Kluwer Arbitration Blog

Round Table on Arbitration in Belgrade (May 2019): Hot Topics in Our Daily Arbitration Practice

Nataša Hadžimanovi? (Gabriel Arbitration AG) and Jelena Perovi? (University of Belgrade) · Tuesday, June 25th, 2019

Prof. Dr. Jelena Perovi?, from the University of Belgrade (Serbia) and Dr. Nataša Hadžimanovi?, from Gabriel Arbitration (Zurich, Switzerland), launched the Round Table on Arbitration in 2018 as a forum to discuss controversial issues, share experiences and highlight new trends in arbitration.

The 2nd Round Table on Arbitration took place in the magnificent rooms of the Aeroklub in Belgrade, Serbia, on 21 May 2019. With the umbrella topic "Hot Topics in Our Daily Arbitration Practice", the Round Table attracted an audience from Bosnia and Hercegovina, Northern Macedonia, Serbia and Switzerland. Under the moderation of Prof. Dr. Jelena Perovi? and Dr. Simon Gabriel from Gabriel Arbitration, participants highlighted and discussed several topics relevant in their practice.

Third-Party Funding ("TPF") in South East Europe ("SEE")

Dr. Nataša Hadžimanovi? started the discussion concerning TPF in the region. Specifically, the audience was asked to discuss

1. whether TPF was being used in SEE, and
2. how the arbitration practitioners tackled the challenges which usually came with TPF.

These challenges were identified as the need for time, considerations whether to disclose TPF, and the possibility that a party who was unaware of TPF could omit to ask for a security for costs at an early stage of the proceedings and then, as a consequence, be unable to obtain reimbursement for its costs as the provider of TPF was no party to the arbitration.

The following was stated:

The rules of the relevant arbitration institutions in the region did not offer specific rules on TPF. Also, in investment arbitrations in SEE, security for costs was hardly ever awarded. Under the BAC Rules and the Rules of the Permanent Arbitration of the Serbian Chamber of Commerce, security for costs had, so far, never been awarded although such a measure could, in principle, be awarded on the basis of the rules on interim measures. This meant that costs could not

be recovered even in case a party had been informed on TPF and asked for security for costs.

Thus far, TPF had been used only in investment arbitrations. As TPF was expensive, the minimum threshold for investing per case was EUR 1 million. The present practice in the region, therefore, was that on average only claims over EUR 10 million were financed. Nonetheless, there were some providers of TPF who would finance smaller claims of EUR 2 or 5 million, and this approach was perceived as promising in SEE, as 95% of all claims were under EUR 10 million.

It was advised that parties who were not sure where to look for TPF could use the services of a TPF broker while the parties who were not sure whether to seek financing from a TPF could nonetheless opt for a free assessment at a preliminary stage.

The biggest challenges related to TPF were time (in one case the assessment of a good claim by a provider of TPF had taken so long that the claimant went bankrupt and no arbitration took place) and whether TPF would be provided throughout the whole arbitration proceedings.

It was pointed out that other forms of financing could be interesting for the region as well – such as the purchase of a claim or of an award. It became clear from the discussions that the arbitration community in SEE would continue to explore this topic and the full potential of the use of TPF in SEE (for example, in an upcoming event of the Belgrade Arbitration Association).

Impact of the Belt & Road Initiative ("BRI") on Arbitration in SEE

Dr. Johannes Landbrecht from Gabriel Arbitration asked the audience whether the BRI had an impact on arbitration in SEE. In his experience, the investment interest in the context of BRI concerned infrastructure, green energy and construction disputes.

Furthermore, one of the topics discussed was that, as with the BRI big Chinese companies came into play, such big companies had the power to impose contractual terms. The key issue was, therefore, how to adequately deal with the imposition of the applicable law, the seat and the applicable rules – unless such clauses were so-called "midnight clauses", where no discussion would take place anyway. It was concluded that an ideal scenario would be if parties with a joint legal background – be it the civil or common law tradition – would pick a law from their legal tradition. In case this was not possible, it was advised that a party should at least not give up the seat in order to choose its arbitrator accordingly, as such an arbitrator would perceive the applicable law from the perspective of his/her own legal system.

The Reform of the Swiss Legal Framework on International Arbitration

Prof. Dr. Milena ?or?evi? enquired about the ongoing reform of the Swiss *lex arbitri*, the aim of which is to be even more user-friendly. If everything goes according to the plan, the new provisions will be approved by the Swiss Parliament without major changes in 2019 and will enter into force in 2020.

Dr. Mladen Stojiljkovi? and Dr. Simon Gabriel pointed out the following changes:

- the possibility was provided to file submissions to set aside an arbitral award in the English language;
- the revision was expressly included as an extraordinary legal remedy against an arbitral award for situations where relevant facts or evidence came to light after the arbitration proceedings had been completed, or where criminal investigations showed that the award had been tainted by illegality, or where circumstances came to light after the arbitration proceedings had been completed that called into question an arbitrator's independence or impartiality;
- an express rule was included that arbitration clauses in unilateral acts such as for example wills or trust deeds would have legal force;
- a default provision on the determination of the seat was included to help parties who just had opted for arbitration in Switzerland (the first Swiss court called would designate the arbitral seat);
- finally, the formal requirements were eased in case parties wished to waive their right to challenge the arbitral award, *i.e*. parties with a domicile/branch/place of residence outside Switzerland can waive their right to challenge an award if they so provide in writing, and it is no longer necessary to "expressly" waive this right.

Formal Defects and Formal Requirements of an Arbitration Agreement

Prof. Dr. Jelena Perovi? started a discussion on what should happen to arbitration clauses in case they did not meet a specific form requirement which the parties themselves had included in their main contract: Should such a defect affect only the main agreement or also the arbitration clause? It was concluded that it should be a matter of interpretation whether the parties had meant to apply the form requirement also to the arbitration agreement – considering that for the arbitration clause, in principle, a lower standard should apply because it exists to set up a conflict resolution mechanism.

Furthermore, Dr. Mladen Stojiljkovi? commenced a discussion by asking the audience on the impact of stamps in SEE: Who would be the party in a case where one party had signed but not stamped an agreement containing an arbitration clause while its parent company had stamped but not signed it? It was pointed out by the audience that historically in SEE the stamp had been very important, and originally it had been more important than the signature. The requirement of the stamp, even though it had recently been abolished under Serbian law, was in practice only very slowly losing its importance. Today, however, the signature would prevail, if authentic. However, there were also opinions that in the described case (where one party had signed and another one stamped an arbitration agreement), both parties should be bound.

Following the discussion on stamps, Prof. Dr. Maja Stanivukovi?, President of the BAC, opened a conversation on whether electronic submissions filed with an arbitral institution should contain any form of signature. The audience expressed its view that this was unnecessary because submissions often contained no names, no signatures of counsel, just the name of the law firm.

Conclusion

The discussion highlights the impact of global trends in trade on the investment and arbitration practice in SEE. Parties from SEE, with the help of their legal representatives, meet the challenges which these trends bring. Notable examples include the use of TPF as well as the impact of the

BRI on business in SEE.

Legislation in SEE is trying to foster the establishment of new business relationships: Strict formal requirements (and the relevance of the stamp in commercial practice) – elements deeply inherent in the SEE legal tradition – are being abolished. However, parties in SEE are aware of the fact that changes in enacted legal acts do not necessarily change the law in practice: Formal requirements (even though abolished by legal acts) are losing their importance only slowly.

The role of legal representatives in this process is of crucial importance, as is the importance of open fora like the Round Table on Arbitration where arbitration practitioners can share their experiences and ideas to better advise their clients.

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