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AIA WORKING GROUPS 2009-2011

AIA is pleased to announce the recent establishment of two **Working Groups** in the areas of **International Commercial Arbitration** and **International Investment Arbitration** as part of our projects for 2009-2011. They are chaired by Mr. Edouard Bertrand and Mr. Christian Leathley respectively, who were selected based on their extensive experience and expertise in the said fields. They are members of AIA. Please find below a brief profile for each of the chairpersons.

The Working Groups will advise and participate in our education and training initiatives, propose conferences and special events in their respective fields, prepare documents and studies to be presented in different forums, comment on different legal proposals at a regional or international level, inter alia. Members of AIA will be provided with further details shortly.

Edouard Bertrand

Edouard Bertrand is of counsel to Campbell, Philippart, Laigo & Associés, a law firm in Paris with an established reputation in Corporate Law and Business Litigation. He has held this position since 2006. Prior to this, Mr. Bertrand was Head of the Litigation and Arbitration Department for Slaughter & May's Paris office from 1992. Amongst his areas of specialty are Mergers and Acquisitions and Business Litigation including International Arbitration.



Mr. Bertrand is not just admitted to the Paris Bar but also the California Bar. Born in Washington DC, USA, he brings a good mix of experiences from both sides of the Atlantic as noted by his educational background. He attained a degree in Economics from the University of Paris II and then proceeded onto attaining a Law degree from the same institution. The following year, he obtained a graduate degree in Business Law and finally obtained a Masters of Comparative Law degree from the University of Virginia Law School.

Mr. Bertrand is always abreast of developments in International Commercial Arbitration and regularly highlights such topics on his web blog. As is evident from a single visit to the blog, his energy, enthusiasm and expertise in the field is undisputable.

Christian Leathley

Christian Leathley is counsel in the International Arbitration group at Curtis, Mallet-Prevost, Colt & Mosle LLP's New York office. His practice focuses on international commercial arbitration, investment arbitration and international litigation. He represents clients as counsel before international tribunals in *ad hoc* and institutional proceedings, including ICC, ICSID, LCIA, AAA and UNCITRAL arbitrations. Mr. Leathley has particular experience in Latin



American disputes. He has appeared as advocate in Spanish-language arbitral proceedings against a specialized agency of the United Nations. He also has been recognized in *Chambers Latin America* as one of the region's "up and coming" international arbitration practitioners. Mr. Leathley has lectured frequently on international arbitration, including most recently as visiting professor at University of Pennsylvania Law School.

Mr. Leathley is admitted to practice law in England & Wales and New York. Along with New York, he has also worked in London, Amsterdam and Madrid. He attended Durham University where he attained his BA (honors) degree in Law. Then he went onto complete the Legal Practice Course at the College of Law of England and Wales. Subsequently he obtained an LLM degree in International Law from New York University School of Law.

INTERNATIONAL COMMERCIAL ARBITRATION IN THE DESERTS OF ARABIA

As the Middle East sees continued rapid growth in its economy and the ensuing inherent integration of its economies with the rest of the world, bridges are being built to understand and overcome differences in commercial practices between this very culturally aware and traditional part of the world and its peers. Without exception, dispute resolution in commercial matters has also been scrutinised and modified in the same effort. One of the largest economies in the region i.e. the Kingdom of Saudi Arabia has been subject to the said scrutiny.

Certain aspects of Islamic Arbitration have always been globally favorable, such as the idea that arbitral awards have the same binding force as a court judgment, a belief held by the Hanbali jurists (one of the four leading Schools of Sunni Islam and also the practice adopted by the Kingdom of Saudi Arabia). However, the areas of tension seem to be at the forefront of the practitioners' and parties' thoughts. One such alarming aspect of arbitration in the Middle East was recently highlighted in early August 2009, in the case of *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (Saudi*

Arabia). The presiding arbitral institution was the ICC and the arbitration was heard in Saudi Arabia by a panel of three

Saudi arbitrators, one of whom was a member of the royal family. It concerned a \$1.2bn claim based on a joint venture construction project in Saudi Arabia that was entered into in 2003. *Jadawel* issued the arbitration proceedings in 2006 contending that UAE-based *Emaar* had formed a partnership with another party in breach of the contract. The arbitration spanned over a two year period. Finally, *Jadawel's* claim was dismissed by a majority vote ordering it to pay legal costs. As is the legal custom in Saudi Arabia, this foreign award was referred to the Saudi Board of Grievances (*Diwan Al-Mazalem*) for their approval so that the award could be enforced. This is a specialized tribunal whose substantial jurisdiction lies in matters of Administrative Law. They re-examined merits of the claim to ensure compliance with *Shari'ah*. On examination, the Second Commercial Court of the Board of Grievances reversed the ICC award in April 2009. *Emaar* was ordered to give 18.61 million shares to *Jadawel*, pay US\$228 million in damages for realty projects and the litigation costs. This was reaffirmed in August after *Emaar* appealed the decision. This uncertainty in the enforcement of foreign decisions based on perfectly valid arbitration agreements is a cause of great concern and a deterrent for all foreign investors looking to enforce their arbitration award in Saudi Arabia.

Foreign arbitration decisions that are contrary to public policy are rendered unenforceable by the Article V 2(b) exception of the New York Convention, to which the Kingdom of Saudi Arabia has been a signatory since 1994. Mostly, this appears to be a reason of anxiety due to a lack of understanding of what might be against Saudi public policy. Educating the legal



Association for International Arbitration In Touch

professionals in matters of local customs and law is common place with most international entities. For Saudi Arabia, the matter might require more time than normally allocated due to the stark contrast in certain aspects between Shari'ah Law and for example, Western Law. Further, in comparison to other Middle Eastern states, its law adheres to pure Shari'ah principles the most and contains the least amalgamation with foreign legal principles. There is constant effort in the Middle East to adjust their arbitration laws for foreign investors. Inter alia, this is noted by accession to the New York Convention 1958 by all of the Gulf Cooperation Council (GCC) states and adoption of UNCITRAL Model Law in Bahrain, Iran, Jordan, Oman, and Tunisia. Reciprocity of this effort by increasing awareness of what would offend local public policy and subsequently avoiding such pitfalls in commercial transactions and arbitrations would help to allay some fears of foreign investors and their legal representatives. The most basic and well publicized of such pitfalls would include contracts involving usury and insurance or any other speculative contracts.

In the arena of Commercial Arbitration in the Middle East, a matter of some considerable discussion has been party autonomy and more so in the case of the Kingdom of Saudi Arabia than other countries in the region. For instance, this has been discussed in the context of Choice of Law clauses. For all domestic disputes referred to arbitration, the applicable law is virtually always Saudi Law. For international disputes that have their seat of arbitration in the Kingdom, failing any Choice of Law provision in the arbitration agreement, the applicable law is determined with reference to private international law. Precedent from the Board of Grievances establishes this to mean that the law of the contract will be the law of the place of performance of the contract. So, where the place of performance is Saudi Arabia, by application of this principle, the applicable law would be Saudi Law. On its own this provision might sound relatively uncontroversial. What does cause the most problems for foreign parties to arbitration is Art 39 of the Implementing Regulations of Saudi Arbitration Law 1985. It makes it binding for any award to be Shari'ah compliant. This makes party autonomy more restricted than is the case for arbitrations with other seats.

However, there are other aspects in which party autonomy

does undoubtedly find respect. In selecting the place of arbitration, parties can agree upon any place whether

within the Kingdom or outside. As stated above all Shari'ah compliant awards will be enforced. For selection of arbitrators, one finds partial respect for party autonomy in that they are allowed to agree upon any person as arbitrators who belong to a free profession, for example, doctors, engineers and bankers according to Art 3 of the Implementing Regulations of Saudi Arbitration Law 1985. They do not need to have any institutional qualifications in a specific field. However, the autonomy of parties is certainly reduced in the sense that all arbitrators must be male and Muslim.

In other areas of Shari'ah law, contracting parties find added protection due to the significantly increased importance attached to contracts. The Islamic maxim "[t]he contract is the Shari'ah or sacred law of the parties" is an accurate summation of the stance taken on contracts in the Shari'ah. The basic idea that a word once given should be honored plays a foundational role in subjecting all contracts to specific performance with the exception of those that contradict the Shari'ah principles.

Certain other aspects of Saudi Arbitration Law are more aligned with general practice in International Commercial Arbitration but the Saudi law could be seen as going further than its counterparts. This is also noted upon comparing national arbitration rules. With regards to liability of arbitrators, as is the case with UNCITRAL Model Law, the Saudi Arbitration Law is silent on this point. The void is filled by the general principles of Shari'ah according to which an arbitrator is to be liable for any fault on his part that causes harm to a party or parties. Further, due to the importance placed on contracts in Shari'ah, an arbitrator is obliged to



conduct himself responsibly under his contractual obligations. Contrary to the position in most other national arbitration regimes, such as that of Britain and Spain, it is not essential to prove bad faith on the part of the arbitrator before one can enforce provisions outlining arbitrators' duties (duty clauses). Arbitrators in Saudi Arabia can be held liable for acts of negligence (according to the Islamic tort-like concept), for example, losing an important piece of evidence.

On an institutional level and in respect of some institutions, a starker contrast is found. Under Art 34 of the ICC international arbitration rules, arbitrators have absolute immunity for all acts and omissions in relation to the arbitration. Art 21 (a) of ICSID takes a similar stance by providing absolute immunity 'except when the Centre waives this immunity'. AAA international arbitration rules provide that arbitrators will only be liable for any deliberate wrong doings. This does not fall in the category of sharpest contrast. The Saudi arbitration regime like all other major legal systems outlines the duties of an arbitrator. Additionally, with Shari'ah Law, we find provisions for full enforceability of these duty clauses.

In this very brief report, it is apparent that there are various facets in the Saudi Arbitration and Commercial Law which is fundamentally different from the more widely accepted practice of International Commercial Arbitration. However, this is a legal system which has developed over the centuries and has its own sophisticated procedures and rules that certainly demand attentive examination and de-marginalization in this age of globalization. For integration of the various commercial cultures, which bear disputes resulting in International Arbitration, professionals in this field could certainly consider further collaboration with the Middle East to explore in-depth the intricacies of this less known legal system. In parallel, a concerted and non-intrusive effort between professionals on both sides could help to modify the said system in an effort to make it more internationally accommodating.

PUNDITS

INTERVIEW WITH MS. FUNKE ADEKOYA

AIA will include a new space in the newsletter called **Pundits**. The idea is to have interviews of some of the most recognized persons in the world of arbitration. This section will invite experienced arbitrators and mediators, officers of international organizations, government officials and academics. In short, the people who are shaping and leading the way in international arbitration in all the different parts of the world. They will have the opportunity to comment on very diverse topics and give their opinion in some of the hot issues in ADR.

AIA will start this section with one of its members who is part of the Who's Who in international arbitration and an excellent representative of the international arbitration movement in general and in Africa in particular: **Ms. Funke Adekoya**.

Ms Adekoya is a Nigerian national who obtained her LL.B from the University of Ife and a LLM from Harvard University. She has been admitted as barrister and solicitor in Nigeria and as a solicitor in England and Wales. Ms. Adekoya has represented parties as counsel in several arbitration proceedings and acted in numerous disputes as either - party appointed Arbitrator, Sole Arbitrator and Presiding Arbitrator. Also, she regularly lectures on arbitration law and procedure. She has a long list of impressive professional achievements and acknowledgements to her credit and is an active member of very important professional associations. At present, she is a leading partner of [AELEX](#) where she focuses in



commercial litigation, corporate dispute resolution, corporate insolvency and competition law.

AIA: How did you get involved with alternative dispute resolution (ADR)?

Increasing delays in having matters heard in the courts, made the progression to ADR a fairly easy transition for me. In the late 1980s, banks and other commercial clients led the call for the establishing of specialized commercial courts in Nigeria, as a means of speedy resolution of their commercial disputes. Perhaps because it seemed as if such commercial clients would have an advantage over the many litigants whose matters were not of a commercial nature, these calls went unanswered. The only other option to such commercial clients was to resort to ADR, and especially to arbitration. As a litigator in a commercial practice, when clients asked about ADR procedures available in Nigeria, I had to learn about arbitration, found that in most cases, it was an ideal alternative to the congested court systems and so became actively involved in promoting ADR and arbitration within the Nigerian legal community, letting lawyers know that arbitration would not take away our livelihood, as many lawyers felt at the time. The Nigerian branch of the Chartered Institute of Arbitrators operated from a room in my office at its inception for about two years until it had sufficient funds to rent its own office space; and I was a part of its Steering Committee.

AIA: What types of arbitration have you done?

I have acted as arbitrator in numerous commercial disputes, ranging from claims arising from a breach of a warehousing agreement by a banking entity, to a breach of an airstrip leasing agreement. I find however that many disputes in which I act are energy related; in that either the party appointing me operates in the upstream or downstream energy sector of Nigeria's economy and has a purely commercial dispute; or the disputes have been energy related – in the last three years I have handled disputes relating to the breach of a gas sales and purchase agreement, a claim for variations under an oil jetty construction contract and the interpretation of the terms of a subsea oil pipeline laying contract.

AIA: From your experience, please discuss ADR in Africa and in Nigeria?

ADR and arbitration in Africa and Nigeria is on the upturn, especially in the energy and natural resources sectors of the economy. Where foreign investors contract with agencies of government, settlement of disputes by arbitration is seen as the preferred alternative to litigating in national courts. As a result of court decisions, such agencies, now realize that they cannot raise a defence of sovereign immunity when disputes arise under the contracts. On their part, for international arbitrations, most investors still insist on institutional arbitration under either the ICC or the LCIA and a venue outside the investing country.

AIA: Has there been a substantial growth in arbitration in Africa?

Due to the influx of direct foreign investment in many African countries, coupled with court delays and congestion as legal systems struggle to meet the needs of their peoples, commercial entities are increasingly turning to arbitration as a dispute resolution mechanism. Many African countries have also signed Bilateral Investment Treaties, which provide for arbitration of commercial disputes.

AIA: In your opinion, what does the future hold for ADR in Africa?

The future of arbitration is assured, both at a domestic level and for international arbitration. ADR itself is an African concept, as traditionally the first recourse of most African peoples is to settle disputes through mediation and negotiation. The principles of negotiation come naturally to an African since we are raised to negotiate the price of anything before buying!!

AIA: What should potential foreign investors looking at investment opportunities in Africa do to protect their interests?

Potential investors should look at the arbitration laws and ADR processes available in the country in which they seek to invest as part of their due diligence procedures. Many African countries have adopted the UNCITRAL model law on arbitration as the basis for their national arbitration laws which should give comfort to the investor. Then they should get a well written arbitration clause in their contracts. The dispute resolution provisions in the contract are as important as the investment and payment provisions and should be given the same careful attention. Luckily as head of the dispute resolution practice group in Aalex, I or a member of the group gets to advise on or review the dispute resolution provisions of every contract document, while negotiations are on-going, not when parties have agreed all else and the dispute resolution clause is seen as an afterthought!

AIA: You have acted as counsel and arbitrator in several arbitrations. What are the main differences in your approach to arbitrations in each role?

The first difference is that as counsel I am expected and allowed to be partisan to my client and passionate about its position, while as arbitrator my role is more detached. I am appointed for my perceived expertise in either arbitration practice and procedure or the subject matter of the dispute and not to take sides or plead the cause of the party that appointed you. Where I act as counsel, in addition to familiarizing myself with the facts of the case, I will research the background of opposing counsel and the arbitral panel, which I won't do as the arbitrator.

AIA: What is the most difficult thing when teaching about arbitration?

I have found the concept of 'independence and impartiality' of the arbitrator the most difficult concept to teach at the early stages of arbitration training. Early entrants to the arbitration process find it hard to understand how they can appoint an arbitrator and he or she will refuse to grant any private access

during the proceedings, or how an arbitrator appointed by a party can be independent and impartial. It only sinks in when you refer to a unanimous award, which means the party appointed arbitrator didn't agree with the case put forward by his appointor!

PUBLIC POLICY IN THE CYTEC CASE

In the past few months a lot of discussion arose on the influence of public policy on arbitral awards. At first sight different positions had been taken in the prominent case SNF/CYTEC by the French judge in execution proceedings and by the Belgian judge in annulment proceedings. These different positions have already been examined by AIA member Mr. Edouard Bertrand in his blog "22-09 SNF v CYTEC: the returning saga".

The approach of the French courts, where CYTEC sought the execution of the awards differed from that of the Belgian courts where SNF introduced an action for annulment an entire year later. The Belgian court in first instance allowed a far reaching review of public policy by the arbitrators. Nevertheless the Court of Appeal ruled that the power of review cannot be that extended and that therefore not the review by the arbitrators infringed competition law, but the arbitral awards in itself. In France on the other hand the judge showed more reluctance towards an interference with the arbitrators' review and therefore limited itself to a summarily check whether there were flagrant violations of public policy.

The criticism could be made that in its ruling the Belgian Court of Appeal remained rather prudent in its consideration of public policy. Perhaps the Court could have applied public policy in a more extensive manner and even by doing so could have come to the same conclusion. After all public policy is a highly comprehensive concept.

The Court in fact did away with the public policy issue by

focusing on the computation of the damages. The Court ruled that the review of the computation of the damages was beyond its control due to the fact that the examination by the arbitral tribunal was perfectly acceptable for international arbitration proceedings of this magnitude especially since the arbitrator cannot direct a question referred for a preliminary ruling to the ECJ.

It also needs to be remarked that due to the tardy introduction of the action for annulment the judge could merely take into account the matter of public policy. After the time-limit of three months other grounds for annulment could no longer be taken into consideration.

Finally, it is paramount to keep in mind the influence of European community law on the matter. Based on the Eco Swiss judgment it appears that arbitrators have the duty to apply Community public policy, which thus involves article 81 EC Treaty, ex officio. As guardian of Community public policy, the arbitrator is entrusted, by the ECJ, with the enforcement of the relevant laws and must prevent arbitration from being used to circumvent the application of public policy rules.

The principle of public policy primacy is remarkable when put in the light of procedural rules, such as time limits. The principle entails that a party can still introduce annulment proceedings at any time by basing his arguments on public policy issues. The ECJ case *Mostaza Claro v Centro Móvil Milenium SL*, even though a consumer protection case, can serve as an example in order to emphasize the repercussions of the principle. In this case the parties did not bring up the unfair nature of a clause in their contract before the arbitration tribunal. Despite this foul the ECJ ruled that the national judge can declare the clause null and is even in power to annul the arbitral award for being contrary to public policy.

The influence of public policy on arbitral awards still remains a complex matter. Nevertheless in the event the case goes further to the highest court of Belgium or even to the ECJ the state of affairs would be significantly elucidated.

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*With kind regards,
Johan Billiet
President*