Association For International Arbitration

IN TOUCH

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AIA

Inside this month's issue:

Scheduled Response to the Commission's Green Paper on Brussels I Regulation Reform

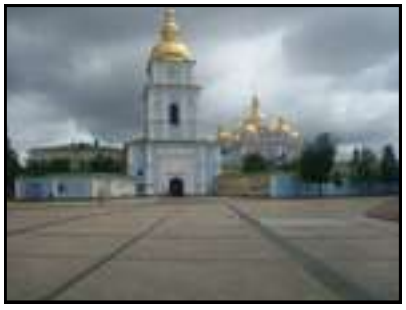
The AIA is currently in the process of writing a response to the Green Paper of the Commission of the European Communities on the review of council regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

A committee of AIA members headed by Edouard Bertrand was set up, comprising the following members: Grace Avigdor; Saurabh Bagaria; Philippe Billiet; Ugo Draetta; Adriana Dreyzin; Raphaël Gyori; Rosemary Jane Harrison; Girish Kodgi; Emmanuel Opoku Awuku; Denis Philippe; Bettina Schmaltz and Gaëtan Zeyen.

The committee debated the relationship between a possible regulation on the one hand, and the New York convention 1958 and the convention of Geneva 1961 on the other. They reached the conclusion that no EC regulation can derogate from previously ratified treaties.

AIA's response to the aforementioned Green Paper will be published on the AIA website soon!

Report on the First International Arbitration Forum held in Kiev, Ukraine on the 21 May 2009



According to the successive EU enlargements and the European Commission's intention to enhance the relationship with its Eastern neighbours, it was necessary to create a specific arbitration institute for the East -West relations. The European Arbitration Chamber (in short EAch) has been founded as an international non-profit association according to Belgian law. The central office of the EAch is based in Brussels. The seat of the East European office of the EAch is located in Kiev. The success of the new association agreements including deep and comprehensive free trade agreements surely depends on neutral and independent arbitrators and is based on mutual commitments to the rule of law and the principles of the market economy as well as sustainable development. By cre-

ating the Each, East-West partners are brought closer together so as to increase good neighbourly relations and effective cooperation among partners.

The EAch is actually appointing arbitrators of the International Commercial Arbitration Court (ICAC) under the EAch. The arbitrators as well as all members have to adhere to the ethics agreement of the association. The EAch is respecting the following principles: professionalism, judiciary's impartiality, freedom from political influence during the case, optimality of terms of case consideration, efficiency of the work of the Secretariat, optimal amount of arbitration costs, strictest confidence of the arbitration proceeding, parties' autonomy concerning language and law, availability of supporting services, such as: an interpreting service, a shorthand service and an IT-service at the place of arbitration proceedings.

The EAch held its first International Arbitration Forum in Kiev on May 21, 2009. The event was very professionally organised. English-Russian simultaneous translation was provided and the press was largely present. After a warm welcome by the President of the EAch, Mr Gennadiy Pampukha, who explained the goal of EAch, different speakers from Ukraine, Russia, France, Netherlands, Great Britain, Poland, Romania, Belarus, Belgium, etc. took the floor.

It was almost a coincidence that at the same moment Mr. Dmitry Medvedev, Russia's president closed with little or no progress a summit with the European Union with a challenge to his guests to help Ukraine pay its gas bills in order to prevent disruption of supplies to Europe next winter and was proposing the EU to join Moscow in forming a syndicate to help Ukraine pay for the vast amounts of Russian gas that it stores underground during the summer to meet peak demand in winter. The EAch conference, attended by almost 200 people, expressed a lasting message of EU-solidarity amongst economics and lawyers and showed how people from West and East could cooperate. Surely it can serve as an example for their politicians as how to solve problems.

The conference was wisely divided into four sections. In the morning the audience was confronted with recent developments in international arbitration: outlooks of the east-west mutual relations (section 1), and different topics of procedural features of case administration in international arbitration (section 2) were examined. The afternoon was reserved for speakers talking about practice and legislative tendencies in the field of the international arbitration at the level of the countries of EU and eastern Europe in particular (section 3) and issues of the recognition and enforcement of international arbitration awards (section 4).

Mrs Chitra Radhakishun opened the debates by introducing the Unctad Course on Dispute Settlement. This course is a very interesting comprehensive basic course on dispute settlement in international trade and may be downloaded free of charge from the Unctad website http://r0.unctad.org/disputesettlement/course.htm. The Unctad course is very much appreciated by developed countries looking for a cheap and good basic overview of international arbitration. One of the main problems still is that most topics are only available in English. Help from the international arbitration community for translation into Chinese, Russian, French and Spanish would be much appreciated.

Mr Johan Billiet spoke about the protection of private investors through the provisional application of the Energy Charter Treaty. Taking into consideration the Icsid decision in the case Ioannis Kardassoupolos v Georgia (Arb/05/18) it cannot be excluded that the arbitrators of the Permanent Court of Arbitration would come to the same result in the case Yukos v the Russian Federation. The potential dimension of such an award cannot be underestimated. It is to expect that such a decision would not be enforceable in Russia but could be executed elsewhere. The

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Amsterdam court decision of April 28, 2009 might only be a small foretaste.

Ms Grace Avigdor reminded the audience of the qualities a good arbitrator must have and how to represent parties' interest in arbitration efficiently.

Ms Yuliya Chernykh spoke about the application of an umbrella clause in investment arbitration which became notorious only in 2002-2004 with the two contradictory ICSID arbitral awards initiated by the Société Générale de Surveillance v. Pakistan on the one hand and Philippines and on the other hand. The speaker explained that nowadays, the umbrella clause may be regarded as a bridge between private contract, national legislation and international public law. The controversial nature of the umbrella clause has invoked some tendency of narrowing its scope or even excluding from the list of investment protection standards.

Mr. Varlam Badzagua spoke about the procedural aspects of dispute consideration in arbitration courts of Georgia. It was noticed that the EAch has plans to extend its working to Georgia and will open a local seat there.

Ms Svitlana Romanova reminded the audience of some practical aspects when conducting a case in international arbitrations: the need for a good arbitration clause as it is the case with EAch, the Kompetenz-Kompetenz principle, evidences in arbitration proceeding and how to determine the optimal decision of the place of international arbitration.

In the afternoon, Mr Benoit Le Bars explained in detail the differences between common law and civil law on documentary evidence, witness evidence and expert evidence.

Mr Oleksandr Kifak explained the role of arbitration clauses in foreign economic contracts. Mr Aleksandr Stepanovskiy dealt with problems of interim conservatory measures in international arbitration courts. Following which, Mr. Axel Reeg explained how the combination of common and civil law can lead to the best of both worlds.

Ms Mayna Britz convinced the audience of the advantages of Arb-Med and explained how, in the USA, an arbitrator can 'change' into a mediator.

Mr Edouard Betrand explained some features of enforcement of international arbitration awards in the EU. He explained that the European Convention of human rights could have an impact on the enforcement of an arbitral award, brought some news about the Heidelberg report and the intention of the EU to revoke the exclusion of arbitration from the scope of Regulation 44/2001. He explained in detail the five positions taken in Europe on the issue of the effect of judgments setting aside arbitration awards. He concluded that users of arbitration from the former Soviet bloc should be confident that arbitral awards rendered in their countries will be generally recognized and enforced in the countries of the EU.

Mr Alexander Bodar spoke about some actual aspects of enforcement of international arbitration awards in Ukraine. Not very good news for the arbitration community however is that Ukrainian law added corporate disputes to the list of disputes over which commercial courts have exclusive jurisdiction. The result of this reform is that domestic and international disputes become unarbitrable.

Mr Ryszard Marcinkowski made a comparative study with the enforcement of international arbitral awards in Poland and finally Mr Vasiliy Gumenyuk spoke about the appeal and cancellation of awards in Ukraine.

All attendees received a map that includes the ICAC rules of the EAch. A book will be printed in Russian and English with the different contributions of the speakers. For those who want to become international arbitrator with the EAch please visit the website of the association www.cea-taic.be or contact the secretariat at the following address secretary@cea-taic.be. The languages spoken within the EAch are Russian, French and English. Please note that the next conference of the Each will be held in Brussels at the beginning of February 2010. It is clear that the European Arbitration chamber is coming at the very right moment!

Arbitration Commitments under EC Merger Procedures: a hybrid and successful form of Arbitration

Introduction

Arbitration has often played an important role in the EC merger control system; this is primarily the case with behavioural merger control remedies. Under the EC merger control system concentrations reaching certain turnover thresholds must obtain clearance from the European Commission (the "Commission") before the merging parties are entitled to close the deal. When deciding on whether to clear the merger or not, the Commission will investigate the likelihood of harm to consumers/competition. If the Commission identifies likely harm it will typically revert to the parties seeking commitments to address the anticompetitive concerns that will otherwise arise from the contemplated deal. Essentially, there are two types of commitments: structural commitments (e.g. the divestiture of a business) and behavioural commitments (e.g. the granting of access to an infrastructure).

This article discusses the special features of arbitration commitments. Arbitration commitments can be defined as commitments made by the merging parties, which constitute *erga omnes* obligations to submit to arbitration any claims made by third-party beneficiaries (competitors, customers, suppliers, etc) that follow from the merger commitments in the Commission's conditional merger clearance decision.

Arbitration commitments are used to assist the Commission in monitoring and ensuring compliance with (behavioural) commitments, including access commitments. Indeed, access commitments could otherwise be very problematic as they require policing over the medium and long term, which weighs heavily on the Commission's resources. It is in the context of an increased use of behavioural commitments that arbitration commitments have developed as useful tools for the Commission to monitor and ensure the merging parties' compliance with the commitments. In theory, a failure to adhere to the commitments (including the arbitration commitment) may cause the Commission to revoke its clearance decision or impose fines. In practice, the Commission would typically force the merging parties to comply with the previously accepted commitments, rather than having recourse to more draconian measures.

Arbitration commitments frequently provide for the appointment of a 'monitoring trustee', a third party free of any conflict of interest, who is appointed by the notify-

ing parties with the Commissions' approval. The monitoring trustee can be assigned a number of tasks; however, his main role will generally be to ensure full, appropriate and timely compliance with remedies and, if necessary, act as a settlement facilitator (e.g. conducting mediation or making a settlement proposal).

The first arbitration commitment was adopted in 1992 (Elf Aquitaine-Thyssen/Minol), since when the Commission has accepted a large number of such commitments and has even used tiered dispute resolution systems by allowing for amicable settlement and mediation of disputes before taking recourse to arbitration.

For this reason, and also given that new and diverse forms of this type of arbitration are developing, the concept of arbitration commitments deserves attention from the world of arbitration. In this article we will emphasise that arbitration commitments can be viewed as a hybrid but very useful type of arbitration.

Arbitration commitments: a welcome development

In the past, the main interest was in keeping competition law disputes in the public domain to ensure that competition policy was interpreted in a uniform way and applied consistently. It was considered that private and confidential arbitration would not serve these purposes. Fortunately, this view has changed and it has become widely accepted that competition law disputes can be resolved by arbitration (often as a tool to defend the parties' contractual interests as rather than tools to react to tortuous conduct). In welcoming the concept of merger arbitration commitments, the Commission has allowed the development of a useful tool to protect third parties within its set notification and clearance system for concentrations without putting a constraint on its resources.

The unique character of arbitration commitments

Arbitration pursuant to arbitration commitments can be distinguished from general arbitration due to its quasi-regulatory character with special prerogatives for the Commission. It represents one of the Commission's tools in ensuring the proper functioning of its merger control role, without replacing or diminishing the Commission's ordinary enforcement role. The arbitrator should as far as possible follow all the parameters set by the Commission's merger clearance decision, not to mention the Commission's precedents and the relevant jurisprudence.

Consensual?

Third parties can trigger an arbitration commitment either under the commitment letter submitted to the Commission, or under the terms of the Commission's Decision. In those rare instances where a third party beneficiary concerned has already concluded a contract with the merged entity in implementation of the behavioural commitment, such a third party could also trigger the arbitration mechanism via the arbitration clause contained in that contract.

This type of arbitration is in most cases merely non contractual in its nature. However, some arbitration commitments contain a notification provision requiring the merged entity to inform identifiable third-party beneficiaries of the existence of the arbitration procedure. Depending on the way in which the notification was made and accepted, a party doing business with the entity subject to commitments might be bound by a de facto 'contractual' arbitration clause.

Against this background, arbitration commitments aim to offer rights, as opposed to obligations, to third-party beneficiaries as a general principle. Therefore, as a general principle, it would be wrong to conclude that third party beneficiaries are categorically obligated to arbitrate a dispute with an entity that has made arbitration commitments.

The lack of contractual basis for the arbitration procedure raises questions about the scope of the arbitrator's mandate. Following the positive outcome of the Commission's adoption of the Standard Trustee Mandate and the Standard Model for Divestiture Commitments, the Commission could perhaps continue its efforts to develop a standard document for the mandate of the arbitrator, including standard arbitration provisions. Introducing such a document would increase transparency and predictability for merger parties, third parties and the arbitrator itself, setting out the principles to be applied when an arbitrator is appointed in a particular case.

Theoretical distinctions and independence

The arbitrator's and the Commission's respective functions are distinct and neither overlap nor substitute each other. The arbitrator is only empowered to award private law remedies under national law. The Commission on the other hand, being the Community's enforcing authority and the Guardian of the Treaties (Article 211 EC) can impose public law sanctions provided for by the Merger Regulations. An arbitration case can therefore proceed in parallel to the Commission investigation.

A distinction should also be drawn between the respective roles of the Commission and the courts following an arbitration process. At the exequatur stage, courts determine the recognition and enforceability of the arbitral award, while the Commission is charged with monitoring the correct application of the arbitration commitment.

The arbitrator, courts and the Commission will use the same concept of 'breach' (e.g. breach of competition law; breach of commitment) raising the question of the consequences if different decisions are reached as to whether a breach was committed. Even in such a case, the Commission maintains its power to monitor all commitments and to impose a fine on the merged entity. Therefore, an arbitral award which is inconsistent with a Commission finding should fail at the exequatur stage. The unsuccessful party to the arbitral procedure would be able to invoke the public order defence under the Convention of New York to prevent the recognition and enforcement of the arbitral award. Moreover, the courts of EU Member States are bound by the principle of loyal co-operation under Article 10 EC, and the principles of supremacy and direct effect.

Accordingly, the arbitrator should always try to estimate how the Commission would decide on the matter, and consider requesting an *amicus Curiae* brief from the Commission in complex cases. While such a brief should provide merely advice to the adjudicator, it would in practice bind the arbitrator who is under the implicit duty to render enforceable awards. In light of this, one can see how this type of arbitration is not totally independent from the Commission's powers to rule on public law aspects. We believe that this is a necessary consequence of arbitration commitments being previously an assisting tool for the Commission to ensure compliant and correct implementation of merger remedies. The Commission may therefore wish to address the arbitral tribunal in the same way as it could do within antitrust cases under Article 15(3) EC Regulation 1/2003, when arbitration proceedings are running in parallel to a Commission investigation. That provision enables the Commission to ask the tribunal to keep the Commission informed of developments, or ask it to provide a summary of the case, documents or other information.

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Arbitration commitments need further development

A number of questions remain unanswered. First, there is not yet a common view on how to apply arbitration commitments. A distinction exists between the 'maximalist' approach and the 'minimalist' approach.

The maximalist approach underlines:

- the fundamental nature of competition law;
- the importance of the courts' ability to review the awards; and
- the risks of arbitration being a tool to circumvent competition law.

The minimalist approach underlines:

- the finality of awards;
- the position that courts should not review awards on the merits;
- the idea that awards should only be overturned in cases of serious breaches of public policy; and
- the trust in arbitration and arbitrators.

The divergence between these approaches results in different answers to the following questions: 1) whether courts are better placed than arbitrators to decide when competition law is breached; and 2) whether court review (at the exequatur stage) represents a threat to competition enforcement.

Secondly, there is no consensus on the basis for the arbitral tribunal's obligation to apply competition rules. Several bases have been referred to as imposing on arbitrators the duty to apply competition law, including the following:

- the *lex arbitri*;
- the obligation to render an enforceable award;
- the public policy nature of competition law; and
- the (implied) will of the parties.

The divergence of bases results in different ideas on the scope of the duty to apply competition law and different answers to the question of whether the arbitral tribunal can raise a competition law issue of its own motion.

That the arbitration practice is not straightforward is demonstrated by the fact that some view the scope of the obligation to apply competition law as deriving from the parties' choice, while others derive it from an implicit obligation to guarantee effective and enforceable arbitration awards. We believe that both positions may be taken, but perhaps the latter is more interesting in practical terms. If arbitrators do not sufficiently take into account competition law issues when rendering the award, the unsuccessful party to the arbitration could challenge the award and/or its enforcement could be denied by means of a breach of public policy. In line with this, the ECJ has agreed that national courts to which application was made for the annulment of arbitration awards, must grant such application if they consider that the content of the arbitral decision is not consistent with what is stipulated in Article 81 of the EC Treaty.

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Thirdly, since arbitration developed as a full alternative to court litigation in dealing with competition matters, it should be allowed the same tools as ordinary judges. Arbitral tribunals cannot send Treaty issues to the ECJ for preliminary rulings since they are not judicial organs in the sense of Article 234 EC. Accordingly, it is all the more important that they are fully able to seek guidance from the Commission, the Authority that has primary jurisdiction over competition, including merger control matters. Against this background, we reiterate that the Commission, through its monitoring function, remains the right to protect correct interpretation of merger remedies.

Conclusion

As discussed above, arbitration commitments differ from 'general' arbitration in a number of significant ways. They have a 'hybrid' character. However, the effectiveness of arbitration commitments is demonstrated by the Commission's repeated and successful adoption of a large number of arbitration commitments for the purpose of monitoring and enforcing (behavioural) merger commitments.

And yet, this type of arbitration needs further development since a number of questions remain, in respect of which the world of arbitration can contribute. As a first step, we would envisage the development of a standard text for arbitrators which would provide guidance for all parties concerned and set out principles to ensure competition law compliant application of arbitration principles to specific merger control commitments.

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Settling Disputes on a Shrinking Planet

The annual Geneva Global Arbitration Forum is attended year after year by about 200 private practitioners, corporate counsel, arbitrators, academics, trade diplomats, company executives. Similar to former editions, the 14th Geneva's conference on May 26-27, 2009, at the border of the Lake Léman, was sponsored by the Journal of World Investment & trade and chaired by Jacques Werner.

A broad range of subjects were discussed – force majeure and hardship clauses, punitive damages in commercial arbitration, on the one hand; investment arbitration, WTO-type interstate dispute settlement system, on the other hand. As explained on the website the Forum truly believes in cross-fertilization between the

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various dispute settlement methods. Speakers included among others Charles C. Adams, Christoph Brunner, Melaku Desta, John Y. Gotanda, Stuart Harbinson, Gary Horlick, Pierre Lalive, Serge Lazareff, Maurice Mendelson, Federico Ortino, Philippe Preti, Pierre Tercier, Jayashree Watal and Roland Ziade.

The conference started by honouring the legacy of Thomas Wälde. In present times of economic crisis, economic disasters, political tensions, armed conflict or exceptional weather conditions, lawyers obtain relief in the concepts of force majeure and hardship in international commercial transactions. Hardship clauses do not apply in contracts with speculative elements or in long term contracts. Subject to debate is the relevance of an impending financial ruin of a party in case of long term installment contracts. Contractual risk assumption and the magnitude and the question of the foreseeability of the current economic crisis could have an impact on individual contracts and the contractual risk allocation.

Punitive damages, as well as moral damages with a punitive element, are unpredictable in terms of the authority and willingness to award them, the appropriate amount of such an award and the likelihood of enforcement by the courts. Unlike punitive damages, awards of interest are common and are typically recognized and enforces abroad.

In the afternoon time has come to discuss investment disputes: How to make the arbitral awards in investment disputes acceptable to the Host States: Is there any lesson to be drawn from the WTO dispute settlement system? Is there a democratic deficit to be remedied in the investment dispute system? Will State Emergency Measures trigger WTO disputes? What prospects exist for reforming the dispute settlement system of the WTO - professional panelists, retroactive remedies, monetary compensation?

The 14th Geneva Forum emphasized once more the unique situation of Switzerland as one of the World's leading site for arbitration proceedings.

JAMS Announces First International ADR Center

Founded in 1979 JAMS is the largest private provider of alternative dispute resolution services in the United States and is responsible for resolving thousands of important cases each year. On 20 May 2009 JAMS announced an agreement to form what will be known as JAMS International ADR Center to provide mediation and arbitration of cross-border disputes and training services worldwide. The first JAMS International ADR Center will have its offices in Rome and New York with additional hearing locations in Geneva, London and Brussels. JAMS plans to establish a network of international centers to provide the same high quality services for which JAMS has become known in the US. Further news about a possible collaboration between the AIA association and JAMS will be set out in our next monthly newsletter.