THE ONLY GLOBAL ASSOCIATION OF YOUNG LAWYERS

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SEMINAR REPORT

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FRIDAY MORNING 18 JUNE 2010

WORKSHOP A: ETHICAL ISSUES IN INTERNATIONAL ARBITRATION

Moderators: **James Freeman** / Allen & Overy, London, **José María Alonso** / Garrigues, Madrid

- *It is controversial whether there is an obligation to comply with local ethical rules if practicing in foreign jurisdiction – depends on the source of such ethical rules (positive law; rules imposed by the bar association etc.)*

- *Various ethical issues may be encountered if practicing in foreign jurisdictions, due to cultural differences.*

- *The clash of various ethical rules may occur e.g. in connection with witness evidences (e.g. if the attorney is allowed to (a) communicate with witnesses before a hearing to ascertain content of his/her evidence; (b) help the witness to draft witness statement; (c) prepare the witness for giving the oral evidence; (d) pay the witness to give evidence; (e) rehearse oral evidence; (f) approach an employee from the other side to give evidence?) or documentary evidence (e.g. if the attorney is under a duty to (a) disclose documents that are unhelpful for his client; (b) confidentiality which may constrain the search?). These ethical issues may influence client's case.*

- *It is controversial how the arbitrators should react to the issue of conflict of interest on level of counsel / arbitrator arising after his / her appointment and caused by selection by a party of another counsel: should the arbitrator step down, or should such new counsel be excluded from the proceeding (as a matter of procedural order), or rather it is only a matter of the professional liability of counsel?*

- *The international ethical standards of ethics could help to address the ethical issues in international arbitration. Works have been undertaken by the Task Force on Counsel Ethics in International Arbitration by IBA Arbitration Committee.*

Reporter: Justyna Szpara

WORKSHOP B: INSOLVENCY AND ARBITRATION

Moderators: **Duncan Speller** / WilmerHale, London, **Matthias Scherer** / Lalive, Geneva

- *Arbitration and insolvency are two distinct areas of law: arbitration is a matter of private dispute, privity of contract, party autonomy and individual claims; insolvency law is by definition domestic, public and has to do with collective satisfaction and equality of creditors.*

- *Insolvency, depending on domestic law, may influence (a) arbitration agreement (b) underlying claim (c) arbitral award.*

- *The impact on arbitration clause may involve (a) arbitration agreement becoming null and void, (b) insolvent party loosing the capacity to arbitrate, (c) trustee becoming entitle to opt out of the arbitration agreement, (d) arbitration agreement becoming voidable, (e) the dispute with participation of insolvent party becoming non-arbitrable.*

- *There is no obvious solution to insolvency of party to arbitration, due to the variety of insolvency laws, little uniformity, variety of arbitration laws and few international instruments (such including NY Convention and EC Regulation 1346/2000 – for EU only).*

- *Another problem is lack on uniform approach taken by state courts –example is a position taken by tribunals and domestic courts in Vivendi v. Elektrim disputes, following insolvency of Elektrim. The contrast can be drawn by comparison of the approach taken by Swiss courts (capacity issue and decision on lack of jurisdiction by tribunal upheld; Decision of Swiss Federal Supreme Court of 31 March 2009) and English courts (procedural issue; application of English law allows for continuing the arbitration proceeding; Decision of English High Court and Court of Appeal, EWCA (Civ) 677).*

- *Practical steps in case of insolvency: (a) make steps to maximise the prospect of enforcement of the award, such as ensure compliance with mandatory rules at the place of enforcement, ensure bankruptcy trustee is notified of arbitration and has opportunity to participate in proceeding, (b) make sure the remedies claimed in arbitration are enforceable within insolvency, (c) address non-participation of insolvent party in arbitration (if this is the case).*

Reporter: Justyna Szpara

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WORKSHOP C: EMERGENCY ARBITRATION: PRE-ARBITRAL PROCEEDINGS

Moderators: **Gisela Knuts** / Roschier, Stockholm, **Alexandra Johnson Wilcke** / Schellenberg Wittmer, Geneva, **Polina Permyakova** / Delphi, Stockholm

- *Increasing trend that institutional arbitration rules provide for pre-arbitral emergency relief;*
- *Pre-arbitral proceedings are sometimes necessary, in the case parties need an order for interim relief before the arbitral tribunal is constituted;*
- *Because of various reasons access to the State courts is not always given (e.g. confidentiality, parties agreed to exclude State courts etc.)*
- *The users of Art. 37 ICDR International Arbitration Rules (2006) gave a positive feedback; the ICDR Arbitration Rules provide for a quick appointment process which is important for pre-arbitral proceedings;*
- *The time limit for appointing an emergency arbitrator differs depending on the applicable Rules;*
- *Usually emergency arbitrator can award every interim relief when it is necessary and appropriate;*
- *Note that the form of the decision on a pre-arbitral interim relief determines the enforceability;*
- *There are two ways – opt in and opt out - that the institutional emergency Rules are applicable and binding for the parties;*
- *Usually the emergency arbitrator is not allowed to sit as an arbitrator later on in the arbitral proceedings, unless parties agree otherwise;*

Reporter: Michèle Landtwing

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WORKSHOP D: CHALLENGING ARBITRAL AWARDS

Moderators: **Tobias Zuberbühler** / Lustenberger Glaus & Partner, Zurich, **Ned Beale** / Olswang, London

- *The adequate scope of review of awards by state courts is a crucial issue for arbitration. The approach taken by state courts is decisive for attractiveness of particular jurisdiction for international arbitration.*

- *English law provides for number of grounds for challenge to the award; the appeal under section 69 allows for opt-out and ICC and LCIA rules include such op-out clause. It is to be noted that wording to the effect that award is "final and binding" is not sufficient to construe opt-out under English law. In a period 2007 – 2009 only approx. 10% of sec. 69 challenges were successful.*

- *Swiss law provides for challenge mechanism in Art. 190 par. 2 of Private International Law, where one of the grounds for annulment is public policy. Public policy under Swiss jurisprudence covers fundamental international rules and principles. Only intolerable decisions could be vacated based on the public policy clause – it does not apply even if the award is contradictory or manifestly erroneous. There have not yet been any successful challenges of the award based on public policy clause.*

- *All of the jurisdictions (the overview was presented by the participants) include a challenge mechanism.*

- *It is disputable whether there is a need of uniform appellate body for international arbitration; most of the participants denied such need.*

- *In many jurisdictions it is an issue whether it is allowed to enforce an arbitral award while it is subject to challenge.*

- *The question whether scrutiny by arbitration institution (such as ICC) is advantage or disadvantage in light of possible challenge – most of the participants viewed it as positive.*

- *In most of the jurisdictions the introduction of a falsified document in arbitration may be a ground for successful challenge of the awa*rd.

Reporter: Justyna Szpara

WORKSHOP E: ADR AND SETTLEMENT IN ARBITRATION

Moderators: **Sandra De Vito Brieri** / Rohner Attorneys at law, Zurich, **Chris Newmark** / CEDR, London

ADR and Settlement in Arbitration

- *More than 50% of all arbitration proceedings are terminated by settlement!*

- *In different countries the definition of an alternative dispute resolution (ADR) is conceived differently: for example, in the US it means any dispute resolution other than litigation including arbitration but in Europe it is understood not to include arbitration.*

- *In Switzerland there is a long tradition of conciliation, i.e. settlement outside arbitration. In the opinion of the practitioners it functions well.*
    - *In Denmark and Finland the district courts offer mediation service.*

- *When drafting the consent award (i.e. settlement recorded in the form of an award), issues relating to enforceability must be considered. In this respect, observe at least*
    - *mandatory law*
    - *jurisdiction of the arbitral tribunal*
        - *Should the scope of the jurisdiction to be extended in order the consent award to be enforceable?*
    - *statement of reasons*
        - *According to ICC Rules art 25(2), the award shall state the reasons upon which it is based.*

The CEDR Rules for the Facilitation of Settlement in International Arbitration

- *Why were the CEDR Rules introduced:*
    - *to increase the prospects of the parties in international arbitration to settle the dispute without proceeding through the conclusion of those proceedings.*
    - *to suggest arbitrators what steps to take and to avoid when settling a dispute.*

- *The CEDR Rules may be incorporated on an ad hoc basis by agreement of the parties, as part of an institution's rules or within a contract clause requiring arbitration.*

- *Under the CEDR Rules, the arbitrator is to ensure that the parties understand they can settle the dispute at any time. The parties themselves (and not only the counsel) shall be invited to participate to the first procedural conference.*

- *If there are doubts that the arbitrator may not remain impartial or independent due to the settlement involvement, the arbitrator shall resign.*

- *The arbitral tribunal may provide preliminary views on issues and evidence required or provide non-binding preliminary findings of law or fact, unless otherwise agreed by the parties.*
    - *According to seminar audience, in certain jurisdictions (e.g. the US and Britain) the parties may consider this inappropriate since the general notion is that the arbitral tribunal should not commit itself on the merits of the dispute before all grounds and evidence have been presented by the parties.*

- *The arbitral tribunal shall not meet the parties without other parties present or obtain information that is not shared with the other parties.*

- *As to the allocation of costs of the arbitral proceedings between the parties, the arbitral tribunal may take into account an offer to settle if the party to whom the offer was made has not done better in the award.*

Reporter: Heli Lavonen

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ADR: Alternative Dispute Resolution

- *Keep in mind that there is a distinction between Europe and the USA in respect of alternative dispute resolution;*

- *An agreement between the parties regarding a waiver of the challenge proceedings in the case of a settlement offer by the Arbitral Tribunal will avoid a later challenge. This can be done prior or after the witness hearing;*

- *It is important to think of the difference between a consent award and an order for the termination of the proceedings;*

- *Generally, an award should be enforceable;*

- *In case a settlement should be achieved between three parties, but one party is not a party of the arbitration, the jurisdiction of the arbitration could be extended to the other party or the third party could agree to join the arbitration;*

- *While drafting a consent award one should always think of the later enforcement proceedings;*

CEDR:

- *The CEDR Rules can be used by claimant as well as respondent and offer a way for settlement;*
- *If the CEDR Rules are not incorporated in the arbitration clause, then do it in a procedural order;*
- *There are less settlements in arbitration than in litigation cases;*
- *It is recommended that arbitrators should not meet with parties in private or obtaining information from them without being shared with other arbitrators or parties;*
- *There is always a little tension regarding a settlement – in general good for the parties, but sometimes not in the interests of the arbitrators in respect of fees, travelling, interesting case etc.;*
- *The arbitral tribunal and the institution should assist parties in achieving a settlement;*
- *The CEDR Settlement Rules facilitate settlement;*

Reporter: Michèle Landtwing