Association For International Arbitration

IN TOUCH

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To become a member of AIA please go to:

http://www.arbitration-adr.org/membership/

Register NOW. New EU Directive on Mediation Conference

The Association for International Arbitration will organize a conference on the subject of the New Directive on Mediation approved on April 23, 2008.
We cordially invite you to this event that will take place on October 17th 2008 at the Big Aula of the Katholieke Universiteit Brussel. Vrijheidslaan 17 1081 Brussels.

The Coference will be accredited with continuous learning points (Permanent education Belgian Bar)

The program will aim to discuss the issues surrounding the promotion of mediation with in the European Union. Mediation is becoming a trend.

We believe this will be a great opportunity to take a close look at the advantages of mediation and the best alternatives for this long awaited EU directive initiative to be put in to practice.
The topics and speakers at this event are:

- Frank Fleerackers. Dean of the faculty of law at the KUB (Belgium). His topic will be Mediation, ADR and Legal Thinking.
- William E O'Brian Jr. Associate Professor of Law. Director, International Economic Law Masters Program University of Warwick(UK). His topic will be the New EU directive on mediation in the light of American Mediation.
- Salla Saastamoinen. Head of Unit JLS.C.1 - Civil justice Directorate General Justice, Freedom and Security European Commission. His topic will be the New EU Directive on Mediation presented.
- Fernando Paulino Pereira. Representative of the Council of the Moderating EU. His topic will be the key provisions in the directive.
- Ivan Verougstraete. President of GEMME. His topic will be Mediation by judges.

A book publication of the conference will be distributed on the day of the conference, on the topics addressed at the conference as well as other mediation subjects.

For the program and registration form please contact us.

Tel : +32 2 643 33 01
E-mail: administration@arbitration-adr.org

Do not miss it! We look forward to seeing you there.

Call for papers

On arbitration and mediation subjects to be considered for the coming CIETAC's Journal to be issued in December 2008

Contact AIA for submission

Xi'an Arbitration Commission is establishing an International Commercial Arbitration Court

Xi'an International Commercial Arbitration Court is inviting the people to become commissioners of the committee of experts of the international commercial arbitration court who will give consultancy and answer of difficult questions as well as give sound expert advice.

Xi'an international commercial arbitration court is also looking for some excellent international arbitrators from all over the world. After international arbitrators are accepted by Xi'an international commercial arbitration court, they will not only become a member of the arbitrator's panel of Xi'an international commercial arbitration court but also they will be introduced to all professional activities.

How to apply?

Please get in touch with AIA to receive the application form and a recommendation letter from AIA.

Note: AIA's recommendation is only for members of the association.

The fight around the US mandatory consumer arbitration

*"**Mandatory arbitration** is a contract policy that prevents a conflict from receiving judicial attention. In a mandatory arbitration, liability for damages must be determined as a result of an arbitration process before a civil lawsuit can be filed in the court system. In arbitration, neutral arbitrators (often knowledgeable practicing attorneys) are selected and then evidence is presented. The arbitrators then determine the amount of the arbitration award, if any. If the arbitration award is agreed to, that is the end of the matter (and often the arbitration award is thereafter made a court judgment for further enforcement purposes). If there is one of the litigants refuses to accept the arbitration award, a lawsuit may then be filed to have a "trial de novo" (new trial) in a court of law, with liability to be determined by a judge or jury."*

Critics and defenders of the so-called mandatory consumer arbitration have spent pages and pages analyzing why one should condemn or support this trend of arbitration .

The fight could start by an in-depth discussion on weather or not the name is adequate to reality, can it really be said that it is a mandatory arbitration when the defenders will argue that, the consumer has always an option to accept or refuse the services or products connected with such trends in arbitration?. Can it really be stated that the consumer has a genuine option to refuse or accept the arbitration mandated by the company when the common average consumer is not aware of the meaning of arbitration and the consequences that an arbitration proceeding may

Call for arbitrators

Interested in China. Call for arbitrators to be part of arbitration panel in China.

Please contact AIA for more details.

Lead him to, thus little could be such consumer evaluate which choice would favor his or her own interest the most or if it makes if it can be granted with the definition of an option when its is being imposed by a small print and utilizing a language that an consumer with limited knowledge of the legal terms would hardly understand or intend to analyze in terms of a possible future dispute. Even in case the consumer has read and understood throughout, is it in fact a choice to accept the provision or is it a take it or leave it choice conditioning the start of the relationship. Furthermore in the case of a well aware costumer that is confronted with the decision to agree or disagree to the terms of the service or product's choice, the critics of this consumer arbitration would argue, that the later would rarely have a genuine option unless offered a competitor's service or product which would not tackle a mandatory arbitration and equally satisfy his or her demand. Of course in a more objective analysis it has to be said that this so called "mandatory" arbitration, is hardly mandatory and it ultimately leads to a type of "agreement" between the parties.

Arbitration is conceived in its strict sense as an alternative to resolve disputes outside of court in a quicker, cheaper, fair manner; it is to be observed that the argument arises now when adding to this original concession the word mandatory, which could, in the eyes of some observers mean a collision between the conceived strict sense of the concept of arbitration converting this one in an unfair, detrimental of the consumer's rights option. In return, there could be a negative consequence attached to the whole idea of arbitration.

The trend of the American practice has attracted a lot of attention some have become applauders of its use, but many others criticize it. Lawyers, academics and journalist of the most prestigious papers of the US have been harsh when producing a judgment over the matter, concluding in its most justified argument that the consumer is likely to lightly and unaware give away his or her constitutional right of resource to court.

Some of the most relevant criticism and defense arguments brought forward are that when the critics attack the issue of the unfair clauses imposed to the consumer with little knowledge on their side, the defender would argue that these are pathological clauses that will not be enforced by courts. When the critics dispute the potential loss of public precedent, the defenders answer that there is still sufficient precedent that provide plentiful information to the public, when critics position the view of the elimination of the class action, the defense advices that this is in fact a good exclusion.

The trend in all legal systems is no doubt in facilitating the fast and economic resolution of possible arising conflict but the attempt of mandatory arbitration could hardly be considered successful, furthermore the legal updates on the recent trends in the American system point toward the use of ADR methods such as mediation to prevent many of the claims from becoming a larger, longer and more expensive forum. The courts will tend to enforce conditions precedent requiring mediation *E.g. B & O Manufacturing,*

Inc. v. Home Depot USA., Inc., C 07-02864 JSW, 2007 WL 3232276 (N.D. Cal. The trend in all legal systems is no doubt in facilitating the fast and economic resolution of possible arising conflict but the attempt of mandatory arbitration could hardly be considered successful, furthermore the legal updates on the recent trends in the American system point toward the use of ADR methods such as mediation to prevent many of the claims from becoming a larger, longer and more expensive forum. The courts will tend to enforce conditions precedent requiring mediation *E.g. B & O Manufacturing,*

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Inc. v. Home Depot USA., Inc., C 07-02864 JSW, 2007 WL 3232276 (N.D. Cal. Nov. 1, 2007) (dismissing claim for failure to mediate first).

Recently, in the United States, Senators Russ Feingold of Wisconsin and Congressman Hank Johnson of Georgia, together with numerous co-sponsors in both Houses, introduced the Arbitration Fairness Act (S. 1782, H.R. 3010) in the U.S. Congress. This would prohibit mandatory pre-dispute binding arbitration in consumer, employment, and franchise disputes. Parties to a dispute case would still have the ability to choose arbitration over court if they wanted to, but individuals would be given a choice in the matter and would not be denied their constitutional right to access the courts and have a jury trial. The statement would knock over opinion in favor of arbitrability that has been raised by decisions of the United States Supreme Court against the Federal Arbitration Act, at least as applied to consumer and employment disputes.

European tendencies would tackle the issue of the so called mandatory arbitration dispute of opinions in a different manner, take for instance the European Court of Justice in which was decided that a public judge can on its own behalf invoke the nullity of an unfair practice towards the consumer (in light of the Consumer protection Directive 93/13/EEC), even if this consumer did not mention this ground before the arbitrator.

How much option should be put in the discretion of the little one (consumer)?

AIA goes to China

We would like to take the opportunity to thank our members for the great response we have received regarding the "Judicature and Arbitration in China" journal sponsored by CIETAC. This month's issue of the journal will be full of the expertise provided by members of AIA.

Our friends in China are deeply grateful with your contributions; this collaboration will open doors in China.

The latest professional trades indicate that publication continues a great way of focusing the professional expertise as well as enriching the profession itself.

We kindly invite you to submit your unpublished articles for consideration to become a part of our partner Chinese journal.

AIA will continue its efforts to strengthen the ties of friendship, partnership and collaborations with several institutes in China. As mentioned in the previous issue a delegation from AIA will visit China with the vision of finding more projects to involve its members.

Member focus

Arbitration in Latvia

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This article summarizes the main aspects of arbitration procedure in Latvia, including the general rules; the disputes, to whom the arbitration procedure shall not be applicable; the cases, when the arbitration award will not be executed; and the practice of Latvian Courts to avoid Arbitration Clause provided by the Contract between the parties.

GENERAL

The dispute resolution by the arbitration is allowed in Latvia. Parties are entitled to choose this alternative to the state court, which provides enforceable arbitration award in general much shorter period of time, strict confidentiality, possibility to choose different language of litigation, applicable law, arbiters et cetera. Arbitration procedure in Latvia is governed by the Civil Procedure Code (Civilprocesa likums), which provides separate chapter in this respect. The parties assign the dispute resolution to the arbitration by the arbitration clause provided in the contract or by concluding separate agreement. Such clause or agreement shall be in writing. The state court is not entitled to hear the dispute, which is assigned to the arbitration, except both parties of dispute agree afterwards otherwise.

ARBITRATION BODIES AND Disputes, to whom the Arbitration Procedure is applicable

Ether permanent or ad hoc arbitrations are entitled to resolve the disputes in Latvia. Each permanent arbitration shall be registered by the Enterprise Register of Latvia in the Register of Arbitrations, where its procedural rules have to be submitted as well. For the moment approximately 156 permanent arbitrations are working in Latvia. Parties are entitled to agree on applicable law, that is – the law of which country is applicable to the dispute. However the arbitration shall examine if such agreement on applicable law is valid and if it is in line with the Latvian Law for particular dispute. Arbitrations are entitled to hear any civil dispute, except the disputes in respect to: disputes, where the interests of third parties might be affected; the party of the dispute is state of municipal body; amendments to the state registers of civil status; disputes affecting interests of persons being in trusteeship or guardianship; disputes about rights of real property, where the party is limited to execute such rights; eviction of persons from the apartment; dispute with the employee in respect to the employment; disputes with parties being in insolvency procedure; other occasions specified by the law, as regarding adoption, civil incapacity, inheritance, insolvency and such like.

Execution of Arbitration Award

The Arbitration Award is not subject to the appeal and cannot be protested in any way. If such decision is not performed by the losing party voluntary, the winning party is entitled to execute it in the same manner as court decision. That is – by applying to the court and requesting the Execution Writ, what is the authorization document for the law enforcement authorities either to collect the debt or to request to perform some activity. The procedural rules to obtain such Execution Writ is provided by the Civil

Procedure Code (Civilprocesa likums). Arbitration Award and other documents shall be submitted to the court in Latvian – if documents are provided in other language, as well the notarized translation to Latvian shall be submitted. The court informs the losing party about the arbitration award and provides possibility to submit the explanations during 10-15 days from the application of the winning party. During 10 days from this period or from the day the explanation is submitted, the court shall make decision either to provide or not the execution writ in closed hearing. No examination of the substance of the case is allowed by the court, the only grounds to refuse the issuance of the Execution Writ is provided by the law and are as follows: dispute was of exclusive jurisdiction of the state court; arbitration clause (agreement) was concluded by person lacking capacity; arbitration clause (agreement) was recognized as invalid or cancelled by parties; the party was not notified in sufficient manner about arbitration procedure; the party was not notified about appointment of arbitrator; the arbitration was not established or arbitration procedure was in contradiction with the arbitration clause (agreement) or arbitration procedure rules set by the Civil Procedure Code; the award was provided to the dispute not covered by the arbitration clause (agreement).

International Arbitration

The Latvia is the party of the New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Therefore it might be applicable for awards made outside the Latvia but to be executed in Latvia and vice versa – that is for awards made in Latvia but to be executed outside in Latvia in country, which is the party of the New York Convention. Latvia is a party of the European Convention on International Commercial Arbitration of 1961 as well. It is provided, that the Latvian Chamber of Commerce and Industry (LCCI) – Latvijas Tirdzniecibas un rupniecibas kamera (LTRK) – is the body performing the functions provided by the European Convention in respect to cases, where the arbitration clause (agreement) is incomplete, or there is disagreement between the parties or ad hoc arbitration applies.

Avoidance of the Arbitration Clause provided by the Contract

The specific of the Latvia in respect to the arbitration, is that arbitration clause might be avoided by the cession of the claim rights. That is, in case the claim rights arising from the contract are ceded to the third party, such third party is no more bound to the arbitration procedure though provided by the contract. Legal justification for this is provided by the Supreme Court Case No SPC-28 of 12.05.2004. Though, such justification of the Supreme Court is quite questionable, nevertheless the state courts of Latvia consider it as sufficient for avoiding the arbitration procedure in case of cessation up to this moment. Therefore in order to escape the arbitration procedure will be avoided, it is recommended to parties along with arbitration clause in contract to provide stipulation, that in case of cessation of the claim rights to the third parties, the arbitration clause shall be ceded as well.

For more information please visit:
http://www.arbitration-adr.org

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