Kluwer Arbitration Blog

Take-aways from the National Conference on Commercial and Arbitration Law in Cluj-Napoca, Romania

Radu N. Catan?, Nataša Hadžimanovi?, Johannes Landbrecht (Gabriel Arbitration AG) · Tuesday, August 6th, 2019

On 7-8 June 2019, the ninth (Romanian) National Conference on Commercial Law in Cluj-Napoca was organized by the Department for Company Law and Corporate Governance of the Law Faculty of the University Babe?-Bolyai in Cluj-Napoca (Romania), together with the Center for Commercial Law of the West University of Timi?oara (Romania), supported by the Romanian National Institute of Magistrates and the Romanian National Institute of Insolvency Practitioners. This year, Prof. Dr. Radu Catan? of the University Babe?-Bolyai and Dr. Nataša Hadžimanovi? of GABRIEL Arbitration (Zurich, Switzerland) added an international element to the conference with two panels on current issues in international arbitration dealing with "*Arbitration and Insolvency*" as well as "*Costs and Efficiency in Arbitration"*.

Arbitration and Insolvency

National Conference on Commercial and Arbitration law, Cluj-Napoca, Romania

The first panel, moderated by Dr. Johannes Landbrecht of GABRIEL Arbitration, addressed the complex issue of how to coordinate arbitration with insolvency proceedings. Prof. Ioan Schiau, partner with Schiau, Prescure, Teodorescu, Cri?an (Bra?ov, Romania) and full professor at the Transylvanian University of Bra?ov (Romania), served as Special Guest and contributed, in particular, the Romanian perspective.

The panelists used the famous Vivendi saga, which had given rise to arbitration and state court

proceedings across multiple jurisdictions (including England & Wales[1]), Switzerland [2]), Poland[3]), as a factual background to the discussion. It was introduced by Simon Walsh of Woodford Litigation Funding (London, UK), who had acted as counsel in Vivendi-related cases. The dispute involved multiple parties across several jurisdictions and was, as a result, complicated enough. However, the complexity significantly increased when one of the Poland-based parties, Elektrim SA, became insolvent.

Dr. Marcin As?anowicz of Schoenherr (Warsaw, Poland) explained that the insolvency of a Polish party, under Polish law as applicable at the time, caused tremendous difficulties in arbitration proceedings because such insolvency proceedings were meant to render arbitration proceedings, in essence, impossible. The result of these difficulties was, amongst other things, conflicting arbitral tribunal and state court decisions, as some applied the position of domestic Polish law and others did not.

For instance, one arbitral tribunal declined jurisdiction *vis-à-vis* Elektrim SA, while another arbitral tribunal accepted jurisdiction. Interestingly, both decisions were upheld by the respective state courts under their own law – which meant that these court decisions respectively in England & Wales and Switzerland were also contradictory. Yet, in Switzerland, the so-called Vivendi Case was not the final word, as further discussed by Dr. Johannes Landbrecht. In the subsequent so-called "Portugal Case", the Swiss Federal Court in essence (tacitly) turned its earlier decision on its head – or at least some commentators would later argue so. Foreign insolvency law and its restrictions concerning arbitration proceedings would no longer impact Swiss arbitration proceedings as long as the foreign entity remained in existence.

The Portugal Case then provided André Pereira da Fonseca of Abreu Advogados (Lisbon, Portugal) with an opportunity to explain how Portuguese law coordinates arbitration and insolvency proceedings. André Pereira da Fonseca furthermore assessed whether the Swiss Federal Court had correctly applied Portuguese law.

Kicked off by Prof. Ioan Schiau, these presentations provoked a lively debate with the audience. The focus of this debate was the corresponding situation and practice in Romania. Romanian law monopolizes all decisions on the existence, as well as the recognition (in the insolvency), of disputed claims with the insolvency authorities, rendering arbitration agreements ineffective. In domestic cases, this does not create insurmountable problems. In the case of international proceedings, however, this approach can potentially lead to conflicting decisions. It emerged from the discussion that other legal orders such as England & Wales, Germany, Switzerland, or Bosnia-Herzegovina, circumvent these problems by employing a two-step approach. Arbitral tribunals remain competent to decide on the existence of a claim. The insolvency authorities decide such a claim's fate in the context of the insolvency.

Costs and Efficiency in Arbitration

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The second panel was moderated by Dr. Nataša Hadžimanovi?. The speakers discussed from different perspectives and shared insights on how to increase the efficiency of arbitration proceedings and on how to decrease costs.

Dr. Alina Oprea of the University Babe?-Bolyai analysed the validity and practicality of unilateral hybrid arbitration clauses under various rules and laws. Such clauses are meant to provide one party with the option to unilaterally decide, at the time the dispute arises, whether to arbitrate or to litigate. That way an informed choice at the latest given moment is possible, namely when the dispute has already arisen. This allows taking several factors into account, namely the complexity of the dispute, the amount in dispute, the whereabouts of the assets of the counterparty, a possible counterparty's insolvency, and others.

Hybrid arbitration clauses are mainly drafted by parties from the banking sector, and such parties are not only risk-averse but are usually also in a strong position to negotiate a dispute resolution clause that is favorable to their interests. Hybrid arbitration clauses are generally upheld in many jurisdictions such as England & Wales, USA, and Switzerland. Under Russian law, on the other hand, such clauses are accepted in principle but the option, if only unilateral as per the parties' agreement, is extended to both parties – based on the principle of equal access to justice. In France, hybrid jurisdiction clauses have even been held invalid for being a potestative conditional obligation (see Article 1304-2 *Code civil*). Dr. Alina Oprea criticized the restrictive approach, *inter alia*, because the justice within the forum chosen by one of the parties was equally available for both the parties. Furthermore, such clauses contain no potestative conditional obligations, but rather potestative rights which are also under the Romanian Civil Code (which is still very close to French law) valid.

Ilma Kasumagi? of Wolf Theiss (Sarajevo, Bosnia and Herzegovina) and Marija Š?eki? of Wilmer Hale (London, UK) then continued the discussion on how to render arbitration proceedings more efficient, from a counsel's and a client's perspective respectively. Marija Š?eki? explained, from the client's perspective, that clients had to know that efficiency in arbitration was a question of the relationship between time, cost and quality: "*Fast. Good. Cheap. Pick two*". There were, however, ways to reduce time and cost without reducing quality. She recommended clients to consider an early case assessment to avoid arbitrating matters with low chances of success. She also recommended attempting to negotiate settlements. Close cooperation of in-house lawyers and external counsel was essential, and clients should consider tailor-made proceedings.

Taking the arbitration counsel's perspective, Ilma Kasumagi? confirmed that an early case assessment was important also to make sure that the request for arbitration reflected all the strong points of the case. She highlighted the importance of tailor-made proceedings and recommended counsel to make sure that the arbitrators could determine the issues of the case early to enable counsel to concentrate on fewer points. She also recommended to write short, well-structured submissions containing few, but strong points, to select the documents used as evidence very carefully, to reduce the rounds of submissions, if possible, to consider to skip a document production phase and, possibly, also a hearing.

Dr. Fatih Serbest of the ?stanbul Zaim University (Turkey) continued the discussion by explaining the advantages and challenges connected to fast-track arbitration rules. He stated that fast-track arbitration provided no "magic potion". It was only suitable for certain disputes such as for instance disputes over issues in sport, M&A, and disputes over price/quality determination in commodities sales. He pointed out that a fast-track arbitration procedure only worked well when no one was sabotaging it. He also warned that a quick arbitration procedure could be followed by a long dispute in the enforcement phase as fast-track arbitration had to strike the difficult balance between due process and speed. Prof. Dr. Ioan Schiau commented that in Romania parties did not like fast-track arbitration as they insisted on choosing a party-appointed arbitrator.

The last part of this panel addressed the impact of third-party funding on the way costs are awarded in arbitration. Simon Walsh was asked to explain what third-party funding was: It transferred the risk of the dispute to the funder who, in exchange, would obtain a portion of the potential value of the claim in case the funded party would win (funding costs).

Eleonora Ebau of the University of Torino (Italy) then explained the impact of third-party funding on the way that costs are awarded in arbitration. She discussed (i) whether a funded party should, due to its duty to reimburse the funder for the costs advanced, be able to recover costs irrespective of the fact that the third-party funder had provided the funds (ii) whether, and if so under which (exceptional) circumstances, the funded party having prevailed in the arbitration should be able to recover the funding costs, and (iii) whether the arbitral tribunal could render a costs order directly against the third-party funder to address the "hit and run" risk if the funded party, who had lost the case, did not make payment to the other side. Eleonora Ebau pointed in this respect also to new regulations such as Art. 35 of the SIAC 2017 Investment Arbitration Rules which address this issue.

Three Takeaways

In addition to what has been illustrated above, we provide three further takeaways for the readers of this post below:

1) When drafting agreements, in order to make an accurate risk assessment and to provide for corrective countermeasures, one should assess whether potentially applicable insolvency law provisions could negatively affect the conflict resolution mechanism(s) being discussed by the parties.

2) Costs in arbitration can be reduced and efficiency improved by a variety of measures: in the drafting phase, for instance, by insisting on a unilateral hybrid arbitration clause or by choosing arbitration rules which allow for fast-track arbitration to be opted-in; in the phase of an emerging conflict, for instance, by negotiating a settlement; in the pre-arbitration phase, for example, by obtaining a thorough case assessment, and/or by obtaining third-party funding; and in the arbitration phase, by insisting on a tailor-made procedure focusing on the essential issues of a case, and/or by avoiding or insisting on fast-track arbitration.

3) *Discussion fora* like the Romanian National Conference on Commercial and Arbitration Law are of crucial importance because they allow arbitration and insolvency practitioners coming from different countries to share their experiences and ideas to better advise their clients and also to think about how to reshape the existing law in a future law reform.

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References

?1 Syska v Vivendi Universal SA & Ors, 2 October 2008, [2008] EWHC 2155 (Comm); Syska & Anor v Vivendi Universal S.A. & Ors, 9 July 2009, [2009] EWCA Civ 677.

?2 Swiss Federal Tribunal, Decision of March 31, 2009, 4A_428/2008.

?3 Decision of the District Court in Warsaw, 20 August 2009, case file No. VIII Co 388/08; decision of the Appellate Court in Warsaw, 16/26 November 2009, case file No. I ACz 1883/09.Cz 1883/09.

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