

Association For International Arbitration

IN TOUCH



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Upcoming events:

- 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 provisional programme includes the following topics and speakers:
 - ⇒ Energy Charter Treaty: Description, Scope, Arbitration Awards Rendered, by Matthew D. Slater
 - ⇒ Role of Arbitration and the Change in the Price of Energy: Adjustment Clause, Indexation, Hardship Clause and Force Majeure in the Energy Contract, by Guy Block
 - ⇒ Alternative Modes of Resolution in the Belgian Energy Sector, by David Haverbeke
 - ⇒ Arbitration of Energy Disputes. Practitioners' Views from London and Paris, by Paul Oxnard

Energy and Arbitration: a Perfect Match?

In a world held in the grip of economic downfall, increasing scarcity of energy supplies, plummeting oil prices, rising intra-state energy transit, protectionist natural resources policies and growing environmental concerns, time and cost are not to be underestimated factors in the choice of a suitable dispute resolution method. Due to the complexity of energy disputes, the length of court proceedings and the increasing political significance of energy – industry allocation, expert arbitration and mediation proceedings are becoming more and more relevant.

The benefits of confidentiality, arbitrator panel neutrality and energy sector related experience seem to be key factors in choosing ADR over litigation. Due to the particular complexity of the energy markets, disputes liable to arbitration require a broad commercial energy market and international energy industry experience, a profound technical knowledge and foreign investment expertise. In this perspective, ADR is particularly suitable for supplying arbitrators and participants who are technologically more proficient than many judges and jurors.

In energy disputes, several different approaches to alternative dispute resolution are plausible:



AIA invites all members and readers to participate in our future conference on

„Arbitration and Mediation in the Natural Resources and Energy Sector“.

To register, please refer to the registration form, attached to this e-mail

- It is common to mediate and negotiate between policymakers and interested parties to adhere to specific difficulties in drafting adequate regulatory frameworks for the production, distributing and pricing of energy services, in order to provide a leeway for companies supporting renewable energy technologies. An outside ADR professional can be helpful to facilitate such discussions to achieve general consensus;
- Mediation and arbitration between state agencies and policymakers on one side and energy suppliers on the other side concerning licensing disputes are another form under which ADR proves its significance;
- More commonly known arbitrated disputes are those between energy players themselves, be it from a B2B perspective or, in recent years, in consumer related arbitration cases (B2C). These disputes mostly concern conflicts rising from a business transaction or particular tariff disagreements, but can also stretch out to disownment disputes between pipeline, power plant or windmill constructors and landowners.

The December 1994 Energy Charter Treaty (ECT), signed by 51 states including European countries, Russia (who has not yet ratified it), Japan and Australia, provides for two more dispute settlement procedures. State versus state arbitration concerning interstate trade and transit disputes (cfr. Russia and the Ukraine early 2009) and investment arbitration between an investor and a national authority based on investment treaties between the investment projects' host government and the international investors' home country. The number of these international arbitrations linked to the energy sector is steadily increasing, as a result of the proliferation of international energy contracts involving binding arbitration clauses, the increase in the number of treaties signed between nations, and the substantial changes in international energy policies, regulations, economics and markets. Where oil and gas disputes tend to be the most frequent topics to be dealt with, the venue of the International Centre for Settlement of Investment Disputes (ICSID) is the most consulted arbitration institution.

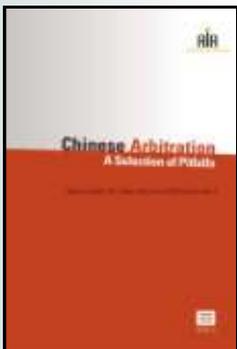
Today's topics amongst others include the deregulation attempts of many nations by restructuring the electrical utilities industry, and the opportunity it creates for ADR to influence the dispute resolution methods. The purpose of the AIA conference on Arbitration and Mediation in the National Resources and Energy Sector will be to inform and to update companies active in the sector of mining, gas, electricity, oil, etc., of the specific advantages and possibilities of these forms of ADR and to introduce them to the existing arbitration and mediation rules and bodies. The Association for International Arbitration invites its members and readers to contribute in the organisation of our Conference on Arbitration and Mediation in the Natural Resources and Energy Sector, either by delivering a personal topic-related article, joining our sessions as a professional speaker or by participating in our event. A book will be published and distributed to all participants free of charge. For more information, please do not hesitate to contact us at administration@arbitration-adr.org.

Conference Report on 'Arbitration in China' of 31st March 2009

The Association for International Arbitration is proud to announce the success of its recent Conference on 'Arbitration in China' held in Brussels on the 31st March 2009. Like all previous meetings of the Association for International Arbitration, sev-



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eral speakers and over 30 visitors from all over the world attended this afternoon event. The large attendance for the Conference, however, would not have been made possible without the assistance and contributions of many. First of all, AIA would like to thank all speakers who preserved the necessary spare time to indulge our audience by providing them with a powerful presentation on the present topic of Chinese Arbitration. Moreover, a great deal of gratitude is owed to those that contributed to the organisation of the Conference itself, in particular those who ensured the facilities at the Vrije Universiteit Brussel. Most of all, however, AIA wishes to grant a special thanks to all the international visitors and numerous students who attended the afternoon Conference and who enthusiastically took part in the live discussions with all our speakers. This year's Conference was dedicated to give a first glance at some peculiar characteristics of Chinese ADR and to investigate the newest evolutions in today's arbitration practice, experienced by both European law firms, European companies and Chinese based law firms. After a warm welcoming word of Gustaaf Geeraerts, Director of the Brussels Institute of Contemporary China Studies (BICCS), who introduced the goals, principles and structure of the Association for International Arbitration, AIA's president Johan Billiet, together with moderator-of-the-day Edouard Bertrand, a specialised business litigator at the Paris and California bars and highly experienced arbitrator, elaborated on the specific topics to be addressed by our speakers.

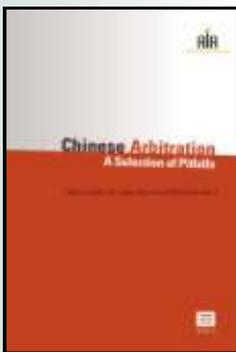


First to take the floor was Ms. Fen He, PhD candidate of Comparative Law at the Catholic University of Brussels and former legal consultant in Beijing. She outlined the most important features of Chinese ADR and the intertwining elements between both negotiation, mediation, arbitration and Chinese litigation. In particular, the national progress China has made over time is astonishing, as it launched mediation as the fore-front ADR method back in the 1950s and has reached a number of over 900.000 mediation committees after a successful reform and revitalisation program in the early 1990s. With over 7 million cases per year involving divorce, inheritance, parental and child support, alimony, debts and property, it is the world's largest known mediation network available. The last two decades have been less favourable for mediation, as the knowledge of Chinese law and the law itself has grown significantly in economic and family related subjects, reaching out to litigation practices to become a more prominent dispute resolution mechanism. Together with arbitration, mediation is therefore very closely linked not only to the economic growth, but also crucial for the social and welfare and stability in mainland China. When combined, however, it was rightfully questioned whether or not an arbitrator in a Chinese arbitration, could force a reluctant party to mediate after the other party raised a valid mediation clause in an agreement between the two parties and if the arbitrator has any form of sanctioning capabilities to enforce it or if he can only oblige both parties to make respectable efforts to mediate. Due to the non-binding method of mediation, the latter opinion was considered to be preferable. More extraordinary, however, is the difference in treatment of Chinese arbitral awards in general and those concerning labour disputes in particular. It is found that the latter awards are not final.

Mr. Axel Neelmeyer, German attorney-at-law, partner of the law firm Schulz Noack Baerwinkel and Chairman of the Board of CEAC, produced a highly illuminating presentation on the comparison of Asian arbitration institutions and their associated arbitration laws. Statistically confirmed, CIETAC arbitrations are by far the most



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common Asian venues for dispute resolution, leaving HKIAC, SIAC, JCAA far in its wake. With its 1994 Arbitration law, China only allows arbitration to be conducted through the organisation of an arbitration institution, hereby declaring ad hoc arbitration quasi-illegal. Contradictory in its approach, Chinese courts do not, however, refuse recognition or declare foreign ad hoc arbitral awards unenforceable for the mere fact of the award stemming from an ad hoc assembled arbitral tribunal.

Having extensive practical experience, Mr. Neelmeyer stressed out that Chinese companies, irrespective of the contracting party being Chinese or foreign, very frequently include a CIETAC arbitration clause in their business negotiations. The following will show that arbitration practice in China has a large number of particularities worth mentioning. First of all, in CIETAC proceedings, the arbitrator appointment procedure is quite different from those known in Europe and the US due to the obligation of the parties to appoint arbitrators from a pre-selected list of CIETAC approved professionals. To get a non-listed arbitrator into the proceedings requires the explicit approval of the Chairman of the Board of the CIETAC institution itself. Theoretically, the presiding arbitrator should be appointed on the basis of a party consensus. Nevertheless, practice has shown that in most cases, the subsidiary method of having the presiding arbitrator appointed by the Chairman of the Board of CIETAC is applied. Secondly, the active role of the CIETAC institution is mostly shown in its authority to rule on the competence of the arbitral tribunals it organises (adapted form of *Kompetenz-Kompetenz*). Thirdly, notwithstanding dissenting opinions of some Chinese nationals, the opinion was brought forward that a relatively large discrimination exists between Chinese lawyers who are eligible to represent a party before a CIETAC arbitral tribunal and foreign attorneys who are not. Non-lawyers, foreign or domestic, are deemed to have no restrictions whatsoever in representing their parties. The *ratio legis* is to prevent foreign attorneys to intervene in and influence the interpretation of Chinese arbitration and other domestic laws with foreign law principles. Due to their neutrality obligation, the same foreign attorneys can nevertheless accept a position as an arbitrator in a CIETAC procedure. A fourth pitfall topic is the obligation to conduct the CIETAC arbitral proceedings in Chinese language if no party consent can be reached. A major benefit and determining factor towards the popularity of CIETAC is the low cost compared to both other Asian and European arbitration institutions.

After a short coffee-break, the conference resumed its activities with Mr. Patrick Zheng, a highly experienced lawyer with Hammonds LLP's Dispute Resolution Department and panel arbitrator at CIETAC, who elaborated on the ICC's involvement in Chinese arbitration. Since the recognition and enforcement rules and requirements of domestic and foreign arbitral awards are very diffuse, the ICC is increasingly conducting arbitration proceedings on Chinese soil to benefit the most from the national Chinese courts' undefined but noticeable preference for recognising domestic awards –including foreign-related domestic awards- over purely foreign arbitral awards.



Kindly enough, Mr. Neelmeyer provided the audience a much welcomed and introductory presentation concerning a new arbitration institution, the Chinese European Arbitration Centre (CEAC) with its seat in Hamburg Germany. Its goal is straightforward: to become the first tailor-made arbitration institution for disputes relating to Chinese European trade and investment practices.



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In sum, the Association for International Arbitration is thankful for the many oral and written contributions of the speakers, article writers and participants. To review the mentioned topics from a closer perspective, please refer to AIA's publication of "A Selection of Pitfalls under Chinese Arbitration", which includes the articles of both the speakers and two more generous Chinese arbitration related contributions:

- 1) Arbitrating China Disputes: A Practical Guide to Recent Developments by Robert Pé
- 2) Recognition and Enforcement of Arbitral Awards in China by Tony Zhang

Mediating Sports Disputes Through CAS

The Fitness of Mediation in Sports Disputes

The Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland, introduced a [mediation service](#) on 18 May, 1999 with a select group of 65 CAS mediators. And, as Ousmane Kane, a former Senior Counsel at CAS responsible for mediation, has remarked: "The International Council of Arbitration for Sport took the initiative to introduce mediation alongside arbitration. As the mediation rules encourage and protect fair play and the spirit of understanding, they are made to measure for sport." Although mediation is expressly excluded (in para 2 of article 1 of the Rules) for disciplinary and doping cases, for obvious reasons, mediation is very appropriate for settling the commercial/financial issues and consequences (for example, loss of lucrative sponsorship and endorsement contracts), which often follow from a doping case, particularly where the sports person concerned was wrongly accused of being a drugs cheat. For example, Dianne Modahl would probably have been better advised to try to settle her claims for compensation against the British Athletic Federation through mediation rather than through the English Courts.

In fact, many prefer to mediate their disputes due to the special characteristics and dynamics of sport. For instance, the case of Richie Woodhall and Frank Warren involving a time-critical dispute under certain management and promotion agreements entered into between them, was settled by mediation within 72 hours. If mediation proves to be unsuccessful, although mediation providers usually claim a success rate of around 85%, the CAS recommends the following additional clause



to be inserted in a contract to cover the above contingency: "If, and to the extent that, any such dispute has not been settled within 90 days of the commencement of the mediation, or if, before the expiration of the said period, either party fails to participate or continue to participate in the mediation, the dispute shall, upon the filing of a Request for Arbitration by either party, be referred to and finally settled by CAS arbitration pursuant to the Code of Sports-related Arbitration.

When the circumstances so require, the mediator may, at his own discretion or at the request of a party, seek an extension of the time limit from the CAS President." Thus, the CAS offers disputing parties the possibility of a 'Med-Arb' dispute resolution process: mediation to identify the issues; and arbitration to settle them.

It may be noted, *en passant*, that in a landmark ruling in the English Courts in the



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case of *Cable & Wireless PLC v IBM United Kingdom* [2002] 2 All ER (Comm) 1041, Mr Justice Colman held that an agreement to refer disputes to mediation is contractually binding. In this case, IBM called on Cable and Wireless to mediate a dispute that had arisen under a contract in which the parties had agreed to mediate future disputes. Cable and Wireless refused to do so, claiming that the reference to mediation in the contract was legally unenforceable because it lacked certainty and was like an unenforceable agreement to negotiate – an agreement to agree is not legally binding under English Law. The judge rejected this argument, holding that the agreement to try to resolve a dispute, with identification of the procedure to be used, was sufficient to give certainty and, therefore, legal effect to the clause. It may be added that, in England too, parties, who, under Court rules, refuse to try - or even consider the possibility of mediating - to settle their disputes by mediation at an early stage in the litigation process, may run the risk of being denied their legal costs if ultimately successful, contrary to the normal rule that 'costs follow the event'. (See *Susan Dunnett v Railtrack PLC* [2002] EWCA Civ 302; and *Leicester Circuits Limited v Coats* [2003] EWCA Civ 333. But see also *Halsey v Milton Keynes General NHS Trust* and *Steel v Joy and Halliday* [2004] EWCA Civ 576; [2004] 4 All ER 920, collectively known as the 'Halsey' case and described by Lord Phillips of Worth Maltravers as "the most important English judgement about ADR").

Because of its popularity in the sporting world, many International and National Sports Federations now include specific provisions for mediation of appropriate sports disputes in their Statutes and Constitutions. As to the legal validity of a so-called CAS arbitration or mediation 'clause by reference' in such Statutes and Constitutions, see the decision of the Swiss Federal Tribunal of 31 October 1996 in the case of *N. v Federation Equestre Internationale* (Nagel/FEI, CAS-Digest I, p.585). In that case, the Court held that, by agreeing to abide by the rules of the Federation, which included a provision to refer all disputes exclusively to the CAS, the sports person concerned was bound to submit the dispute to the CAS, even though he had not expressly agreed to CAS arbitration or mediation. So-called 'sports association law' applied.

Procedural Aspects of CAS Mediations

Pursuant to Article 6 of the Rules, the CAS President chooses the mediator from the list of CAS mediators drawn up in accordance with the provisions of Article 5. The mediator appointed must be and remain independent of the parties (ibid.). Under Article 8 of the Rules, the procedure to be followed in the mediation shall either be agreed by the parties themselves or determined by the mediator. This is a slight deviation from the general principle that the mediator is the one who controls the procedural aspects of the mediation. But the parties are required to "cooperate in good faith with the mediator and ... guarantee him the freedom to perform his mandate to advance the mediation as expeditiously as possible." Article 10 also makes provision for the mediation to be conducted on a 'without prejudice' basis: "The parties shall not rely on, or introduce as eviden-





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ce in any arbitral or judicial proceedings:

- A) views expressed or suggestions made by a party with respect to a possible settlement of the dispute;
- B) admissions made by a party in the course of the mediation proceedings;
- C) documents, notes or other information obtained during the mediation proceedings;
- D) proposals made or views expressed by the mediator;
- E) the fact that a party had or had not indicated willingness to accept a proposal."

Article 13 of the Rules deals with the question of failure to settle and includes the following important provision – absolutely fundamental to the process of mediation: "In the event of failure to resolve a dispute by mediation, the mediator shall not accept an appointment as an arbitrator in any arbitral proceedings concerning the parties involved in the same dispute."

CAS Mediations to Date

To date, there have only been a relatively small number of CAS Mediations - mainly in relation to administrative sporting disputes involving Sports Federations and the exercise of their regulatory functions. Details are sketchy because of the confidentiality requirements. There have also been a number of commercial disputes settled by CAS Mediation. These cases have included disputes with a sports management agency over the commercialisation of a cyclist's image rights; and some financial disputes between athletes and their advertising agencies in relation to substantial commission payments. As the CAS mediation service becomes more widely known, it is expected that more sports disputes, including commercial and financial ones, will be referred to CAS for settlement under the Mediation Rules, thus proving the suitability of mediation for resolving sports disputes quickly, confidentially and relatively inexpensively.

The Association for International Arbitration would like to thank Prof. [Ian Blackshaw](#), International Sports Lawyer and Academic and also a CAS Mediator, who provided us with this enriching and informative article. For more information on ADR in Sports Disputes, consult: 'Sport Mediation and Arbitration' by Ian S. Blackshaw to be published in June 2009 by the TMC Asser Press, The Hague, The Netherlands (details on line at www.sportslaw.nl).

Element Analysis of a Chinese Arbitration Agreement

Many businessmen and lawyers have concerns about how different the Chinese system is from their familiar systems. The authors want to remove the artificial mystery of the Chinese arbitration system by disclosing and analyzing the relevant laws governing certain elements of a Chinese arbitration agreement.

Firstly, following the New York Convention or implementing the UNCITRAL Model Law, most countries require an arbitration agreement in written form. Only Sweden and several other countries recognize the binding effect of an oral arbitration agreement. A related question is whether or not an oral arbitration agreement that is considered to be valid in Sweden be treated as a valid arbitration agreement in China when the extraterritorial execution of a domestic arbitral award is needed. Chinese arbitration committees and scholars have divided opinions on this question. Another unsettled question is: what is considered as a "written form"? If one party signs a contract containing an arbitration clause, but the other does not; or, if the arbitration clause is included in the "terms and conditions" on the backside of



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the contract or in a separate document, and the parties only signed the front side of the contract, does the arbitration agreement fulfill the written requirement? In an effort to answer these questions, Chinese scholars and professionals turn to several interpretation aides such as: article 11 of the Chinese Contract Law defining the "written form" as: "*the forms which can show the described contents visibly, such as a written contractual agreement, letters, and data-telex (including telegram, telex, fax, EDI and e-mails)*"; art. II NY Convention stipulating: "*an arbitral clause ... signed by the parties or contained in an exchange of letters or telegrams*"; and art. 7.2 of the UNCITRAL Model Law stating the alternative of: "*an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.*" In practice, the CIETAC Arbitration Rules induces parties to integrate the different aforementioned interpretations into one clause.

Secondly, China does not recognize the ad hoc arbitration conducted in mainland China. Chinese courts, however, recognize the validity of the arbitration agreement which prescribe ad hoc arbitration conducted outside the Chinese territory as shown by *Hong Kong Yunwei Shipping Agency Co. Ltd v. Shenzhen Native Produce & Animal Byproducts & Tea Import/ Export Co* (No.18 [2002] of No.4 Civil Tribunal of the Supreme People's Court, July 16, 2002). Nevertheless, foreign arbitration institutions conducting arbitration proceedings in mainland China do not count as a "designated arbitration commission" required in art. 16 of the Chinese Arbitration Law and according to the Supreme People's Court's judgment in the *Letter of Reply of the Request for Instructions on the Case concerning the Application of Züblin International GmbH and Wuxi Woke General Engineering Rubber Co., Ltd. for Determining the Validity of the Arbitration Agreement* (No.23 [2003] of No.4 Civil Tribunal of the Supreme People's Court July 8, 2004). Any clause which designate a foreign arbitration institution to arbitrate disputes in China, or any clause which states an arbitration seat in China and quotes a foreign arbitration institution's rules but does not designate a Chinese arbitration committee shall be void. Furthermore, if the dispute is of a domestic nature, the Supreme People's Court holds a disapproving attitude towards any arbitration agreement that designates a foreign arbitration institution or a foreign arbitration seat.

When the name of an arbitration institution is inaccurate in the arbitration agreement, shall this arbitration committee be deemed as "designated"? Cases have revealed that names as "China International Economic Arbitration Committee" and "China Economic and Trade Arbitration Committee" are acceptable designation for China International Economic and Trade Arbitration Committee, since no other arbitration committee bears the similar name. Yet if the name appears as "the arbitration committee in Beijing", the arbitration agreement will be deemed void since there are three arbitration committees in Beijing.

The Association for International Arbitration would like to thank Prof. Wan Meng, Arbitrator at CIETAC, Dean of Beijing Foreign Studies University Law School and Xia Qin, LLM candidate at Michigan University Law School, who generously provided us with this article. AIA would also like to show its gratitude for all the other academics and professionals who have sent us numerous articles on the topic of "Arbitration in China".