

Association For International Arbitration

# IN TOUCH



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**Upcoming events:**

- 31 March 2009 : [Conference on Arbitration in China](#), organised by the Association for International Arbitration in Brussels, Belgium. [For registration details, please find enclosed the registration form attached to the e-mail.](#) The following topics will be extensively addressed:
  - How to draft the perfect China related arbitration clause by Gerold Zeiler
  - Enforcement of arbitral awards in China and of Chinese arbitral awards elsewhere by Tony Zhang
  - CIETAC arbitration compared to other Asian institutions by Axel Neelmeier
  - Arbitration in China, a practitioner's view by Patrick Zheng
- 13 May 2009 : [Conference on Arbitration and Mediation in the Natural Resources and Energy Sector](#), organised by the Association for International Arbitration in Brussels, Belgium.

**The 'arbitration boom' in China: "Arbitration is Business"**

Everyone agrees that resolving disputes through arbitration serves business goals. It is this insight that has led to the "arbitration boom" in China. Nowadays, the 'world' of arbitrators and lawyers outside China wants to become more involved in disputes with Chinese parties. It is necessary to investigate the entrance barriers of this young 'market' (of arbitration) and its opportunities. Until 1954, there was no recourse in China if a foreign party wished to arbitrate with a Chinese party. To meet the needs of China's expanding economic and trade relations, The Central People's Government created the Foreign Trade Arbitration Commission ("FTAC"). The FTAC is the former name of China's International Economic & Trade Arbitration Commission ("CIETAC"), a commission that deals with disputes arising between Chinese Organizations and foreign parties. Later, in 1958, the China Maritime Arbitration Commission ("CMAC") was created to facilitate 'efficient' transportation within trade.

These bodies and their rules created the basis on which international disputes could be resolved whilst entering into modern 'business' relationships with China. The 'open door policy' of the cultural revolution of the late 1970s added to this



AIA invites all members and readers to contribute articles and/or speakers at our future conferences on „*Arbitration in China*“ and „*Arbitration and Mediation in the Natural Resources and Energy Sector*“.

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ideological revolution. It was at this stage that several legislative steps were taken, enabling arbitration to better serve business goals. See for instance;

- The Arbitration Law of the People's Republic of China ("CAL"), adopted on August 31, 1994;
- The Civil Procedure Law, adopted on April 9, 1991;
- The uniform Contract Law, adopted on March 15, 1999;
- The Sino-Foreign Equity Joint Venture Law, adopted on April 13, 1988;
- The tremendous amount of BITs concluded with China;
- The signing of the New York Convention on January 22, 1987;
- The signing of the ICSID Convention on February 6, 1993;
- The signing of the Convention Establishing the Multilateral Investment Guarantee Agency on April 30, 1998

Currently China has over 185 arbitration commissions and has signed trade treaties with over 100 countries and regions including the European Union and the United States. China has also signed at least 115 investment protection treaties with 112 countries. These treaties lay down in detail how disputes should be dealt with by arbitration. It is clear that the "arbitration boom" in China offers many new possibilities for non-Chinese lawyers and arbitrators. Although; arbitration in China might revolve around the same



principles; it takes on a different perspective than the 'Western' world. This explains why it is often extremely difficult for major institutions like the ICC and the LCIA to operate with Chinese parties. Therefore, it is necessary to investigate how far 'doors' have effectively been opened for non-Chinese lawyers and arbitrators to become involved with arbitration in or with China. Next to the question concerning the accessibility of the Chinese arbitration market, there is another question that refers to the required forms and skills of arbitrators and lawyers involved in the arbitration process with a Chinese party. Arbitrators and lawyers should certainly not deal with the case before they have a clear understanding of the Chinese way of doing business. Indeed, if the lawyer or arbitrator does not have a clear insight in the required formalities of interaction, future commercial relationships with the Chinese party could easily encounter serious harm.

In recent years, the arbitration movement in China has known several new evolutions. To name just a few: the appointment of CIETAC's own staff and personnel as arbitrators, a custom historically originating from the absence of qualified experts due to the Cultural Revolution, will be explicitly prohibited in a possible new Chinese Arbitration Law; the establishment of the Chinese Arbitration Association will be ensued by discussion concerning the non-governmental status of arbitration committees, its relevance to civil society and its (in)dependence from political interference. Most innovative, however, is the reporting mechanism introduced by the Supreme Court of China obliging national courts in China to notify the Court of every judgment that sets aside a foreign award, finds an arbitration agreement void, rejects the jurisdiction of an arbitral tribunal and disallowing foreign awards. Undisputedly, this will enhance the predictability of the recognition and enforce-



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conference on

*Arbitration in China*

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ment of foreign arbitral awards and reassure international investors with certainty of law.

Taking all this into account, the AIA's conference on arbitration in China should definitely help you to discover the market of 'Chinese' arbitration and to benefit from its possibilities. Following the conference on the 31 March 2009 in Brussels, Belgium, AIA will publish a comprehensive book on the topic of 'Arbitration in China' distributed to the conference participants free any charge. Next to the topics addressed at the conference, the publication will contain, amongst others, contributions concerning:

- Chinese Maritime Arbitration by Zhao Jinsong
- The New Labor Arbitration Statute and its Impact in the Current Economic Downturn in China by Arnold M. Zack
- Specificities of Arbitration in Hong Kong and Mainland China by Robert Pe

**New Scottish Arbitration Bill 2009**

Long expected and eagerly discussed, arbitration enthusiasts welcome the arrival of the [New Scottish Arbitration Bill 2009](#). While there may well be commendable aspects of Scots law, yet there are also many areas where it seems to have fallen behind the times; the language of the courts is a mixture of Latin, old Scots, English and other influences and is, linguistically at least, not readily accessible to the general public. Arbitration law is more inaccessible than most areas of law since Scotland is one of the few countries in the world lacking a modern domestic arbitration statute, the law being a mixture of out-of-date, old, very old and truly ancient case law (dating back at least to 1207) and piecemeal statute (back to 1598 and 1695) and is riddled with anomalies and uncertainties. A CI Arb team led by Lord Dervaird drafted, privately, the Arbitration (Scotland) Bill 2002 (the "Dervaird Bill") substantially consistent with the Model Law and drawing on the best features of the "English" Arbitration Act 1996 but our political masters displayed no vision and ignored it. Astonishingly, in 2004 the then Deputy Justice Minister trumpeted his government's "commitment to arbitration" just as he and his colleagues were consigning the Dervaird Bill to a dusty oblivion. The political landscape of Scotland changed dramatically in May 2007 and, inter alia, a minority Government has



to focus on noncontentious legislation.

The old Scottish arbitration law suffered from numerous inherent problems:

1. there is no inherent power in Scots law for an arbiter to award any of damages, expenses or interest;
2. it is unclear whether an arbiter has immunity from suit;
3. it is unclear whether an arbitration agreement is severable from its



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container contract; the importance of severability is seen in the recent House of Lords case *Fiona Trust v Privalov*

4. a party or his agent can be appointed sole arbiter;
5. the internationally accepted principle that an arbiter can determine his/her own jurisdiction (*kompetenz-kompetenz*) is expressly rejected in Scotland;
6. there is no legal presumption in Scots law that an arbiter may make a part (partial) or interim award; typically, the relevant precedents date from the early 19th century;
7. the position regarding privacy or confidentiality of arbitration is unclear;
8. the applicability of court rules of evidence is uncertain;
9. the currently-in-force Stated Case Procedure is not only an anachronism but one expressly rejected in England by the Arbitration Act 1979.

The Arbitration (Scotland) Bill 2009, introduced to Parliament on 29<sup>th</sup> January and published on 30<sup>th</sup> January 2009, is not only noncontentious, it has all-party support since "everyone's a winner". The following comments are based on the CI Arb's annotated version of the Bill dated 18<sup>th</sup> September 2008. The Bill has a different shape from other countries' legislation in that it collects together all the procedural aspects in the "Scottish Arbitration Rules" (the "SAR", set out in Schedule 1 to the Bill) so that the commercial user (and arbitration practitioner) effectively need only consider the Rules, ignoring the "legal stuff".

The Rules are of two types (a) mandatory rules which apply in all cases and (b) default rules which will apply absent agreement to the contrary by the parties so that if the parties agree nothing or do nothing, they acquire a complete and comprehensive set of rules. If they have already agreed something else (except as to the mandatory rules) either by express agreement or by adoption of some other set of rules (e.g. ICC, LCIA or the Scottish Arbitration Code 2007 ("SAC07")), then that agreement will supersede the default rules in the SAR. All the weaknesses, omissions, grey areas, imprecisions, anomalies etc of the former domestic law have been dealt with by modern provisions, drawing on what were assessed as the most relevant and/or effective features of the Dervaird Bill, the UNCITRAL Model Law, the 1996 Act and other sources.

The Bill rests on three founding principles which govern the operation of the Bill, the third being the minimisation of the role of the Court. The process of challenging awards broadly follows the very successful English model including challenges on questions of law; the 10-Year Survey of the 1996 Act showed a clear majority for retaining the present s.69 regime in England so we saw good reason to follow the market's preferences in this contentious area. The Bill establishes a single regime covering all arbitration and therefore repeals the UNCITRAL Model Law which has not been a success in its 18 years on the statute book. An informal survey of leading international arbitrators led to an 8-point list of the key features that a successful arbitration jurisdiction has or should have; the Model Law did not feature on the list and there is no causal link between the Model Law and the success of an arbitral venue. London, Stockholm, Geneva/Zurich and New York are all successful arbitral venues but are non-Model Law.

The Bill has a number of features which, in our most humble view, improve on our most obvious rival, the 1996 Act:

- (1) It is proposed that there be an express confidentiality/privacy obligation as a default rule (i.e. from which the parties can opt out), as is given in England by case law but the drafters of the 1996 Act considered this area too difficult to draft; the proposed Scottish solution (drafted by the CI Arb team) is wholly novel and has been seen and warmly approved by two



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members of the 1995/96 DAC and by international colleagues.

(2) S.18 of the 1996 Act brings in the Court to deal with any failure of the appointment process but what, with respect, do the judiciary know about appointing arbitrators? Would it not be more logical to have an experienced appointing body sort out such failures? The Bill creates "Arbitral Appointments Referees" who will resolve such failures and the CI Arb will apply to be registered as an AAR.

(3) Mindful of the excellent example of Singapore where the legislature has in the past responded with remarkable speed to rectify anomalies in its arbitration law, under the Bill Ministers may *by order* make any provision which they consider appropriate for the purposes of giving full effect to any provision of the Bill. This will preclude the need to go back to Parliament to rectify any problems that may arise, thereby permitting rapid response. We intend to beat the Singaporean record of 42 days!

(4) The Bill covers oral arbitration agreements, excluded from Part 1 of the 1996 Act, since these do occur from time to time (of course proving such an agreement is another matter).

(5) Reflecting ECHR Article 6 and extensive recent international developments, the Bill will require arbitrators to be independent as well as impartial.

(6) The Bill expressly requires arbitrators to be wholly neutral irrespective of who appointed them; while this might appear obvious, (a) UK users of arbitration sometimes think that "their" arbitrator is on their side and (b) party-appointed arbitrators (e.g. in the USA) can be non-neutral.

(7) Challenges to arbitrators will be dealt with at first instance by the appointing body or, if none, by the AAR as opposed to rushing off to court.

(8) In a number of areas, the arbitrator's discretion has been reinforced e.g. as to whether or not there should be a hearing and there is a proposed power for the arbitrator to consider the necessity of any hearing when assessing the recoverability of expenses. With a view to limiting cost and time, there is expressly no inherent presumption that a party is entitled to a Hearing.

(9) Following *Cetelem v Roust*, the Court will have the power to grant interim measures given only the existence of an arbitration agreement and a (prima facie) relevant dispute;

(10) the Bill expressly deals with the *Gannet v Eastrade* issue where, following application of the slip rule to correct a miscalculation, the arbitrator revisited his/her expenses award to make consequential changes;

(11) the confusing and often misused terminology "interim", "part/partial" and "provisional" awards is made precise; "interim" will drop out of usage, "part/ partial" will refer to a final and binding award on one or more issues in the arbitration, and "provisional" will mean an award, e.g. a payment on account, but binding only until superseded by a partial or final award on the same issue. One matter has been omitted from the Bill and that concerns express provisions to deal with smaller cases, e.g. those involving consumers and small businesses. Politically it is essential that the Bill be seen to benefit the entire community at all levels and be seen as a user-friendly process (there was a case in England concerning a house extension for a new kitchen; the arbitration was held in the kitchen, in a shirt-sleeve environment and with everyone sitting around the table).

The Association for International Arbitration would like to take this opportunity to thank Mr. Hew R Dundas, past President of the Chartered Institute of Arbitrators and co-drafter of the new Scottish Arbitration Bill, who provided us with this outstanding and highly informative text.



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## European Court of Justice rejects the use of cross-border anti-suit injunctions

In [Case 185/07](#) between *Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc* of 10<sup>th</sup> February 2009, the ECJ decided upon the preliminary question of the House of Lords regarding the compatibility of an anti-suit injunction, ordered by a court in one Member State and restraining a party to an arbitration agreement from commencing or continuing court proceedings in another Member State, with art. 1 (2)(d) of the [Regulation No 44/2001](#) which explicitly excludes arbitration from its scope of application.

The facts were as follows: Erg Petroli SpA chartered a vessel of West Tankers Inc. under English law and concluded a contract to perform arbitration in London when necessary. In Syracuse (Italy), however, a collision occurred between the vessel and an Erg Petroli SpA owned jetty. The latter company requested compensation from its insurers, Allianz SpA and Generali Assicurazioni SpA, and claimed the excess amount of damage that the insurance contracts did not cover from West Tankers Inc. in front of a London arbitration panel. In turn, the insurers commenced court proceedings against West Tankers Inc. in Italy to recover the compensation paid to Erg Petroli SpA.

Subsequently, West Tankers Inc. sued the insurers in the UK for not applying the between West Tankers Inc. and Erg Petroli SpA agreed upon arbitration agreement and requested an anti-suit injunction from the High Court, prohibiting the insurers to litigate in Italy any further. The request was granted but was unsurprisingly appealed by the insurers on grounds of incompatibility of the anti-suit injunction with [Regulation No 44/2001](#).

In the past, the ECJ already confirmed such incompatibility of anti-suit injunctions in commercial and civil matters in C-116/02 *Gasser* [2003] and C-159/02 *Turner* [2004], but has now expanded that prohibition to arbitration disputes as well, although art. 1 (2)(d) of the [Regulation No 44/2001](#) excludes arbitration from its scope.

The Court's reasoning confirms the principle of mutual trust between the jurisdiction of courts in different Member States. In particular, it considered the claim for damages as falling within the scope of the Regulation and the preliminary question concerning the validity of an arbitration agreement indirectly affecting that claim as well. In particular, it found that the objection of lack of jurisdiction as a preliminary question, raised by West Tankers Inc. in front of the Italian Court, needed to be included within the scope of application of the Regulation as well.

For those reasons and based on its old case law, the ECJ extended the incompatibility of anti-suit injunctions in cross-border jurisdiction issues to situations where the validity of an arbitration agreement is preliminary questioned.

## Latest news in US arbitration

Recent case law by American Courts shows a continuous strive towards the prevalence of arbitration.

In *Qorvis Communications, LLC v. Wilson*, No. 07-1967, 2008 WL 5077823 (4th Cir. Dec. 3, 2008), the Fourth Circuit Court of Appeals has confirmed a first instance court decision enforcing an arbitral award. The losing party in the arbitration procedure, i.e. *Wilson*, opposed the award and the consecutively judicial enforcement on the basis that the arbitration agreement included no mention of a posterior court enforcement procedure. It was argued that such specific language –



Wilson speaks of "magic language" in this context- is paramount for the enforceability of an arbitral award on the grounds of Section 9 U.S.C. § 2. Nevertheless, both the first and second instance US courts denied the necessity of an explicit clause in the arbitration agreement affirming a national court's jurisdiction to enforce an arbitral award. In the case at hand, the Fourth Circuit Court of Appeals upheld the presumption of both parties to adhere to a court enforceability procedure. According to the Court's ruling, such a presumption exists where the parties have refused to object to the arbitration procedure prior to the rendering of the final award. Furthermore, the arbitration agreement purported the use of attached arbitration rules that mentioned –without going into detail–the enforceability of an award, obviously strengthening the Court's approach.

#### In next month's issue:

- **Report on AIA's** Conference on **'Arbitration in China'**
- Mediating sports disputes through CAS
- And much more...

In *La Torre v. BFS Retail and Commercial Operations, LLC*, No. 08-22046-CIV-SEITZ, 2008 WL 5156301 (S.D. Fla. Dec. 08, 2008), a Florida federal court compelled a mechanic to adhere to the arbitration clause he concluded in the employment contract and solve his salary dispute by means of arbitration instead of the court proceedings, which he set up. In opposing the Court's conclusion, the mechanic argued that an arbitration clause constitutes a far too great imbalance in the bargaining powers of the parties. In fact, he states that a possible arbitration would only benefit the employer due to his easy access to resources whereas the employee suffers not only from a lack of knowledge of arbitration proceedings, but in the specific case at hand the mechanic does not even speak the language in which the arbitration would be held. The Florida federal court strictly applied the party autonomy principle however by finding the arbitration agreement not unconscionable.

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