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## AIA Upcoming Events

The Association for International Arbitration is proud to invite you to its upcoming one day Advanced Mediation Training:

### "Maritime and Insurance - Mediating Across Cultures"

LOCATION: Brussels, Belgium

DATE: January 20, 2012

LECTURER: Rhys Clift

More details regarding the training will be available from November 10, 2011 on AIA website

[www.arbitration-adr.org](http://www.arbitration-adr.org)

## Arbitration in Turkey

by Prof. Dr. Ergun ÖZSUNAY (Em.) and Murat R. ÖZSUNAY, M.C.J.

Depending on their size, the attitudes of Turkish enterprises are different to Alternative Dispute Resolutions (ADR). Small and medium sized firms prefer litigation, whereas large firms tend to refer their disputes to arbitration, both "ad hoc" and "institutional", particularly, with regard to international contracts.

With regard to the institutional background, there have been attempts to establish an Arbitration Center for Domestic and International Disputes by the Istanbul Chamber of Commerce. The Istanbul Rules for Domestic and International Arbitration have been drafted in the light of UNCITRAL Arbitration Rules, taking into account the current arbitration rules of several existing arbitration institutes. Nevertheless such a center has not yet been established.

Another attempt to institutionalize arbitration in Turkey has recently been made by a commission of experts at the Ministry of Justice when preparing a draft law for the establishment of an "Istanbul Arbitration Center" (Istanbul Tahkim Merkezi Kanunu Tasarısı).

Concerning the legal sources of arbitration in Turkey, the law distinguishes between mandatory and voluntary arbitration and within that field between provisions regulating domestic arbitration and those dealing with international arbitration.

International arbitration is regulated by the Turkish Act on International Arbitration (Milletlerarası Tahkim Kanunu), No. 4686 of 21 June 2001 (AIA), whereas domestic arbitration is regulated by the Articles 407-444 of the new Code of Civil Procedure, No. 6100 (CCP) of 12 January 2011, succeeding the old CCP of 1927 and mostly copying AIA. Both laws consider their own set of rules on arbitration, international and domestic respectively, to be self-contained and exclusive. Therefore, no other provision elsewhere, which may seem to be useful also in arbitration, may apply unless a provision of AIA or of CCP Chapter 11 makes an explicit reference thereto.

Neither AIA nor CCP apply to disputes relating to "rights in rem" on immovable property located in Turkey or dispute matters that are not subject to the wills of the parties. Neither do they apply to matters involving public order such as the protection of the rights of relatively weaker parties or rights of third parties.

Although Turkey principally adopted the UNCITRAL Model Law 1985, and both AIA and CCP were mostly modeled upon it, some of their provisions differ from the Model Law and are thus worth mentioning.

## Waiver of the Right to Object to Arbitration in Arbitration Proceedings

In contrast to Article 4 of the Model Law, the issue of "waiver of right to object" is not specifically regulated in AIA. However, a parallel rule is observed in the CCP. In case of a breach of a non-mandatory CCP-provision or of the arbitration agreement, the other party may raise an objection within two weeks after it becomes aware of such breach or within the period prescribed by the arbitrators in this respect. If the parties continue with the arbitral proceedings without raising such objection in due time, they will be deemed to have waived their rights to object.

## Court or Other Authority for Certain Functions of Arbitration Assistance and Supervision

Pursuant to AIA, the state court which shall carry out various specifically defined functions is identified as the "Civil Court of General Jurisdiction" (Asliye Hukuk Mahkemesi). This is a local court of first instance. As to jurisdiction, this court would be the one at the place of domicile or habitual residence or place of business of the respondent. If the respondent does not have any domicile or habitual residence or place of business in Turkey, the "Istanbul Civil Court of General Jurisdiction" has jurisdiction.

In domestic arbitration, according to CCP, these authorized state courts are the "District Civil Courts" (Bölge Adliye Mahkemesi). Note that, these 2<sup>nd</sup> level courts are not yet operational and are still in the process of being established.

## Validity of Arbitration Agreement

This issue is not specifically covered by the Model Law. According to AIA, an arbitration agreement is valid if it complies with the law applicable to an arbitration agreement as chosen by the parties. If the parties have not chosen such a law, the validity of the arbitration agreement shall be subject to Turkish Law, excluding its rules on the conflict of laws.

## Arbitration and Substantive Claim before Court

AIA roughly adopts the same principle in Article 8 of the Model Law, yet it does not contain a provision which directly corresponds to that Article.

CCP however states, that the objection to the jurisdiction of the court based on an arbitration agreement does not hinder the initiation of arbitral proceedings.

## Arbitration Agreement and Interim Measures by Court

Under a provision that was principally modeled further to Article 9 of the Model Law, a party may request the court to order interim measures if the arbitrators or a mutually appointed third party are not able to grant interim measures or collection of evidence on their own. Moreover, only in domestic arbitration, an interim measure granted by the court may be altered or annulled by the arbitrators.

## Jurisdiction of Arbitral Tribunal

Like in the Model Law, the arbitral tribunal shall rule on a plea relating to jurisdiction as a "preliminary question" (ön sorun) and decide first on this issue. If the arbitral tribunal rules that it has jurisdiction, it may continue the arbitral proceedings and make an award. But, unlike the Model Law, no party may request a state court to examine the existing decision as to jurisdiction while the arbitral proceedings are still pending before the arbitral tribunal. Under AIA, the parties may request the setting aside of the decision on jurisdiction only after the arbitral award is made as to the merits.

## Enforcement of Interim Measures

If a party fails to comply with the decision of the arbitrators regarding an interim measure, there is a slight difference between the options of the other party between AIA and CCP with regard to Article 17 of the Model Law. In international arbitration, the court, upon the request of the other party for assistance, would decide whether or not to grant an interim measure irrespective of the existing interim measure already granted by the arbitrators. If the court sees a need, it may officially ask the assistance of another - more relevant court. On the contrary, in domestic arbitration, the court, upon the request of the other party, may declare the existing arbitral decision in this respect as enforceable.

Since the Model Law has been amended regarding "interim measures" in 2006 and Articles 17A and 17J have been added, it may be expected that AIA and CCP will introduce similar changes in the near future.

## Conduct of Arbitral Proceedings

Although the Chapter V of the Model Law, laying down provisions on the conduct of Arbitral Proceedings, has mostly been adopted by AIA and CCP, there are slight differences with regard to statements of Claim and Defense, including Terms of Reference.

Only under AIA the arbitral tribunal draws up its "Terms of Reference" (TOR, "Görev Belgesi"), once the arbitral tribunal receives the Request for Arbitration and the Answer to the Request, and unless otherwise agreed by the parties. The provision regarding the TOR in AIA is inspired by Article 18 of the ICC Rules of Arbitration. The TOR shall be signed by the arbitrators and the parties.

In domestic arbitration, CCP does not contain any rule regarding TOR.

## Rules Applicable to Substance of Dispute

Failing any designation of the applicable law to the substance of dispute by the parties, unlike Article 28 of the Model Law, the arbitral tribunal shall apply the substantive law of the State to which the dispute has the closest connection. As for domestic arbitration, CCP does not refer to the application of any foreign substantive law.

## Settlement

Comparing to Article 30 of the Model Law, it is only domestic arbitration, in which the appropriateness of the settlement is not left to the discretion of the arbitrators. The terms of the settlement shall be recorded in the form of an arbitral award upon the request of the parties only if they are not contrary to "good morals" (ahlak) or "public order" (kamu düzeni), or do not pertain to a non-arbitrable issue.

## Form and Contents of an Award

Under Article 31 of the Model Law, the arbitral award shall be made in "written form" and shall be signed by the arbitrators. Although AIA oddly does not refer to the term "written form" explicitly, all related AIA provisions inevitably imply "written arbitral awards".

CCP slightly expands and clarifies the mandatory contents of the arbitral award in domestic arbitration. In addition to the contents required by AIA, a domestic arbitral award has to contain the rights and obligations imposed on the parties in



a numbered sequence in a clear and definitive manner as well as costs of procedure. Furthermore, whereas AIA requires the signatures of all arbitrators including those who dissent, if any, in domestic arbitration, CCP deems it sufficient if the award has been signed by the majority of the arbitrators. Accordingly, an arbitrator cannot hinder the procedural completeness of an award by simply refusing to sign the award. Another difference in domestic arbitration is that the dissenting opinion of an arbitrator has to be mentioned in the text of the award only if the grounds of such dissenting opinion are attached to the award. Finally, in international arbitration the award and the file are sent by the arbitrators to the Court of General Jurisdiction for safekeeping only upon request of the parties and provided that the parties pay the relevant costs, whereas in domestic arbitration this shall be done by the arbitrators without the request of the parties.

#### Grounds for Setting aside an Award

Concerning the grounds for setting aside an award, AIA's provisions correspond in general to Article 34 of the Model Law. However, unlike the provisions of the Model Law, the award may be set aside by the Court if the party making application for setting aside proves that the award has not been rendered within the time limit of arbitration. The Model Law does not "specifically" address this procedural issue.

#### Appeal of the Decision of the Court

It is possible to "appeal" (temyiz) the decision of the Civil Court of General Jurisdiction (in case of international arbitration) and the decision of the District Civil Court (in case of domestic arbitration) to set aside an award before the Court of Cassation (Yargıtay) in Ankara.

#### Recognition and Enforcement of Awards

The Model Law-provisions have been partly adopted by AIA. The "recognition and enforcement of awards" provisions under AIA only regulate international arbitral awards made in Turkey and do not refer to foreign arbitral awards of any kind. Such recognitions and enforcements are primarily subject to the 1958 New York Convention and the Act on Private International and Procedural Law, (MÖHUK) No. 5718.

Enforcement of final arbitral awards under AIA is subject to the following procedure:

When the Court decision to deny the request to set aside the award becomes final, the Court shall issue a gratis "certificate of enforceability of the arbitral award" (hakem kararlarının icra edilebilirliğine ilişkin belge). Thereupon, the arbitral award can be enforced in Turkey –as any final court judgment in accordance with the provisions of the Code of Enforcement and Bankruptcy, No. 2004 (İcra ve İflas Kanunu) (as amended). "Execution Offices" (İcra Dairesi) have the authority to enforce. Costs of enforcement in Turkey are subject to the provisions of the "Act on Charges, No. 492, (Harçlar Kanunu) (as amended).

In cases where "certificate of enforceability of the award" is to be issued by the request of a party, on the basis of the elapsing of the time limit to initiate proceedings for setting aside or, the parties' waiver of their rights in this respect, the Court shall only examine the same (two) ex officio grounds

(non-arbitrable subject-matter and public order) for setting aside arbitral awards.

In domestic arbitration, CCP does not refer to any specific certificate indicating the enforceability of the domestic arbitral award to be submitted to Execution Offices.

Codified Solutions which do not exist in UNCITRAL Model Law

Unlike the Model Law both AIA and CCP entail provisions regulating costs of arbitration, arbitrators' fees and regulations about the maximum duration of arbitral proceedings and the re-opening of trials after a final award.

## Book Review- Confidentiality in International Commercial Arbitration

by Anand Ayyappan Udayakumar



This book has been authored by Ileana M.Smeureanu and is published by Kluwer Law International. The text focuses on confidentiality, an integral and debatable subject in international commercial arbitration. While iterating confidentiality is of utmost importance as it secures the interests of businessmen by ensuring non-disclosure of their trade secrets, business plans, strategies, contracts, financial results or any other vital

business information that is not publicly accessible, the book analyses the current degree of confidentiality in international commercial arbitration as implicit from important arbitration rules, national legislations, other arbitration-related enactments, and practices of arbitral tribunals and domestic courts globally. By studying this data, the author establishes criteria to assess the breach of confidentiality in international arbitration and the proper rules for protecting or sanctioning such breaches.

The book begins with the definition of the concept of confidentiality and distinguishes it from the related notion of privacy in arbitration. Further, the text examines confidentiality in arbitration in detail, considering its limitations, individuals required to observe it and quantifies its breach. In analyzing these issues, the book engages in the following topics:

- ⇒ reasons for disclosure - eg., for the establishment of a defence, for the enforcement of rights, in the public interest or in the interests of justice;
- ⇒ disclosure by consent express or implied;
- ⇒ current trends towards greater transparency in investor-State arbitration;
- ⇒ circumstances triggering statutory obligation of disclosure;
- ⇒ court measures in support of arbitral confidentiality such as award of damages for breach of confidentiality; and
- ⇒ categories of individuals bound by confidentiality, including third parties such as witnesses, experts,

confidentiality advisors, researchers in arbitral institutions and other actors.

Rather than examining confidentiality on a country-by-country basis, the analysis covers the duty of confidentiality from the initiation of arbitral proceedings through their unfolding to the issuance of the award and thereafter. Varied relevant arbitration rules and numerous significant cases have been dealt with to substantiate and review the concept in depth.

In clarifying the degree of confidentiality implicit in each phase of the arbitral process and in identifying the "patterns of disclosure", this book raises awareness about the various facets and problems posed by confidentiality in arbitration.

Corporate counsel around the world dealing with international commercial arbitration will find this book of significant practical relevance. The appendix consists of selected arbitration materials and instruments relevant to the topic under consideration.

This book is available for purchase at:

<http://www.kluwerlaw.com/Catalogue/titleinfo.htm?ProdID=9041132260&name=Confidentiality-in-International-Commercial-Arbitration>

AIA Members receive a 10% Discount on this book.

## To Arbitrate or Not to Arbitrate

by Eugene S. Becker

The Second Circuit decision in *Bechtel Do Brasil vs. UEG Araucaria*, 10-0341, March 22, 2011 (NYLJ, March 30, 2011) certainly straddled the fence as to the question of an all-encompassing arbitral jurisdiction. This case presents a good recent example of the difficult interplay as among a governing law, governing procedure and the parties' contractual arrangements in resolving the reach of arbitral jurisdiction. As will be (lightly) suggested, the case did nothing to illuminate a bright principle.

UEG sought to arbitrate claims under the contractual arrangements it had with Bechtel. In the mix were included non-timeliness issues. Bechtel moved before the District Court here in New York to stay the arbitration. The substance of the argument in the court below the Second Circuit was that there were claims that were not subject to arbitral jurisdiction. The District Court held that claims involving issues of timeliness were not subject to arbitration.

So far, there is nothing special in the posturing of the process and the arguments that weigh in to this kind of matter for scores of litigants and arbitration participants.

In legislating or over-legislating for potential disputes, the parties had a complex set of identifiers when it came to applicable law and dispute resolution. As is common with complexity, there was greater scope for confusion than for clarity. The parties' contractual arrangements provided that New York law governed arbitration "procedure and administration". There was no more indication in the voluminous arrangements that timeliness matters were arbitrable and there was, at best, ambiguity as to the proper invocation of court jurisdiction.

The Second Circuit remanded the matter to the District Court, by nominally resolving the confusion that had arisen. The Second Circuit held that the District Court had erred in, in effect, excluding timeliness issues from arbitral jurisdiction. The premise to the Second Circuit's decision was not contractual certainty or express or properly implied provision, but rather "ambiguity" as to whether timeliness issues were to be withheld from arbitral jurisdiction. In other words, since there was ambiguity as to the timeliness question at hand, the position would be that the matter would be subject to arbitral jurisdiction.

Now, admittedly, there are here in the US a strong presumption and policy favoring arbitration in context of dispute resolution availabilities. But what may be difficult to appreciate is where resort to arbitration in a disputed case such as here is premised on what is not said rather than what is expressed in the arrangements between the parties.

The submission may be made that this may not be part of a trend in the larger more powerful District and Circuits in the federal court system in the US. The difficulty is that the underlying facts here are odd to the point of eviscerating whatever one understand to be general (and basic) arbitral principle.

## AIA's presentation at the British Chamber of Commerce in Belgium

by Dilyara Nigmatullina

On October 18, 2011 the representatives of AIA, Johan Billiet and Dilyara Nigmatullina gave a presentation at the British Chamber of Commerce on the topic of "Alternative Dispute Resolution and Going to Courts in Belgium".

Beginning with an overview of the choice available to the parties, namely three main dispute resolution options, mediation, arbitration or court proceedings, the speakers concentrated on the merits and demerits of each of the options providing their detailed description.

Usually the parties prefer arbitration, as contrary to court proceedings, because it gives them possibility to select a neutral venue and to determine the procedure, language and arbitrators. In addition, the process is characterized by privacy, flexibility, speed and the final awards are enforceable in more than 145 States worldwide owing to the New York Convention of 1958. Mediation compared to arbitration procedure wherein the parties and not the neutral are the determining factor of the outcome; they negotiate in a structured and interest-oriented manner focusing on resolving the underlying business conflict and preserving their relationship.

Mediation in Belgium is used for family, social, restorative, and civil and commercial matters. Belgian Law on Mediation of February 21, 2005 is incorporated into Part Seven of the Belgian Judicial Code (Articles 1724 - 1737). In principle, any dispute which can be the subject matter of a settlement agreement may be submitted to mediation. However, there is a *lex specialis* concerning public legal entities that may be parties to mediation only in cases provided for by

the law or a Royal Decree. The Belgian law on mediation distinguishes voluntary mediation, court-instigated mediation and so called "free mediation". It also provides an insight into the objectives and purposes of the Federal Mediation Commission which comprises a General Commission and three Special Commissions, for family, social, and civil and commercial matters. The law on mediation also contains provisions regarding duty of confidentiality imposed on the mediator and the parties, covering all documents and communications made during and for the purpose of a mediation process.

The legislation on arbitration in Belgium is incorporated into Part Six of the Belgian Judicial Code (Articles 1676 - 1723) and governs both, domestic and international arbitration. Non-arbitrable in Belgium are disputes incapable to be settled and if provided so under the specific legislation (for example, among others, certain disputes within IP and competition law). The law also regulates the courts' assistance throughout arbitral proceedings: in the appointment and replacement of arbitrators, in ordering interim measures, conducting the hearing of the witnesses, verifying the authenticity of documents, disputes relating to the submission of documents or allegedly forged documents. Additionally, Part Six of the Belgian Judicial Code provides detailed procedure of how to set aside, enforce the award and oppose against its enforcement. Under Belgian legislation it is possible to appeal the award if the parties provide for that in their arbitration agreement.

Discussing courts in Belgium, the speakers distinguished various types of courts depending on subject-matter and territorial jurisdiction. At a county level there are Police Courts and Justices of the Peace, at a district level the courts system comprises Courts of First Instance (with three subdivisions: Civil, Juvenile and Criminal Court), Commercial, Labour and Allocation Courts. At a judicial area level there are Courts of Appeal and Labour Courts of Appeal. Additionally, the Belgian court system includes an Administrative, a Constitutional and one Supreme Court. The Belgian Supreme Court is located in Brussels and comprises three chambers dealing, in particular, with civil and commercial, criminal, and labour cases. The review at the Supreme Court level is limited to the issues of law and specific rules of the procedure are applicable.

AIA representatives were glad to share with the audience their knowledge and experience within the Belgian dispute resolution procedures, and positive comments from the participants evidenced that the information provided had been found useful and helped to increase the awareness regarding the topic.

## Book Review – Guide to ICSID Arbitration

by Anton Fischer



Seven years after having published their first edition, Kluwer Law International released Lucy Reed's, Jan Paulsson's and Nigel Blackaby's second edition of their "Guide to ICSID Arbitration" earlier this year. Intended to give an overview and basic knowledge of the ICSID arbitration system this book, also incorporating the major amendments to the ICSID rules since the release of the first edition,

provides the reader with an elemental overview foremost of its procedural aspects. After briefly introducing ICSID, the authors, all leading experts in the field of International Arbitration, discuss technical matters with regard to the arbitration by outlining the dispute settlement regime and giving advice on how to draft an ICSID arbitration clause.

Reed, Paulsson and Blackaby moreover pay attention to the unique features of investment treaty arbitration by elaborating on different sources of possible claims. They furthermore sketch relevant technical aspects and highlight the procedures of review, recognition and enforcement of final awards, illustrated by recent case law.

Lucy Reed's, Jan Paulsson's and Nigel Blackaby's Guide to ICSID Arbitration attracts students as well as practitioners through its compelling conciseness. It is only chapter three elaborating on different kinds of claims which appears more extensive compared to other parts. Headed "ICSID investment treaty arbitration", it differs between and takes a closer look on national investment arbitration claims, bilateral investment treaty (BIT) claims and multilateral investment treaty (MIT) claims. Foremost BIT claim related aspects such as the beneficiaries of a BIT with regard to the claims procedure, the right choice of law the question about the investors' substantive rights and the enforcement procedure are dealt with in more detail.

This guide has been written in order to give investors and their counsel, as well as government legal advisers a principal understanding of ICSID arbitration. Well supported by relevant case law and provided with a selective bibliography of resources, the interested reader will be encouraged to use the Guide to ICSID Arbitration as a starting point for further research. Clearly represented tables of case law will facilitate this endeavor.

This book is available for at: [http://www.kluwerlaw.com/Catalogue/titleinfo.htm?wbc\\_purpose=Basic%2525252525252?ProdID=9041134018&name=Guide-To-ICSID-Arbitration.-2nd-edition](http://www.kluwerlaw.com/Catalogue/titleinfo.htm?wbc_purpose=Basic%2525252525252?ProdID=9041134018&name=Guide-To-ICSID-Arbitration.-2nd-edition)

AIA Members receive a 10% Discount on this book.

## The Costs of International Arbitration: Results of the CI Arb Survey

by Ricardo Molano

The Chartered Institute of Arbitrators (CI Arb) decided to take up the challenge of examining the costs of international arbitration. In September 2011, CI Arb came up with the results of the Costs of International Arbitration Survey which explores how and why costs are incurred at each stage of the arbitration process. Some of the most important numbers and results of the survey are considered next.

### Methodology

The survey consisted of ten questions with multiple subcategories designed to elicit responses about the amounts parties claimed, the amounts arbitral tribunals awarded and the costs spent on various items. Information on 254 arbitrations



conducted between 1991 and 2010 were considered to be useful for statistical analysis.

#### Survey participants at a glance

Out of 254 respondents who participated in the survey, 71% (180) of respondents described themselves as party representatives, 25% (64) as tribunal and members and the 4% (10) did not identify with either category.

Over 50% of respondents were from the UK (32%) and the rest from Europe (20%). The remaining 48% came from Asia, the Middle East, Africa, North America and other locations.

#### Where was the seat of arbitration?

The United Kingdom had 28% of the seats, followed by Europe with 22%, Asia with 11%, North America with 7% and the remaining 32% with some other regions.

#### What type of Arbitration was it?

Nearly two out of every three arbitral proceedings were administered by an institution. The remainder were ad hoc. Of those which were institutionally administered, the ICC was the most popular choice, followed by the LCIA.

#### How much did they get?

Regardless of the nature of the dispute, the data indicates that 100% of those that claimed up to £ 1.000.000 received an award within this category. 62% of the parties claiming between £ 1.000.000 and £ 10.000.000 obtained an award within this range, in comparison with a 46% success rate for claims between £ 10.000.000 and £ 50.000.000. Additionally, **39% of survey participants claiming between £ 50.000.000 and £ 100.000.000 received an award within these limits**, while 33% of participants claiming for £ 100.000.000 or more received an award for no less than this amount.

#### What did they spend it on?

74% of the party costs were spent on external legal costs (including where applicable barristers' fees), with the remaining 26% spread across other headings. For example, out of a total expenditure of £ 1.000.000, the costs a party would incur might be distributed as follows: i) £ 740.000 for external fees; ii) £ 100.000 for experts' fees; iii) £ 80.000 for external expenses; iv) £ 50.000 for witness fees; v) £ 30.000 for management costs.

On the 74% of costs referred to external fees, parties spend 19% on the pre-commencement/commencement of the arbitration, 25% on the exchange of pleadings, 5% on discovery, 14% on fact and expert witnesses and the remaining 37% on the hearing (before, during and after).

In addition to the party costs, common costs will also be incurred by both parties. 60% of these costs were spent on arbitral fees, with the remaining 40% divided amongst the cost of producing transcripts of the proceedings, hiring the hearing venue, paying certain arbitral expenses and covering other miscellaneous costs.

#### Length of Arbitration

The average arbitration took between 17 and 20 months, depending on the nature of the dispute. While length may affect some of the common costs, it does not appear to have been a material factor with respect to arbitral fees.

#### Who Spends More?

Although similarities were observed between the allocation of party costs, survey data indicated that, regardless of the nature of the dispute or the amount claimed, a claimant spent more than a respondent. Overall, claimants spent approximately £ 1.580.000 while respondents spent an average of £ 1.413.000 a difference of nearly 12%. On the other hand, when the survey participants were asked how much was spent on experts, a noticeable difference appeared, with respondents outspending claimants by £ 330.000 to £ 213.000, or nearly 55%.

#### Costs: UK vs Europe

**Irrespective of the nature of the dispute, a party's costs can vary depending on where the seat of arbitration is.** The survey assumed hearings took place at the seat. Survey data indicated that arbitration whose seat was in the UK were **less costly than in the rest of Europe.** Claimants' costs averaged approximately £ 1.540.000 in the UK, in comparison with £ 1.685.000 in Europe, a difference of nearly 10%.

Although barrister costs were higher in the UK (possibly due to the traditional separation of functions between solicitors and barristers) external legal fees were over 26% higher in Europe. Survey respondents similarly reported that the common costs of arbitrations in Europe were over 18% higher than in the UK. In any event, given the small proportion of the population surveyed that reported such costs, these results should be interpreted with caution and may not be representative of international arbitration as a whole.

#### Common Law vs Civil Law

A comparison was made between the amounts parties spent on arbitral proceedings whose seats were in common and civil law countries. Regardless of the nature of the dispute, survey participants reported that arbitrations with seats in common law countries were less costly than in civil law countries for both claimants and respondents. Party costs averaged approximately £ 1.348.000 in common law countries and £ 1.521.000 in civil law countries, a difference of nearly 13%.

External legal costs, external expenses and witnesses were significantly more expensive in arbitrations with the seat in a civil law country. In common law arbitrations, however, barrister fees, experts and managements costs were higher than in civil law countries.

#### Comments

In accordance to the Survey, the majority of the costs incurred by a party are within its own control. In addition, it appears that a party's expenditure is mostly on its legal team, not on experts, documents or witnesses. How can the cost of arbitration be reduced? Is this mainly responsibility of the party involved? Is there any responsibility from the external legal advisors?

The length of arbitration must also be of concern. International arbitration must be an efficient and cost effective process for everyone involved. How can the time of arbitration be reduced? How could the parties and their legal teams contribute to shorten the length of the proceedings?

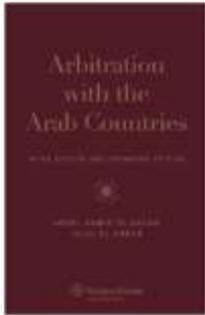
Why is Europe more costly than UK? What about the costs of international investment arbitration? This survey produced an important amount of information which should pave the way for further investigations. The arbitration community should address all these questions and recognize the importance of the effort done by CI Arb with this first survey on the costs of arbitration which is worthy of study and discussion.

The CI Arb Costs of International Arbitration Survey 2011 is available at: <http://www.ciarb.org/conferences/costs/2011/09/28/CIArb%20costs%20of%20International%20Arbitration%20Survey%202011.pdf>



# Book Review - Arbitration with the Arab Countries

by Anand Ayyappan Udayakumar



This book is the third and expanded edition which is published by Kluwer Law International and authored by Abdel Hamid El-Ahdab and Jalal El-Ahdab. The book provides a country-by-country overview of the legal systems and processes in relation to arbitration in Arab jurisdictions namely, the Middle East and the North African countries.

ous editions, this book has been revised, updated and expanded providing commentaries, an overview of case laws and translations of the relevant statutes. In summary it can be stated that this text constitutes a comprehensive and up-to-date encyclopedia of all Arab arbitration laws.

This book is available for purchase at:

<http://www.kluwerlaw.com/Catalogue/titleinfo.htm?ProdID=9041131701>

AIA Members receive a 10% Discount on this book.

The initial chapter deals with an outline of the Islamic law and arbitration and concentrates on:

- ⇒ A General Overview, which includes a historical outline and a description of the current status of arbitration;
- ⇒ The Arbitration Agreement, analyzing in particular the validity and form of arbitration agreements, their incorporation by reference, capacity, the agreement and the subject matter of the dispute, arbitrability, severability and autonomous nature of the arbitration clause, and its effects;
- ⇒ The Arbitrators, examining the issues of the number of arbitrators, their appointment, capacity and termination of their mission;
- ⇒ The Proceedings, discussing the law applicable to the procedure, seat of arbitration, language of arbitration, waiver, interim and conservatory measures, experts, witnesses, statement of claim and defense, hearings, time-limits, stay and suspension of proceedings, and the closure or termination of proceedings;
- ⇒ The Award, addressing the law applicable to the merits, consensus of majority in rendering the award, form and contents of the award, deposit of the award, res judicata, and correction and interpretation of the award;
- ⇒ Enforcement of Domestic and International Arbitral Awards, and
- ⇒ Means of Recourse, which include opposition, appeal, revision and setting aside.

All the subsequent chapters deal with a specific country such as Algeria, Bahrain, Egypt, Iraq, Hashemite Kingdom of Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen, following the same structure of the above mentioned initial chapter.

The Amman Arab Convention on Commercial Arbitration (1987), the Riyadh Arab Convention on Judicial Cooperation and certain statutory provisions on arbitration are also detailed in this text.

The intense study adopted in this book is valuable to practitioners, scholars and businesses interested in arbitral processes in the Arab jurisdictions. In comparison to the previ-

## Involvement of PwC in ADR

by Ainhova Vermunt



Based on studies conducted by PwC in recent years, it has become increasingly apparent that dealing with conflicts in one of the few remaining areas in the corporate environment where fundamental innovation and relevant cost optimisation are possible. The corporate environment is adopting the notion of conflict management. When considering, for example, conflicts between companies, the classic range of arbitration procedures has been expanded to include mediation or expert determination as well as corresponding new contract clauses; some companies have also developed technology-based procedures for selecting the most suitable approach for a specific conflict.

PwC has extensive knowledge in diverse areas of expertise such as active litigation support, forensic investigations, external and internal audit, tax and legal matters, corporate governance, (actuarial) valuations and sustainability. Multi-competence teams are built on a case-by-case basis in order to optimise the outcome for each client. The vast range of competences is complemented by a large international network enabling PwC to provide analyses in relation to any jurisdiction or applicable legislation. Due to the well-considered use of resources, efficiency is guaranteed which is reflected in the limited time in which results can be presented. All of the above qualities contribute to appropriate conflict management.

Worldwide PwC professionals have extensive experience advising clients and their legal advisers to investigate and understand the financial and business aspects of any case. The aim is to present data, information, analyses in clear language and/or graphics for adversaries, opposing counsel, judges, arbitrators and juries. Our litigation experience includes forensic accounting and investigation, technical analyses, valuations, electronic document recovery and e-discovery. The technological tools enable the comprehensive processing of large quantities of documentation, thereby increasing efficiency and effectiveness.

The PwC UK practice conducted a study to obtain empirical and qualitative data with regards to the perceptions and experience of corporations in enforcing arbitral awards and settling their disputes more generally, both before and after awards had been handed down. Conducted over a six-month period, this study summarizes data from 82 questionnaires and 47 interview. PwC UK surveyed major corporations that are users of arbitration services. Its key conclu-

sions are that international arbitration remains companies' preferred dispute resolution mechanism for cross-border disputes, international arbitration is effective in practice and when international arbitration cases proceed to enforcement, the process usually works effectively.

In order to understand the ins and outs of conflict management in the corporate environment, the PwC Germany practice performed several elaborate national studies on conflict management highlighting the existing preferences with regards to conflict management and the actual way in which conflicts are handled. The publication of the results has led to the establishment of national round tables including representatives of large corporations sharing their insights on conflict management.

The PwC Belgium practice helped a subsidiary of a major Japanese corporation to build a strong case in its defence of a breach of contract claim. Working closely with the company's lawyers, we provided an independent fact finding report including a detailed analysis of the relevant contracts and financial information, which bolstered the client's settlement-negotiating position. The lawsuit was settled out of court at 30% of the initial claim.

The PwC Belgium practice investigated the joint venture partner of a company active in the chemical sector in the context of a potential disposal process and in light of allegations about unusual activities of this joint venture partner. An in-depth analysis with a multi disciplinary approach was performed, including a financial analysis and an analysis of the contracts, incurred costs, expenses and corporate intelligence research on the people and companies involved and their potential network. The results were complemented with interviews of management and relevant employees. The report of PwC was used as a firm and objective base to decide upon further steps in the management of the joint venture partner and as an independent basis for the legal counsel in the negotiations.

The PwC UK practice provided litigation support to a major aluminium melting plant, which was involved in a series of contractual disputes with a former business partner. The client launched legal proceedings against its own former chief executive, a former business partner, a number of associated and their officers after allegedly discovering a fraud perpetrated by the defendants by way of bribery. The PwC UK practice was appointed as accounting expert witness in these and other related proceedings. The team worked closely with the client's internal and external legal counsel while producing a series of independent reports which analysed the key accounting issues at stake in our client's claim. These reports were submitted to the High Court in London. Our client settled out of court on undisclosed terms.

In all the above cases, the litigation support of PwC resulted in minimising the damages and reaching a settlement out of court in a short timeframe. In all cases, PwC provided an independent report including an analysis of all relevant data, facilitating all parties to assess all aspects of a case on top of the financial implications.

Due to the swift production of such a comprehensive and objective report, a well founded decision can be taken at an early stage smoothing the way towards a possible solution.

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## AIA Recommends to attend

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