Arbitration, Of Counsel, Billiet&Co

Conference moderators include:

⇒ Edouard Bertrand, Of Counsel, Campbell, Philippart, Laigo & Associés, Paris
⇒ Geert Van Calster, Prof. Dr., Partner, DLA Piper UK LLP, Brussels
⇒ Johan Billiet, President, Association for International Arbitration, Senior Partner, Billiet&Co

Preliminary program

8.30 – 9.00 Registration
9.00 – 11.15 General Policy of CIS Countries Towards Arbitration

⇒ Recommendations to non-CIS parties when choosing arbitration in CIS countries

⇒ General policy of Russia towards arbitration

⇒ General policy of Ukraine towards arbitration

⇒ Arbitration in Kazakhstan: contemporary status and perspectives of development

11.15 – 11.45 coffee-break
11.45 – 13.00 Specific Issues in Arbitration in CIS Countries (part 1)

⇒ Arbitrability of corporate and real estate disputes under Russian law

⇒ Bribery and Russia-related Arbitration

13.00 – 14.30 lunch
14.30 – 15.30 Specific Issues in Arbitration in CIS Countries (part 2)

⇒ Interim measures at the stage of recognition and enforcement of international arbitral awards on the territory of Ukraine: practical concerns

⇒ Enforcement of the arbitral award annulled in the country where it was rendered (experience of Russia)

15.30 – 16.00 coffee-break
16.00 – 18.00 Sector-Specific Arbitration

⇒ Arbitration in the Energy Sector involving parties from CIS countries

⇒ Investment Disputes at the SCC involving parties from CIS countries

⇒ WTO dispute settlement system and the CIS experience

18.00 – 19.00 Reception

More information about the conference and the registration form are available on www.aiaconferences.com

3. European Mediation Training For Practitioners of Justice

EMTPJ
European Mediation Training for Practitioners of Justice

After two years of success, Association for international Arbitration (AIA) is proud to announce the third edition of its European Mediation Training for Practitioners of Justice (EMTPJ). AIA initiated the EMTPJ project in the year 2010, with the support of the European commission and in collaboration with the HUB University of Brussels, Belgium and Warwick University, United Kingdom.

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.

The program is accredited by mediation centres and has attracted many prominent and experienced mediators. The EMTPJ course is unique because 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 EMTPJ, students may apply for accreditation at mediation centres worldwide.

EMTPJ 2012 is a two-week training program that will take place this year from 3rd to 15th of Sep-

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tember. In line with previous training courses, the EMTPJ 2012 program aims to introduce and promote the concept of European mediators in civil and commercial matters. The course will consist of 100 hours of intensive training sessions including an assessment day, which will cover 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.

The course lecturers for EMTPJ 2012 are: 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 Reijerkerk, Mr. Arthur Trossen, and Mr. Jacques de Waart.

For registration and a more detailed program of the course schedule, logistical information and lecturers, please visit the website: www.emtpj.eu.

If you have any further questions, please feel free to contact us at: emtpj@arbitration-adr.org.

Sol and Sombra in Spain's New Mediation Law

by Clifford J. Hendel

The February issue of the AIA newsletter contained an article titled "*Plotting a Future for Commercial Mediation in Spain*". In the article, the context for the development of commercial mediation in Spain has been discussed (noting the content of the then-pending draft law), brief reflections on the likely near-term future of the institution of commercial mediation in Spain have been provided and some ways of accelerating towards that future have been suggested.

It came as a surprise in early March, that Spain's new government (the right-of-center Partido Popular) enacted – or perhaps imposed – a mediation law with immediate effect. By "imposed", the use of the fast-track Spanish legislative process of the Royal Decree-Law is meant, by which legislation is promulgated by executive order subject only to fast-track parliamentary review which typically results in little or no change in the legislation. Designed for urgent or emergency measures, the use of the Royal Decree-Law route for passing the mediation law was justified in this instance by concerns of EU sanctions for Spain (the former left-of-center government had let some nine months pass after the date established by the EU Mediation Directive (2008/52/EC) of May 21, 2011 for transposition into Spanish law). The use of the Royal Decree-Law process was apparently viewed as the best way to put an end to the risk of an embarrassing (and potentially) costly EU disciplinary proceeding against Spain.

Whether this is indeed a constitutionally-sufficient justification is an interesting question, which has been the subject of some polemic in local legal circles. Leaving this debate to more appropriate fora, this article will provide a brief appraisal of the law, pointing out some of its highlights, defects and key changes from the prior government's draft.

Philosophy

The law's lengthy and somewhat pedagogical statement of motives describes mediation as being built on three pillars, identified as "de-judicialization" (favoring private and consensual resolution of disputes and leaving resolution by the over-crowded courts to be a last resort), "de-legalization" (favoring relational considerations over strictly legal considerations) and "de-juridicalization" (leaving to the parties the form and content of their ultimate agreement).

Scope

While the scope of the Directive is limited to transnational civil and commercial disputes, the Spanish law will be applicable to all civil and commercial disputes (transnational or not) in which one of the parties has its domicile in Spain and the mediation takes place in Spain. In this regard, the law is reminiscent of the Spanish arbitration law, i.e., in being essentially "monist" in nature (with the same rules applying for domestic as for international matters) and in applying geographic criteria for determining scope of application.

Still, the concrete, consensual and typically pre-established nature of the seat of an international commercial arbitration makes it easier to know where an arbitration is or will be taking place than would seem to be the case with a mediation, which may "take place" virtually and not physically, or in various jurisdictions and without a unique and formal "seat". For this very reason, the UNCITRAL Model Law avoids, as "artificial" (according to the commentary), the use of the idea of the place of mediation. This could be considered as a first example in which the monist, all-inclusive nature of the legislation may make it inapt or overly-cumbersome insofar as commercial and particularly international commercial matters are concerned.

On the other hand, and in view of the constitutional structure of the Spanish state in which significant governmental and legislative attributes are "devolved" to the various regional entities (Autonomous Communities), the law purports to set out a mere framework for the operation of mediation without limiting or prejudicing regional legislation to develop or supplement the framework in areas of their competence. The fact that a large number of Autonomous Communities had already enacted mediation legislation (generally but not always, limited to concrete areas such as consumer and family matters) before the Royal Decree-Law was enacted on the national scale, and the less-than-perfect articulation of the dividing line between the respective competences of the national government and those of the regions, suggests a possibility for confusion and inefficiency in this regard in going forward.

Voluntary but Bureaucratic Nature

As with the draft circulated by the prior government, the Royal Decree-Law trumpets the primacy of the voluntary nature of mediation that it conceives. Indeed, it removes a much-criticized feature of that draft pursuant to which small claims (of less than €6,000) would mandatorily need to pass through mediation before being brought to court.

The law evidences in many areas a somewhat lighter regulatory hand than the prior draft. For example, the prior draft included requirements as to the maintenance of a central register of qualified mediators and the suggestion of detailed requirements (university degree, etc) in order to accede to this register, the law in contrast eliminates the concept of the register and the requirement of a university degree. However, the possibility of such a register is mentioned as within the eventual scope of contemplated implementing regulations. Vague requirements as to training or accreditation which are included in the law offer comparatively little guidance (or solace) to the would-be mediator, and the suggestion of specific requirements

as to mediation training and the providers of such training could be viewed as excessive. In these areas in particular, it would seem that the regulatory hand remains at least potentially heavy. The law could be said in this regard to have opted to "kick the can down the road", leaving to the future regulation of various important and thorny issues of detail.

Thus, the general tonic of the law is rather (some would say) heavy-handed or bureaucratic. An example, shared again with the Spanish arbitration law, is the amorphous and questionably practical requirement that the mediator maintain professional liability insurance or similar security for his conduct. Since liability for an arbitrator's or mediator's conduct is limited to cases of gross negligence or willful misconduct, and since such events are generally non-insurable, the insurance requirements in either context (and the similar requirement for institutions) would seem a dead letter. Indeed, in light of the mediator's merely facilitative role, the insurance requirement seems unfounded and has been criticized as potentially violative of EU rules regarding freedom of services. Another example is found in the somewhat detailed requirements for the initial constitutive session and the minutes to be prepared as a result. The law maintains the aspirational statement that the process should be concluded as rapidly as possible and with the minimum number of sessions, but eliminating the six-month deadline contained in the draft.

Other

As with the draft, the law maintains a certain parallel treatment (for enforcement purposes) of a mediation agreement and an arbitral award, although naturally only the latter can benefit from the provisions of the New York Convention. This aspect, manifested by way of example in the requirement that the mediator sign the eventual agreement and that it be notarized in order to accelerate its execution, has been criticized as reflecting an inaccurate view as to what, in essence, the mediation agreement is: a settlement agreement between the parties and only facilitated (not crafted, ratified or guarantied) by the mediator, and not a judicial or quasi-judicial instrument.

The law specifically contemplates that Spain's chambers of commerce - local or regional bodies typically active in administering and promoting arbitration as an alternative to judicial resolution of disputes – shall be authorized and encouraged to act in the context of mediation. The speed and enthusiasm with which the chambers of commerce pick up the mediation ball could be a good litmus test to measure the interest of the Spanish business community in general in exploring and developing the institution.

The law incorporates the principal aspects of the Directive, including provisions as to confidentiality, suspension of statute of limitations or prescription periods, and the like.

Conclusion – Shades of Grey

Without doubt, the practitioners of commercial dispute resolution (and particularly international and alternative dispute resolution) will be frustrated with and critical of both the content of the Royal Decree-Law and the rapid and non-consultative manner in which it was enacted. They will argue that mediation needs detailed regulation much less than it needs visibility, and that visibility will come from confidence and confidence from practice (and not from regulation). They will argue that the lighter the regulatory hand is, the better. They will argue that the lofty, aspirational rhetoric of the statement of motives (and the three claimed pillars on which mediation, as conceived by the law, is stated to be built) may not be accomplished – and may even be obstructed – by the details of the legislation. And they will argue that the legislative process chosen for enactment of the law is particularly unfortunate, if not to say abusive.

They may well be right. Still in all, the Directive needed to be transposed, law has at least lightened to some extent the burden of the more restrictive draft and evidences that the new government is anxious to take, and to be seen to be taking, action to unblock the courts in a fashion similar to that of many of its European peers.

Time will tell if there is more "sol" than "sombra" in the new Spanish legislation. On first review, there seems to be a good amount of each.

Book Review: International Civil Litigation in United States Courts

By Ian de Lombaert

The fifth edition of this comprehensive book is published by Wolters Kluwer Law & Business and is justified by the dramatic changes in the law governing international civil litigation in the United States, as well as by the latest decisions of the United States Supreme Court rendered after the previous edition. These recent decisions had an impact on personal jurisdiction, sovereign immunity and extraterritoriality. The authors also did not neglect the importance of international aspects in relation to international civil litigation. Even though, the focus of the fifth edition is on United States law, a comparative study of foreign law, especially European law, is a new inclusion to the recent edition.

This book has been authored by reputed jurists such as Gary. B. Born and Peter B. Rutledge.

Gary B. Born is regarded as a worldwide renowned authority on international commercial arbitration and international litigation. He is the Chair of the International Arbitration Practice Group and tops the list of leading international arbitration practitioners. He is also a member of the American Law Institute and has published numerous works on international litigation and international arbitration.

Peter B. Rutledge is a professor of law at the University of Georgia School of Law. In the teaching and research he concentrates on international dispute resolution, arbitration, international business transactions and the United States Supreme Court. Before entering the teaching arena, he has worked at prominent international law firms.

Comprised of four parts and thirteen chapters, this book offers a complete overview of cases and materials, commentaries and notes.

The first part, *Judicial Jurisdiction*, examines the jurisdiction of United States courts over the subject matter and parties to international disputes. This section also deals with the foreign sovereign immunity and jurisdiction of