

# Association for International Arbitration

## In Touch

July 2011



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### AIA Upcoming Events

The Association for International Arbitration is proud to invite you to  
its upcoming Training Program

European Mediation Training For Practitioners of Justice

LOCATION: HUB University, Stormstraat 2 Rue d'Assaut, 1000, Brussels

DATE: September 5-17, 2011

THERE ARE A LIMITED NUMBER OF PLACES STILL AVAILABLE. REGISTER SOON!

Check the program, lecturers and application form at

[www.emtpj.eu](http://www.emtpj.eu)

For further information regarding AIA conferences and trainings

please visit our website

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

AIA presents  
the European Mediation Training for  
Practitioners of Justice 2011



After Last year's success, AIA is proud to announce the second EMTPJ course. EMTPJ is a two-week training program on cross-border civil and commercial mediation, sponsored by the EU commission and organized by the Association for International Arbitration (AIA). The AIA is also pleased to inform you that 16 mediation centers located in 11 different countries, have agreed to become associated institutions of the EMTPJ project. Accordingly, they will accept mediator applications from participants that have completed the course.

This year the course will take place from September 5th to the 17th in Brussels, Belgium. It will be a 100 hour training program including the assessment day. Training will cover the following essential areas: the stages in the mediation process, analytical study of conflict resolution, theory and practice of EU and mediation acts, theory and practice of negotiation in mediation, International and cross – border mediation, the role of experts and counsel in civil and commercial mediation, theory and practice of contract law in Europe, interventions in specific situations and EU ethics on mediation.

# Report on the AIA's conference on the

## ADR in the Aviation Sector and the Sector of Tour Operators

by Dilyara Nigmatullina

On Friday, 24 June 2011 the Association for International Arbitration held its latest conference on Alternative Dispute Resolution in the Aviation Sector and the Sector of Tour Operators. The constant development of air and package travel facilitates economic growth, world trade, international investment and tourism, and is therefore crucial to the globalization taking place in many other industries. AIA invited

the leading experts and practitioners within the field in order to address the issues of ongoing initiatives in Europe regarding passenger rights and package travelling, the tour operators' duties in case of force majeure events, alternative dispute resolution methods available at the Belgian Travel Complaints Commission, mediation in the aviation sector and ADR in Dutch Aviation.

Mia Wouters, from LVP Law and Professor at University of Ghent, gave an overview of air passenger rights available in Europe. Particular attention was paid to Regulation 1008/2008 on the common rules for operation of air services in the Community, Regulation 1107/2006 concerning passengers with reduced mobility, Regulation 80/2009 on a code of conduct for computer reservation systems, Directive 2005/29 concerning unfair business-to-consumer commercial practices, Regulation 211/2005 on carriers with an operating ban, and Regulation 261/2004 on compensation and assistance in the event of denied boarding, cancellation or long delays. Mia Wouters also analyzed case law of the European Court of Justice.

Hans de Coninck, from the Belgian Consumers Association Test-Achats, presented selected pitfalls and hard cases on air passenger and traveller rights. He mentioned the lack of coherency between European Regulations of air passenger

and package traveller rights, and that their review is needed. The scope of the Directive 90/314/EEC on package travel should be widened and comprise all travel services. Hans de Coninck proposed to introduce the principle of joint liability between all implied travel traders because concepts of retailer, organizer, and travel intermediary seem to be outdated. He also advised to pay special attention to sales on internet and such non-EU traders like booking.com, expedia and likewise.

Flor Diaz-Pulido, deputy head of the unit on services of general economic interest, passenger rights and infringements at the European Commission, provided insight into the EU Transport Policy, giving an overview of the existing and expected EU passenger rights legislation, steps to be taken by transport operators, member states, and the Euro-

pean Commission in order to implement the developing legislation. Mrs. Diaz-Pulido emphasized the importance of the innovative twofold system of dealing with complaints which comprises penalty schemes and a complaint handling system to help public enforcers monitor the application. She also characterized the situation with ADRs in transport. According to the experience there are few means of ADR really operational in transport and only the Nordic countries, Sweden, Finland and Norway, and recently the

Netherlands have resorted to using ADR to resolve transport related disputes. In conclusion, Mrs. Diaz-Pulido mentioned that it would be impossible to impose on all member states a common complaint handling system, but whichever complaint handling is established in a member state, it needs to ensure two goals: authorities must have a reliable source of information to detect problems, and trends, and passengers must have an easy, quick and cheap way to assess whether from a technical view, the carrier is likely to be right.

Jos Speybrouck, from the Knowledge Centre for Travel Law in Bruges and the president of an arbitration board of the Belgian Travel Complaints Commission,



dwelled upon the force majeure issue. Mr. Speybrouck analyzed different aspects of force majeure: its function, absence of common force majeure definition in the European Package Travel Directive 90/314/EEC, EU-Regulation 261/2004 and Montreal Convention and consequences of force majeure in general and under European travel law.

Anne Moriau, the President of the Belgian Travel Complaints Commission, addressed the role of the Commission in resolving disputes and means of dispute resolution available at the Commission, namely arbitration and mediation. The Commission was established in 1983 with the aims to obtain an optimal quality in the package travel sector, to find a simple and effective method of resolving conflicts and to facilitate access to justice. Anne Moriau gave an overview of the arbitration and mediation procedures conducted at the Commission, and provided the statistics for the last year.

Patricia Antersijn, from Human Centered Approach, and Linda Reijerkerk, from Stichting Aviation Mediators, explained how mediation could contribute to good conflict management in the aviation sector. The audience was involved in an interactive discussion of a conflict as a threat to aviation safety, the interrelation between unsafe operation and conflicts and possibilities for mediation arising out of such interrelation. Mrs. Antersijn and Reijerkerk described the role of a mediator in resolving a dispute, and gave advice on an approach to be taken by a mediator in order to achieve a better outcome.

Hendrik Noorderhaven, CEO at EUclaim, analyzed public vs. private dispute resolution in the context of the aviation sector in Holland. Mr. Noorderhaven provided insight into the history and development of ADR in Holland, and explained the way EUclaim works and assists the passengers whose rights have been infringed and who are entitled to compensation.

AIA would like to thank all the speakers who found time in their busy schedule to provide the audience with discussion-provoking presentations as well as all international attendees who actively participated in the debates raised throughout the conference.

## AT&T Mobility v. Concepcion

by Stephen H. Marcus & Mary Ladd

The United States Supreme Court issued a monumental decision on April 27, 2011, in *AT&T Mobility LLC v. Concepcion* 563 US \_\_\_\_ (2011), concerning class action waivers in arbitration agreements. The Supreme Court decided by a 5 to 4

vote, that arbitration agreements in standard form consumer contracts which prohibit class actions are enforceable, and the Federal Arbitration Act (FAA) preempts California law prohibiting class action waivers in arbitration agreements with individual consumers. The Supreme Court reversed the California federal courts' rulings (the US District Court and US Court of Appeals for the Ninth Circuit) which opined to the contrary- where such arbitration agreements' waivers are unconscionable they will be unenforceable. With this ruling the highest court in the United States sent a message of disapproval for class action arbitration.

AT&T involved a charge of \$30.22 for a free cell phone. The Concepcions were not charged for the phones, but were charged for the sales tax based on the retail value of the phone. In March 2006, the Concepcions filed a complaint against AT&T in California. The complaint was later consolidated with a class action alleging that AT&T engaged in fraud and false advertising by charging sales tax on a phone it had advertised as free. AT&T moved to compel arbitration under its terms of the contract. The Concepcions opposed AT&T's motion, arguing that the arbitration agreement, which allowed only individual proceedings in arbitration and precluded arbitrations on behalf of a class of affected consumers, was unconscionable under California law, specifically the *Discover Bank rule*.

The *Discover Bank rule*, established in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), is that an arbitration agreement found in a consumer contract of adhesion which excludes class actions, is unconscionable and unenforceable. The rule only applies to adhesion contracts, but almost all consumer contracts in the United States are of that kind. The US District Court and US Court of Appeals for the Ninth Circuit enforced this rule almost reluctantly, acknowledging that the contract was extremely fair, and that AT&T had implemented means of justly compensating the individual so that the class action waiver would not be detrimental to the consumer. According to the agreement, AT&T had to pay all costs for nonfrivolous claims, the arbitration could only take place in the county where the consumer was billed, and for claims of \$10,000 or less, the customer could choose to either arbitrate by phone, submissions; or could have brought a claim in small claims court instead of arbitrating. If the consumer received an arbitration award greater than AT&T's last written settlement offer, AT&T was required to pay a \$10,000 minimum recovery and twice the amount of the claimant's attorney's fees. The district court noted that consumers as members of a class would be worse off.

The Supreme Court reversed the decisions below, alternatively finding that the *Discover Bank* rule was an impediment to the fulfillment of the purposes and objectives of arbitration and the FAA. The purpose of arbitration is to resolve problems through a quicker, less formal and less expensive procedure. According to the American Arbitration Association (AAA), the average bilateral arbitration opened by the AAA lasted 4-6 months. None of the 283 class arbitrations opened by the AAA has resulted in a final award on the merits. 162 were settled, withdrawn, or dismissed after a mean of 630 days. These statistics illustrate that class arbitrations frustrate the efficiency that the arbitration procedure can, and is meant to offer.

The Court gave three main reasons for its ruling in AT&T, in the majority opinion written by Justice Antonin Scalia, the first being that the advantage of arbitration lies in its informality. Class arbitration requires heightened procedural formalities that come with the certification of the class and with discovery issues that would arise. Second, class arbitration is more expensive, and the added parties would complicate and slow down the arbitration process. Finally, class arbitration increases the risk to defendants. It is the absence of multilayered review in arbitration that increases the chance of uncorrected errors. But in class arbitration involving thousands of potential claimants the risk of an error becomes unacceptable. Defendants would rather settle than assume a risk that could not easily be appealed.

Justice Breyer argued in the dissenting opinion that the FAA did not preempt state contract law, and "California is free to define unconscionability as it sees fit." The dissent also noted that with the unavailability of a class proceeding, the alternative will not be millions of individual suits, but "zero individual suits." Justice Breyer observed in the dissent: "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?"

There are a number of ways that the Supreme Court's decision may impact consumers and corporations. A consumer with a small claim will not have the ability to deter corporate exploitation by pursuing a class action when his or her contract includes an arbitration agreement. On the other hand, in order to compete in the market place, corporations will most likely strive to make their arbitration contracts attractive to consumers with small monetary claims, evidenced by the contract between the Concepcions and AT&T. It is possible that corporations that have in the past chosen to abstain from using arbitration will now require arbitration

in their contracts in order to avoid class actions. This is potentially a good situation for both corporations and consumers. Consumers could reap the benefit of more corporations choosing to use arbitration, and as arbitration is proven to be quicker and less expensive than going through the traditional litigation process, in the long run the consumer would save time and money.

Alternatively, the consumer could assume a greater risk by not having the option to join his small claim with other consumers facing the same injustice. Alone, a consumer with a \$30.22 will find it hard to acquire a lawyer willing to take his case, but joined with many others the consumers acting as a class might be able to hold the corporation accountable. With the Supreme Court's decision, consumers do not have the option to pursue corporations through class arbitration. Only time will reveal the exact implications of the Supreme Court's decision.

## AIA Questionnaire on the right to apply for the annulment of an award - overview of the results

by Edouard Bertrand

In February 2011, the AIA launched a survey about the right to apply for the annulment, or the setting aside, of an award. Currently, the arbitration laws of Belgium, Sweden, Switzerland, and most recently, France, allow parties to forego the right to apply for the annulment, or setting aside, of an award. The goal of the survey was to assess the reactions to and professional opinions of those in the legal field regarding such provisions in arbitration laws. This article gives the statistics compiled from the answers of the professionals who anonymously participated in the survey, which was open from February until June 2011. The survey was in the form of a questionnaire accessible by a link on the AIA's website. Of those who responded, 71 percent are independent lawyers, 12 percent are academics, 17 percent are in-house lawyers. For the sake of clarity, percentages are rounded up to the nearest whole number.

1. All participants were aware that the waiver of the right to apply for the setting aside of an arbitral award was offered in at least one of the four countries. Thirty-five percent of the participants were aware that it was offered in Sweden, 53 percent knew about the existence of such a possibility under Belgian arbitration law, 59 percent

- were aware that the waiver was permitted under Swiss arbitration law, and 71 percent were aware of its recent addition to French arbitration law. Seventy-five percent of the respondents, who were aware of the option afforded by the law in France, were aware of the option in other countries, and 25 percent knew of the existence of the discussed waiver in France alone. Only 18 percent of respondents were aware of the implementation of the discussed provision in all four countries.
2. When asked if they knew of other countries that offered the same option of annulment, 29 percent of respondents answered in the affirmative. For example, Turkey was indicated, among others.
3. Participants were also asked to give their opinions concerning the application of the provision in question in their personal experiences. When asked if they had been faced with cases where the parties had made use of the laws allowing them to forego the right to set aside an award, 24 percent said that they had.
4. Eighty-five percent of all participants said that they saw the right to apply for the annulment of an award as an advantage. However, only 65 percent of all participants indicated that if they were advising a client, they would recommend using the possibility to forego the right to apply for the annulment in any of the countries where it is permitted. Furthermore, 65 percent, not the same 65 percent as mentioned previously, said that if they were asked to recommend a place of arbitration, they would suggest any of the four countries because of the possibility offered under their arbitration laws to waive the right to seek the annulment of the award.
5. All participants expressed an opinion on the scope of the waiver. Sixty-five percent said that they would recommend limiting the waiver to only some grounds for setting aside, while 35 percent indicated that they would be in favor of making the maximum use of the waiver. Results show that out of those 65 percent who would recommend using the possibility to waive the right to seek annulment of an award to their client, only 55 percent would be in favor of making the maximum use of the waiver. One participant elaborated, saying that the option was welcome, but only in cases of urgency or of limited economic importance.

#### Conclusion remarks

The number of responses to the questionnaire is not large

enough to allow definitive conclusions about the attitude of the arbitration community towards the option to forego in advance, the right to seek the setting aside of an award.

A much larger sample would be required to form a representative picture. The sample could be biased also because the people who responded to the questionnaire all knew that the option existed in one or several countries.

Nevertheless, the survey would suggest a few tentative conclusions.

First, among the people who are aware that the option exists in some jurisdictions, the knowledge as to which jurisdictions offer the option, is fragmented. Only a minority knew of the existence of the option in all four countries. The publicity attached to the recent reform of French arbitration law explains perhaps why France is better known as a jurisdiction offering the option than all three others.

Second, the actual use of the option, when available, is still very marginal.

Third, a majority of those aware of the option are in favour of using it but recommend using the option for limited grounds rather than for all possible grounds for setting aside awards. The scope of the waiver stands out as a central aspect of discussions on the advisability of clauses providing for the waiver of actions to set aside awards. It will be interesting to see how this aspect is dealt with by the international arbitration community.

The AIA hopes that the findings of its survey will inspire others to conduct their own surveys and provide a basis for discussion among practitioners and scholars of arbitration on this interesting subject.

The AIA wishes to thank the lawyers and academics who responded to the questionnaire of the survey. They provided us with valuable information which we in turn are happy to share with our readers.

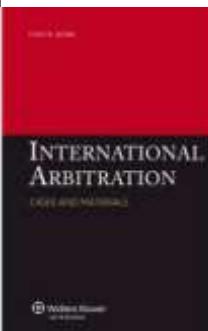
## Book Review - International Arbitration: Cases and Materials

by Mary Ladd

Gary Born has published *International Arbitration: Cases and Materials* (Kluwer 2011) adding to his list of highly acclaimed works on international arbitration such as *International Commercial Arbitration* (Kluwer 2009), *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Kluwer 3d ed. 2010), *International Commercial Arbitration: Commentary and Materials* (Kluwer 2d ed. 2001), and *International Civil Litigation in the United States Courts* (Kluwer



4<sup>th</sup> ed. 2006). Mr. Born is a Partner at WilmerHale and Chair of the International Arbitration Practice Group. He is one of the leading international arbitration practitioners in London and worldwide, and was chosen by peers to receive the Global Arbitration Review's Advocate of the Year award for 2010. He has participated in more than 550 international arbitrations and has experience arbitrating under all leading institutional rules as well as in ad hoc arbitrations in major cities in the US, Asia, and Europe.



It is a valuable case book to have on your shelf as a student, professor, or arbitrator focusing on international arbitration because it is not based on the standpoint of a single, but numerous jurisdictions. Mr. Born includes notes following cases and supplements, allowing readers to pull the most important learning points from the text.

Mr. Born introduces the topic with a complete, concise historical overview of International arbitration, guiding the reader from the birth of arbitration which some have linked to ancient mythology, up to contemporary arbitration, highlighting the evolution of international arbitration in France, the US, and European jurisdictions. He gives an overview of the current conventions that have molded arbitration proceedings, explains national arbitration legislation's effect on the international arbitral process, examines elements of arbitration agreements, and the choice of law in international arbitration.

The case book is divided into three sections. The first section, chapters 1-6, focuses on international arbitration agreements. The author addresses the legal framework for arbitration agreements, issues of separability, competence, competence, validity, interpretation of such agreements, and effect arbitration agreements might have on non-signatories.

In the second section of the book, chapters 7-13, Mr. Born focuses on international arbitration proceedings. These chapters deal with the applicable legal framework for proceedings, selecting the arbitral seat and arbitrators, the conduct of the arbitration and procedures, disclosure or discovery, confidentiality, provisional measures, consolidation and joinder, selecting substantive law, and legal representation and ethics.

The final section of the book, chapters 14-16, examines international arbitral awards, their legal framework, form and contents, correction and interpretation, annulment, recognition and enforcement.

Taking a comparative approach in examining different national legal system's treatment of international arbitration, the casebook does not give preference to any particular

jurisdiction. Rather it compiles the experience of various legal systems into a "common corpus" of international arbitration law which applies globally. The book encourages national courts in various jurisdictions to consider decisions of each other in the matters of international arbitration.

The book may be purchased for 60 € at [www.kluwerlaw.com](http://www.kluwerlaw.com). The members of AIA receive a 10% discount.

## Scottish Arbitration Centre Announces Two Honorary Vice Presidents

In addition to its Honorary President, Professor Sir David Edward QC, the Scottish Arbitration Centre announced that it had appointed two Honorary Vice Presidents, The Hon Lord Dervaird (Professor John Murray QC) and Hew R. Dundas.

Andrew Mackenzie, Chief Executive of the Centre, said:

"We are delighted to announce that The Hon Lord Dervaird (Professor John Murray QC) and Hew R. Dundas have agreed to be the Centre's Honorary Vice Presidents. Both men are well known in the world of international arbitration, and will play a vital role in the Centre's promotion of Scottish arbitration and Scotland as a place to arbitrate."

### Background of Centre

The Centre is a newly established, non-profit company limited by guarantee, made up of the Law Society of Scotland, the Faculty of Advocates, the Chartered Institute of Arbitrators, the Royal Institute of Chartered Surveyors, and the Scottish Ministers.

The objects of the Centre are to:

- ⇒ promote domestic and international arbitration under Scots Law;
- ⇒ promote Scotland as a place to arbitrate;
- ⇒ increase the number of arbitrations under Scots law;
- ⇒ increase the level of business for arbitration advisers; and
- ⇒ increase the number of appointments for arbitrators based in Scotland.

### Honorary Vice Presidents

The Hon Lord Dervaird  
(Professor John Murray  
QC)

The Hon Lord Dervaird (Professor John Murray QC) is a former



judge of the Court of Session.

He has experience as an arbitrator and as counsel in numerous international arbitration proceedings, both institutional (LCIA, ICC, NAFTA, and ICSID) and ad hoc, in Scotland, England, France, Belgium, Switzerland, the USA, Canada, South Africa, Tanzania, India, the West Indies and Singapore. These disputes have included construction, oil and gas, shipbuilding, banking, information technology, intellectual property, and insurance matters. He is a Member of the Advisory Board of the International Arbitration Institute, and an Honorary Council Member of the Conciliation and Arbitration Centre for Advanced Techniques (ATA), both in Paris.

He wrote the National Report, Scotland, in the ICCA International Handbook on Commercial Arbitration in 1995. He is Emeritus Professor at the University of Edinburgh, and lectures on international arbitration at London (King's College) and Strathclyde Universities.

### Hew R. Dundas

Hew R. Dundas spent more than 30 years in the oil and gas industry and during this time was General Manager Legal and Company Secretary at Cairn Energy PLC, before becoming a full-time international arbitrator, mediator and expert determiner in oil and gas, energy and general commercial disputes.

He is a panel arbitrator in Scotland, Beijing, Hong Kong, Kuala Lumpur, Singapore, New York, Chicago, India and Kazakhstan, and is a member of the London Court of International Arbitration, the Swiss Arbitration Association, the Singapore Institute of Arbitrators and other leading arbitral institutions. He was President of the Chartered Institute of Arbitrators (which currently has approximately 12,000 members in 110 countries) in 2007.

He had significant input in the Arbitration (Scotland) Act 2010, and has co-authored the definitive book on the Act. He is also a visiting lecturer and examiner in International Commercial Arbitration at Edinburgh University and at the Centre for Energy Petroleum and Mineral Law and Policy at the University of Dundee, and lectures on international arbitration law at several other universities.

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## AIA Recommends to attend

### VENICE, ITALY- TRAIN TO BE A WORKPLACE MEDIATOR

OCN accredited Certificate 'Mediation in the Workplace'

March 26-30th 2012 – Special 5 day intensive in luxurious hotel training venue by St Mark's Square, Venice

Train to be a Mediator in one of the most beautiful cities with International Mediation Experts PMR Ltd – to resolve workplace complaints in all types of organisations.

Tutor: Nora Doherty, Director PMR Ltd

Course fee: £1600 no vat non-residential (includes FREE DVD 'Workplace Mediation' worth £300)

Course details & Booking Form on web page:

[www.workplacemediation.co.uk](http://www.workplacemediation.co.uk)

Email: [workplacemediation@googlemail.com](mailto:workplacemediation@googlemail.com)

### CONCERNED ABOUT THE COSTS OF INTERNATIONAL ARBITRATION?

Tickets are now on sale for CIArb's major Costs of International Arbitration Conference in London on 27-28 September: [www.ciarb.org/conferences/costs](http://www.ciarb.org/conferences/costs)

The conference will focus on how costs are incurred, and explore ways of making international arbitration more efficient and cost-effective. It will also analyse the findings of CIArb's survey into the costs of international arbitration, which has been completed by international arbitrators and lawyers worldwide. Discounts are available for everybody who contributed to the survey.

The conference's impressive line-up of speakers include Doug Jones AM FCIArb, President, CIArb; John Wright FCIArb, Partner, Bird & Bird LLP; The Rt Hon the Lord Falconer of Thoroton QC; Peter J Rees QC FCIArb, Legal Director, Royal Dutch Shell; Katherine Gurin, Arbitrator & Mediator, JAMS; Teresa Giovannini FCIArb, Partner, LALIVE; and Andrew Clarke, General Counsel, Esso UK Limited.

To book a place at the conference, visit CIArb's website:

<http://www.ciarb.org/conferences/costs>