

Association For International Arbitration

# IN TOUCH



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## Conference on Arbitration and Mediation in the Natural Resources and Energy Sector

The Association for International Arbitration in collaboration with the Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee (CEPMLP) welcomes all our readers and ADR enthusiasts to participate at our [Conference on Arbitration and Mediation in the Natural Resources and Energy Sector](#) on 13 May 2009 in Brussels, Belgium. The purpose of this event 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 ADR and to introduce them to the existing arbitration and mediation rules and bodies. A book will be published and distributed to all participants free of charge. This conference is accredited with 6 continuous learning points for the Permanent Education at the Belgian Bars. For more information, please do not hesitate to contact us at [administration@arbitration-adr.org](mailto:administration@arbitration-adr.org). To register, please fill in the registration form attached to this email.

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### Provisional program:

- ⇒ 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 and Benoit Le Bars
- ⇒ The Concept of Soft Law in Investment Arbitration, by Aloysius Gng
- ⇒ Potential EU Competence on Investment: Challenges for Investment Arbitration, by Sophie Nappert
- ⇒ Dealing with Sovereigns in the Energy Sector: Some Salient Issues, by Johannes Koepf



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conference on

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#### Our Partners

Oil, Gas & Energy Law Intelligence (OGEL, ISSN 1875-418X, [www.ogel.org](http://www.ogel.org)) focuses on recent developments in the area of oil-gas-energy law, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting, including the oil-gas-energy geopolitics. With over 2000 published articles and over 1100 contributing authors from all over the world, OGEL has become the principal "Global Energy Law & Regulation Portal".

Linked to OGEL is the OGELFORUM Discussion (Energy, Natural Resources) listserv. It is a discussion group for posting news and comment and engaging in debate, sharing of insights and intelligence, of relevant issues related in a significant way to oil, gas and energy issues: Policy, legislation, contracting, security strategy, climate change related to energy it is co-sponsored by CEPMLP/Dundee ([www.cepmlp.org](http://www.cepmlp.org)) and OGEL in collaboration with TDM.



OGEL Special Features include: Dispute Management in the Oil, Gas and Energy Industries; Production-Sharing Contracts; Liquefied Natural Gas (LNG); The Energy Charter Treaty; Geopolitics of Oil and Gas; Asian Energy Law and Policy; Coal; Windpower; Corporate Responsibility; Taxation; Renewable Energy; Corruption; Natural Gas; Energy and Electricity Regulation; Unitisation; Pipelines; Energy Security; Africa; Energy Litigation and Arbitration - Expert Perspectives etc.



Transnational Dispute Management (TDM, ISSN 1875-4120, [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)) is a comprehensive and innovative information service on the management of international disputes, with a focus on the new and rapidly evolving area of investment arbitration,

but also in other significant areas of international investment such as oil, gas, energy, infrastructure, mining, utilities etc. It deals both with formal adjudicatory procedures (mainly investment and commercial arbitration), but also mediation / ADR methods, negotiation and managerial ways to manage transnational disputes efficiently.

One of most innovative elements of TDM is its link to OGEMID, the global internet discussion, information and news forum. Membership of OGEMID is essential for anybody to stay abreast, without time lag, with current developments, new awards, new legal arguments, new methods of dispute management, new developments in negotiation of investment and related treaties - all the elements that are relevant to understand, as an academic, what happens in the reality of international investment disputes and to be able to use, as a professional, emerging argument, practices and precedent. TDM subscribers have the benefit of a related membership on OGEMID, including access to the efficiently searchable database of archived messages.

TDM Special Features include: International Investment Law at a Crossroads; Litigating Across Borders: Hot Topics and Recent Developments in Transnational Litigation and The Relationship Between Local Courts and Investment Treaty Arbitration; Appeals and Challenges to Investment Treaty Awards: Is It Time for an International Appellate System?; Arbitration-Mediation; Advocacy; Energy Litigation and Arbitration - Expert Perspectives; The Hague 2004; Binding Precedent; Dispute Settle-



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ment in Asia etc. Professor Thomas W. Wälde is the founding editor of OGEL & OGELFORUM and TDM & OGEMID. Visit the OGEL & TDM websites for more information. Both publications are supported by the Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP, University of Dundee).

Established in 1974, the International Association of Oil & Gas Producers (OGP) is the single association representing companies and associations engaged in the exploration and production of oil and natural gas both at global and at EU level, with offices in London and Brussels. Globally, OGP's membership consists of about 65 companies and associations, accounting for more than half of the world's oil output and about one third of global gas production. OGP shares best practice in the area of health, safety and the environment, operations and engineering, and represents the industry before international organisations, such as the UN, IMO and the World Bank, as well as regional seas conventions, such as OSPAR. At EU level, OGP represents towards the EU institutions around 30 members who are active in Europe.



### **The European Arbitration Chamber's « First International Arbitration Forum »**

Together with Mr. Gennadiy Pampoukha, Chairman of the Permanent Court of Arbitration, Mr. Johan Billiet, President of AIA, established the European Arbitration Chamber to promote arbitration between East- and West-European relations. On 21 May 2009, the European Arbitration Chamber will host its « First International Arbitration Forum » in Kiev, Ukraine. The objective of the Forum is to create a united platform for arbitration institutions, arbitrators and lawyers from the East and the West of Europe in order to exchange information concerning international arbitration practice. The main topics of discussion will be the national legislative trends and practice of institutional arbitration in the countries of the EU and Eastern Europe. Amongst many internationally recognised arbitrators, academics and other practitioners with a particular background in East- and West-European Relations, the President of AIA will hold a presentation on *Protecting Private Investors through Provisional Applications of the Energy Charter Treaty*. You are kindly invited to participate to this unique event. For more information please visit the European Arbitration Chamber's website: <http://cea-taic.be/fr/node/160>

### **Arbitration developments in India**

In a dynamic and developing market like India, with national courts under duress of procedural delays, arbitration and ADR in general are able to provide a more cost-efficient approach for international and national Indian companies to resolve their disputes. Recently, the London Court of International Arbitration (LCIA) has established an India branch in New Delhi, making it the first international arbitration institution to spread its wings over India.

The Indian Council of Arbitration established in 1965 is the primary national arbitration organization, conducting mostly national arbitrations. The arbitrations held under its authority, are mainly conducted by retired judges and experts in different areas of both law, industry and trade. Next to its Rules of Arbitration based on the Indian Arbitration and Conciliation Act of 1996, the Indian Council of Arbitration has separate arbitration rules for conducting maritime disputes.

The introduction of LCIA on the Indian arbitration market might help putting an end to some prejudices of Indian arbitration and might prevent national companies,



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who are contracting with foreign parties, from going abroad seeking arbitral relief before other international arbitration institutions. Nevertheless, certain reasons for preferring other forums are profound, such as willingness to avoid domestic Indian arbitration due to the predicament of the Indian Arbitration and Conciliation Act of 1996, granting parties the possibility to successfully challenge the arbitration proceedings before national courts.

Moreover, in a recent case, brought before the Supreme Court of India, a restrictive vision was given on the definition of 'international commercial arbitration' preference of a national court to follow the parties' autonomy was shown once more. With New Delhi assigned as the seat of arbitration, both *TDM Infrastructure Private Limited* and *UE Development India Private Limited* could not agree on the appointment of a nominee arbitrator. Normally, it is up to the Supreme Court to appoint an arbitrator in cases where the disputes qualify under the term: 'international commercial arbitration'. The international aspect of the term is constituted by one of the parties having its incorporated seat in another country than India or its central management and control exercised outside India. TDM argued that, since it had its shareholders and directors located in Malaysia, the Supreme Court should consider the commercial arbitration dispute as being 'international' and consequently appoint the arbitrator according to the Indian Arbitration and Conciliation Act of 1996. In its decision, however, it considered the registered seat of TDM in India as being more relevant to determine the nationality of the company than the company's centre of management.

For those reasons, it held that the arbitration agreement could not constitute an international commercial arbitration agreement, and, therefore, not give the Supreme Court of India the jurisdiction to decide on the appointment of the arbitrator.

### **ICLG: International Arbitration 2008: Book report**

In the course of April 2009, AIA had the pleasure of reviewing Global Legal Group's fifth edition of "The International Comparative Legal Guide to : International Arbitration (2008)". With the contributions of leading international arbitration lawyers and other practitioners on the status of arbitration in their home-country, the publication can offer the reader an informative overview of the arbitration laws and traditions of over 50 countries. Each provide in-depth knowledge on the difficulties and particularities arbitrators and counsel face in practicing day-to-day arbitration in their own specific country. By listing short to-the-point summaries of the more popular arbitration systems such as those of the US, France, Germany, the UK and Sweden, and by drafting fresh insights into some of the world's lesser known ADR-cultures, including those of e.g. Malaysia, Luxembourg, Mexico, Canada, Bahrain, South Africa and many more..., this book should be seen as a unique opportunity for in-house counsel, arbitrators and ADR-enthusiasts to retain the most relevant information on a nation's arbitration statutes and characterizing case law in a fast and efficient method of research.

What makes this publication different from most other comparative legal studies on arbitration laws, is its 'question and answer'-format. All contributions follow the chronological order of a normal arbitration proceeding, which will be exemplified in the following with some aspects of several different arbitration systems.

First, matters concerning the existence and validity of the arbitration agreement are generally discussed. Particular to Belgium for instance, section 1678 of the Belgian Judicial Code finds arbitration agreements void due to the fact that one party is given a privileged position in appointing one or more arbitrators. With regard to arbitrability issues in Australia, Section 11 of the Australian Carriage of



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Goods by Sea Act of 1991 declares void an arbitration agreement in a bill of lading or similar document relating to the international carriage of goods to or from Australia, unless the arbitration agreement provides that the place of arbitration is in Australia. Moreover, In respect of jurisdiction disputes, the involvement of national courts in Finnish arbitration proceedings is prevented due to the prohibition of court ordered anti-suit injunctions.

Second, in issues concerning the constitution of arbitral tribunals, Section 600 of the Liechtenstein Judicial Code orders the courts to declare arbitration agreements invalid in case of the parties not reaching consent in appointing an arbitrator by them jointly according to the terms of the arbitration clause. Contrary to the UNCITRAL Model Law and in case of an absence of a party agreement concerning the number of arbitrators, Israel only allows arbitration proceedings conducted by one arbitrator. In Romania, the Civil Procedure Code expressly considers arbitrators liable for damages should they unduly waive their duty as arbitrators or fail to participate in the settlement of the dispute or to render the award within the time limit provided by the arbitration agreement or by law.



Third, in respect of interim measures, Russian courts have a tendency of being reluctant to grant injunctions in support of arbitration, this in contrast to the obligation resting on Swedish courts to speedily handle the requests for interim measures by parties to an arbitration agreement, hereby not using any distinguishable treatment between court and arbitration proceedings, constituting a common feature of many other European countries such as Spain and Slovakia. In dealing with evidentiary matters such as discovery requirements, Swiss arbitrators are free to request discovery without being compelled upon one party but whose failure to produce documents may constitute adverse conclusions in the arbitral tribunal's opinion of the presumed content of a certain document.

Fourth, the rendering of an award is sometimes subject to extra formalities, such as the Costa Rica arbitration system ordering arbitrators to include guidelines or standards which might be necessary and relevant for the parties implementing the award. Countries such as Brazil and Bolivia explicitly give leeway for dissenting arbitrators to form their separate opinion.

Fifth and last, setting aside arbitral awards is made easier in Egypt, where an extra ground for nullity of the arbitral award is stated in the Egyptian Arbitration Law of 1994, namely if the tribunal has excluded the law chosen by the parties to govern the merits of the dispute.

### **Case Study of a Western Company facing Disputes in China**

When disputes arise in China, just like other parts of the world, it will be necessary to deal with procedural as well as substantial issues arising from the disputes. This article will focus on a case study showing how a Western company deals with those issues and obtains a satisfactory result.

The Background



For more information on *Arbitration in China*, AIA offers a comprehensive and extensive booklet on the subject.



For purchasing information, please check our website at:  
<http://arbitration-adr.org/activities/publications.html>

A German company is a large and reputable mechanical and engineering company ("M&E Company") specialising in heating, ventilation and air conditioning systems. The company is listed in Germany and has been engaged in projects around the world, including Europe, the USA and Asia. The M&E Company as Claimant decided to commence arbitration proceedings against a Chinese developer ("the Developer") for outstanding fees payable by the Developer. The bases of the M&E Company's claims are as follows: (1) The Developer issued a Notice of Winning Tender to the M&E Company. (2) Pursuant to the Notice of Winning Tender, (a) the Developer is responsible to pay for the work done by the M&E Company, and (b) any disputes arising between the parties would be resolved by way of arbitration in China.

The M&E Company decided to instruct an international law firm plus a local Chinese law firm. Given that the international law firm has international experience of handling arbitration, and understands the specific needs of the M&E Company, the international law firm would be responsible to advise on the procedural issues and to finalise the tactics. As for specific Chinese legal issues, those would be handled by the Chinese law firm. Although such arrangement may be seen as incurring two sets of legal costs, the M&E Company thought that in the long run, it would be more economical to adopt such arrangement.

#### Validity of the Arbitration Agreement

The Developer objected to the arbitration proceedings. In particular, the Developer submitted that the arbitration agreement between the Developer and the M&E Company is not valid. The Developer submitted that the M&E Company is effectively a Sub-contractor, whereby there is no direct contract between the Developer and the M&E Company. The Developer even produced a Main Contract (which is signed between the Developer and the Main Contractor, which is a company based in Beijing), and produced a Sub-contract (which is signed between the Main Contractor and the M&E Company). The Developer's decision to nominate the M&E Company as a Sub-contractor is in fact quite common for the construction industry around the world. By nominating the M&E Company, the Developer would be able to enjoy the benefits of the experience, the knowhow, the quality assurance offered by the M&E Company. On the other hand, given the idea that the M&E Company would enter into a Sub-contract with the Main Contractor, the Main Contractor (rather than the Developer) would be responsible to manage the M&E Company on a day to day basis, and thus reduce the risk of the Developer. In response, the M&E Company admitted that it has signed a Sub-contract with the Main Contractor. However, the M&E Company submitted that the signing of the Sub-contract (1) does not preclude the Developer from being liable for making direct payment to the M&E Company under the Notice of Winning Tender for work done by the M&E Company, and (2) does not preclude the M&E Company from relying on the arbitration agreement in the Notice of Winning Tender to commence arbitration proceedings against the Developer. The M&E Company also relied on various facts to support its claim, (1) the Notice of Winning Tender confirmed that the Notice amounts to a binding contract between the Developer and the M&E Company, and (2) the Developer has in fact made direct payment to the M&E Company.

#### Preliminary Issue

In the light of the arguments between the parties regarding the validity of the arbitration agreement, the Arbitral Tribunal had to decide on the procedural issue as to how to resolve those arguments. There are two options. Option One - given that there are other outstanding issues (e.g. whether the M&E Company has done the relevant works, whether the M&E Company is responsible for any defects arising from the works, whether the Developer is liable to pay the M&E Company for the



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work done, and if so how much), the Tribunal may deal with the issue regarding the validity of the arbitration agreement at the same time when the other outstanding issues are being dealt with. Given that the parties would need time to prepare the evidence regarding the other outstanding issues (factual evidence regarding what work has been done, expert evidence regarding the value of work being done, the amount of any damages suffered by the M&E Company etc), if the Tribunal were to adopt Option One, then the issue regarding the validity of the arbitration agreement could not be dealt with until at least a few months later. The disadvantage of Option One is that after a few months, the parties would have incurred significant time and costs to prepare for the proceedings. If at that stage the Tribunal decided that the arbitration agreement is invalid for one reason or another, the parties' time and costs for preparing evidence regarding the other outstanding issues would have been wasted. Option Two - in order to reduce the risks of the

parties wasting time and costs, the Tribunal may deal with the issue regarding the validity of the arbitration agreement by way of a preliminary issue, i.e. the Tribunal will direct the parties to focus their energy and effort to prepare evidence regarding the validity of the arbitration agreement. In the meantime, the Tribunal will not set a timetable for the parties to submit evidence regarding the other



outstanding issue regarding defects, amount of damages etc. Depending on the Tribunal's decision on the preliminary issue, the Tribunal would make further directions. For example, if the Tribunal decides that the arbitration agreement is valid, then it would be natural for the Tribunal to set a timetable for the parties to submit evidence regarding the other outstanding issues. On the other hand, if the Tribunal decides that the arbitration agreement is not valid, then it would be the end of the arbitration. Although Option Two has the advantage of reducing the risks of the parties wasting time and costs, the disadvantage is that the risks of extending the overall time, i.e. other outstanding issues would effectively be put on hold, so that the Tribunal and the parties would focus on the validity of the arbitration agreement, the Tribunal would then make a decision, and if the Tribunal decides that the arbitration agreement is valid, then the Tribunal would set a timetable for the parties to submit evidence regarding the other outstanding issues, the Tribunal would assess the evidence, and then come up with a final decision.

#### The Decision of the Arbitral Tribunal Regarding the Preliminary Issue

Given that the choice between Option One and Option Two relate to procedural and tactical issues, the international law firm took the lead and made submissions to the Tribunal. After considering the submissions from the parties, the Tribunal decided to adopt Option Two, i.e. hear the issue regarding the validity of the arbitration agreement by way of a preliminary issue. It is because the Tribunal took the view that there are genuine differences of opinion between the parties regarding the validity of the arbitration agreement. If the validity of the arbitration agreement is not dealt with by way of a preliminary issue, there is a real danger that the parties' time and costs for preparing evidence regarding the other outstanding issues would have been wasted. From the perspective of the M&E Company, the decision of the Tribunal is to be welcomed. Although the M&E Company is confident that the arbitration agreement is valid, early confirmation by the Tribunal is nevertheless prudent. If in the event that the Tribunal takes a different view, it would be better to find out and then take alternative action by say commencing court proceedings.



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### The Decision of the Arbitral Tribunal Regarding the Arbitration Agreement

Having dealt with the procedural issue, it was necessary to focus on the substantial issue as to whether the arbitration agreement was valid or not. Given the importance of the Notice of Winning Tender, it was necessary for the M&E Company to make submissions under Chinese law to demonstrate the binding nature of the Notice between the Developer and the M&E Company. Accordingly, the Chinese law firm took the lead in this regard and conducted relevant research under Chinese law, including the PRC Contract Law, the PRC Bidding and Tendering Law, as well as the relevant rules and regulations. The international law firm focused on the relevant wordings in the Notice of Winning Tender and other related documents (such as the Sub-contract). After considering the submissions from both sides, the Tribunal decided that the arbitration agreement contained in the arbitration agreement was valid. The Tribunal found that although the M&E Company has signed a sub-contract with the Main Contract, the Sub-contract in effect provided that the Main Contract would be responsible for the day to day management of the work done by the M&E Company, with the Developer being responsible for direct payment to the M&E Company under the Notice of Winning Tender. In this connection, if there are claims against the Developer for non-payment, the M&E Company is entitled to rely on the arbitration agreement in the Notice of Winning Tender to commence arbitration proceedings to recover the outstanding monies against the Developer.

The Association for International Arbitration would like to sincerely thank [Mr. Terence Wong](#) for providing us with this practice-oriented article.