

SansFrontières

The bi-annual newsletter of SJ Berwin's International Arbitration Group

Issue 4 2007

Contents

EDITORIAL by David Goldberg	Page 1
GUEST FEATURE: Competition for Arbitration by Dr. Philip Landolt of Tavernier Tschanz	Page 2
SPOTLIGHT ON ARBITRATION CASE: Stopping Russian Proceedings in their Tracks by Justin Michaelson	Page 5
ADR IN BLOOM: 9th Annual ABA Section of Dispute Resolution Spring Conference by Per Runeland	Page 6
ARBITRATING COMPETITION LAW ISSUES: The Dublin Forum on Arbitration and Competition Law 2007 by Gordon Blanke	Page 9
Special ICC UK Working Session on Arbitrating Competition Law Issues by Gordon Blanke	Page 11
SWEDEN: SCC Institute has Adopted New Rules by Per Runeland	Page 13
SJ BERWIN'S INTERNATIONAL ARBITRATION GROUP: Profile of Dr. Susanne Heger	Page 13
FORTHCOMING EVENTS: Hot Topics in International Arbitration 2007	Page 15
Mediation in Resolving Commercial Disputes	Page 15

If you prefer to receive your copy by email in future, please send details to dawn.haynes@sjberwin.com

sjberwin 

EDITORIAL



David Goldberg
Co-Head and Partner of the
International Arbitration Group
SJ Berwin LLP, London
E david.goldberg@sjberwin.com

SJ Berwin's International Arbitration Group has grown once again since our last issue with Justin Michaelson joining us and becoming a partner on 1 May 2007.

As befits an environmentally friendly firm, Justin is in fact a "recycled" SJ Berwin associate. He returns to us after developing his arbitration skills with Clifford Chance and Weil Gotshal & Manges LLP. In this edition, Justin contributes a piece on the outer limits of the anti-suit injunction.

Tim Taylor, who started his sabbatical swiftly after speaking at the annual ASA Conference in Zurich, has now returned to the office to go straight into a Court of

Appeal hearing on an interesting point of Public International Law, which is likely to be reported later in the year. We are also pleased to announce that Tim has recently been appointed to the UK Panel of Arbitrators of the Independent Film & Television Alliance (I.F.T.A).

Per Runeland reports on the Spring Meeting of the American Bar Association, at which he and I together with Khawar Qureshi Q.C. and Lord Slynn of Hadley were panelists.

The guest feature in this issue is contributed by Dr. Phillip Landolt of Tavernier Tschanz, who examines the phenomenon of competition between different seats for arbitrations.

Confined space does not permit me to say more than "Read On!"



SJ Berwin's International Arbitration Group

GUEST FEATURE



Dr. Philip Landolt
Tavernier Tschanz, Geneva
E landolt@taverniertschanz.com

Competition for Arbitration

1. Introduction

Everywhere and incessantly it seems, countries are vying to attract arbitrations. One might take the recent House of Lords' *West Tankers*¹ preliminary reference to the ECJ. Lord Hoffmann found in commercial rivalry significant supplementary support for the proposition that anti-suit injunctions favouring arbitration should escape prohibition under the Brussels Judgments Regulation²:

“the European Community is engaged not only with regulating commerce between Member States but also in competing with the rest of the world. If the Member States of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of other states which will.”

Sometimes, the competition for arbitrations becomes decidedly pitched. One surmises that it was the perceived compelling nature of commercial interests of arbitration in England, coupled with a concern that the Luxembourg *magistrates* would not be sufficiently alive to them, that provoked Lord Hoffmann to don the mantle of an Advocate General, and to proffer his opinion for the ECJ's consideration rather than making an ordinary request for interpretation. That this behaviour was singular is suggested by the cursory speeches of two of the four other Law Lords who sat in the case. Lord Rodger approved the reference to the ECJ and the content of the opinion, but not explicitly the fact that it was being addressed to the ECJ. Lord Nicholls less subtly confined himself to approving the reference alone.

Recently, a legislative amendment³ came into force in Switzerland to permit arbitral tribunals to take jurisdiction over cases despite prior court or arbitral proceedings involving the same questions between the same parties, absent serious reasons to the contrary. The Swiss government justified this measure, reversing a decision of the Swiss Supreme Court in the much maligned *Fomento* case⁴, as follows:

“For the Federal government also attaches great weight to the maintenance of confidence in this branch of services, which is important from both an economic standpoint and for the international reputation of Switzerland.”⁵

These legal developments, and the justificatory statements which accompanied them, invite hypotheses on the competition for arbitration, and what is really to be gained by seeking to attract arbitrations.

2. The Stakes

a. General

When seeking to attract arbitrations, judges and law-makers are generally intent on increasing the use of their State's arbitration law and substantive law, and physically hosting arbitrations. Almost invariably, the applicable arbitration law follows the seat of the arbitration, and the seat is usually expressly selected by the parties who have practically untrammelled freedom in this choice. However, since the seat constitutes a juridical connection with a State, the arbitration hearings and other events in the arbitration do not necessarily take place at the seat, but in practice they very often do. There is no necessary correspondence between the arbitration law and the substantive law applicable in a case, nor does any tendency to couple the two seem to have been brought to light. It is perhaps true, though, that the increased prestige of a State's arbitration law will lead to increased prestige in its substantive law, and thus to a corresponding increase in demand for the latter.

In the result, making the local arbitration law more attractive to users probably increases the use of the local substantive law to a limited degree but it in all likelihood would appreciably

¹ *West Tankers Inc. v. RAS Riunione Adriatica di Sicurtà SpA and others*, [2007] UKHL 4.

² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1–23.

³ This amendment added a new paragraph “1bis” to Article 186 of the Swiss Private International Law Act, the unofficial English translation of which is as follows: “[The arbitral tribunal] shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a State court or another arbitral tribunal, unless there are serious reasons to stay the proceedings.”

⁴ ATF 127 III 279; decision of 14 May 2001 in *Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A. (“Fomento”)*.

⁵ Opinion of the Swiss Federal Council of 17 May 2006 on the Report of 17 February 2006 of the Legal Affairs Commission of the Federal Council concerning the parliamentary initiative to amend Article 186 of the Swiss Private International Law Act, ad 02.415, page 4483.

increase the number of arbitrations physically held within the territory of the State in question.

b. Work for Lawyers

Arbitration practitioners gain particular expertise in the arbitral law where they are based. Moreover, actions lie to the courts of the seat for such matters as provisional measures, the constitution of the arbitral tribunal, and the setting aside of the arbitral award. This work is generally reserved for lawyers at the seat of the arbitration. There will often be savings in time and costs in hiring arbitration counsel initiated in the arcane complexities of local civil procedure. This is not to suggest that lawyers based at the seat luxuriate behind high barriers to the entry of lawyers based elsewhere, and that arbitration practitioners survey arbitration law outside of their home base as “a forest of single instances”. It is rather the enjoyment of certain advantages, not all and not insuperable ones, which channels a disproportionate share of arbitrations to lawyers based at the seat. Mainly for these reasons, increasing the attractiveness of a particular arbitral seat tends to increase the work of lawyers based there.

c. Hotel and Hospitality Industry

Since hearings are generally held at the arbitral seat, battalions of lawyers with clients, witnesses, and stenographers in their train, occupy hotel rooms, take meals in restaurants, and purchase goods and services at the seat. It is also not unknown for arbitral hearings to take place in comfortably-appointed hotel conference rooms. Therefore, increasing the attractiveness of an arbitral seat must increase revenues for the local hospitality industry.

d. Removal of Burden of Dispute Resolution

States are required to provide dispute resolution before the courts. There are difficulties in recovering the costs of this service from users. First, since the administration of justice is traditionally conceived of as an essential service and indeed an incident of statehood, there is a reluctance to treat it on a commercial basis, any more than say a State would charge (fully) for policing or diplomatic protection. Secondly, charging full user-fees for court services may violate the fundamental right of access to justice, even where prosperous businesses are concerned. Thirdly, since most of the costs of the administration of justice are in fact fixed, there would be difficulties in costing the services to individual litigants who can pay, and avoiding a situation, also likely to be a violation of fundamental rights, where they cross-subsidise impecunious litigants.

Arbitration is so attractive to States since it privatises dispute resolution, and thereby largely relieves the State of having to provide administration of justice services to a certain population of users. Since in most legal systems there are relatively few legal requirements of connection to a court’s territory for its jurisdiction to be claimed, arbitration has the particular advantage of privatising the administration of justice in respect of foreign parties unconnected to the State to whom the State feels no duty to offer services.

e. Prestige Spin-offs

It should not be overlooked that much prestige attaches to a State’s acting as host to arbitrations, as intimated in the Swiss government’s justification for reversing *Fomento*. Even if it is the

peace-makers who are blessed, countries putting in place the conditions under which peace-making may prosper bask in their reflected glow. Choosing a foreign seat, and giving up the certainties of one’s home court or even home arbitration law is a considerable vote of confidence in that foreign seat. Countries can develop reputations as modern, cosmopolitan, and fair by attracting arbitrations through their arbitration law. Such a reputation doubtless brings non-arbitration economic activity, and may be instrumental for the modern development of legal business clusters.

f. Support for Trade generally

Arbitration is often cited as being the dispute resolution mechanism of choice for international business. The various qualities of arbitration have been sufficiently extolled elsewhere. It is noteworthy that arbitration is valuable in and of itself as an effective alternative to court litigation. Parties have voted for arbitration with their feet, flocking to it, and forsaking court proceedings. So a great advantage of arbitration is its being in the service of international business and adding value to international business.

3. Assessment of these Advantages

A model with much force to explain what hosting arbitrations can offer a State is the so-called “Wimbledon effect”. The opposing parties, who have most to gain, and to lose, in an arbitration, are generally foreign. But hosting this tournament like hosting arbitrations brings revenues for certain sectors of local business, like the hospitality industry, and above all prestige for the host country, which can be expected to translate into economic gains elsewhere in the local economy.

These local advantages, even taken together, must, however, be fairly modest and cannot alone explain the rapt and sustained attention paid by States to the improvement of their arbitration systems. Whatever the advantages of arbitration enjoyed by the seat, by far the most significant benefit of improvements to arbitration laws to make arbitration more attractive to users must lie in facilitating international trade. The fascinating aspect of this, from an economic point of view, is that these benefits cannot be captured alone by the country moving to improve its arbitration laws but rather that country is in the main benefited only indirectly, by the general increase in trade and the general unburdening of courts, in the way a rising tide lifts all ships.

It is, however, the combination of local advantages derived from hosting arbitration and indirect advantages stemming chiefly from the increase in trade, which provide sufficient incentives for countries to undertake a perpetual quality review of their arbitration laws. Of course, the local advantages need not be massive, since the cost to the State of that review is not great, for much of it is covered by private parties, such as arbitration practitioners, with a private interest in the expansion of arbitration. A further consideration fostering State willingness to review local arbitration laws for improvement is that, especially as regards sophisticated commercial parties, such improvement does not generally entail a policy trade-off in States' interests in other areas. It is specifically the interests of large

commercial parties which, when attended to, create growth in international trade.

Furthermore, the localised benefits of a State's improving its arbitration law are important in creating a sort of regulatory competition and in effect ensuring that State interference with private interests is pared away to the greatest practicable degree.

Yet one might legitimately ask whether this is not a pernicious race to the bottom. As regards the protection of disputants, there is no real concern, since the large, sophisticated entities which are the paradigmatic arbitration users can and are indeed usually happy to watch out for themselves.

On the other hand, some have argued that a seat's review of an arbitral award should serve to protect the interests of all States, and that, therefore, the public policy test should take into account the mandatory norms of other States, not just those of the seat, even though there is no international legal requirement on the seat to entertain actions to annul an arbitral award to take into account the public policy of any other State.

Against this view one might assert, however, that the protection of the interests of States other than that of the seat is sufficiently assured by their power to refuse to enforce an international award under the New York Convention⁶, in particular for its repugnance to the public policy of the State of enforcement. Also, where certain norms are really important to a

State, public enforcement will often exist alongside private enforcement (arbitration), and the former will remain largely unaffected by any impairment in private enforcement.

Michael Reisman has argued⁷ that a seat's restriction of public policy review creates a free rider problem. This is fallacious since reductions in that control having the effect of attracting arbitrations are not parasitic on any other State's (shared) entitlement, expense or exertions. This is to be contrasted with tax competition, which raises concerns of States hosting businesses which take advantage of services, employees, infrastructure or even markets there while being taxed exclusively or primarily in another, lower tax State.⁸

4. General Consequences

Arbitration law policy should resist mercantilist, beggar-thy-neighbour instincts. There is comparatively little to be gained, and, if a reduction in trade results, all lose.

The economic interest of States is in reality to ensure that they offer the best possible arbitration system to parties involved in international trade, typically large commercial users. Generally speaking, the arbiter of excellence here is State non-interference in arbitrations, but assistance, where necessary, to make arbitration efficacious. To ensure predictability, and because the parties are the best judges of their own interests, that assistance should, wherever possible, be in accord with the parties' own intentions.

⁶ Convention on the Recognition and Enforcement of Foreign Arbitration Awards adopted in New York on 10 June 1958.

⁷ W. M. Reisman, *Systems of Control in International Adjudication & Arbitration* (Durham and London: Duke University Press, 1992), at 131 – 132.

⁸ One hastens, however, to observe that Singapore's offering of tax incentives – most recently a 50% arbitration income exemption for approved law firms – to attract arbitrations presents no free rider problem. Again, there is here no reaping of what others have sown or have helped to sow. The real question is whether the lower taxation enjoyed by the same firms who select Singapore arbitration as those who may run Singapore arbitration cases, and therefore benefit from the tax exemption, introduces a perverse incentive scheme, that is, one unrelated to the comparative (undoubted) quality of Singapore arbitration. See the Singapore Ministry of Law announcement on: http://notesapp.internet.gov.sg/_48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-6YF7C6?OpenDocument

SPOTLIGHT ON ARBITRATION CASE



Justin Michaelson
Partner, International
Arbitration Group
SJ Berwin LLP, London
E justin.michaelson@sjberwin.com

Stopping Russian Proceedings in their Tracks

In the first case of its kind, the Court of Appeal in Bermuda upheld an anti-suit injunction granted in our client's favour restraining their opponents from proceeding with an action in Russia, in favour of an agreement with our client requiring arbitration in Switzerland. The case is unique in that it involves three countries: Country A (Bermuda) restraining proceedings in Country B (Russia) in favour of an arbitration agreement with a seat in Country C (Switzerland).

Our client had been involved in arbitrations and litigations with this opponent since 2003. In 2006, proceedings were commenced in Russia in breach of two agreements requiring arbitration in Switzerland. An anti-suit injunction was ordered in Bermuda and required our client's opponent to (i) discontinue proceedings in Russia; (ii) discharge the injunctions it had obtained from the court in St Petersburg freezing shareholdings in a valuable telecoms company; and it also (iii) prohibited them from commencing any legal proceedings relating to any claim in respect of those shareholdings in breach of the agreement to arbitrate.

In the absence of overriding State interests in attracting arbitrations, it may also be that the fully mature expression of arbitration law around the world will be one of uniformity, perhaps even commoditisation, typified by a high degree of State reserve, and involvement almost exclusively to give effect to arbitration agreements. Indeed the substantive subject matter of arbitration law is not that broad, such that there are relatively few components to bring into harmony with their foreign counterparts. It is perhaps no surprise that the UNCITRAL Model Arbitration Law, which States the world-over accept of their sole, unprompted volition, has met with such success, whereas the efforts to develop and bring into operation a uniform civil code confined to the European Union, in spite of the great political weight of the European Commission and its Action Plan, seem sadly to be flagging.

5. West Tankers and the Swiss Amendment

With both *West Tankers* arbitration-friendly anti-suit injunctions and the Swiss near abrogation of the litispence principle for arbitrators there is a favouring of local arbitral jurisdiction over foreign court jurisdiction. Insofar as this ensues from a desire to capture economic advantages at the expense of a foreign State, this is misguided. Lord Hoffmann's justification in support of pro-arbitration anti-suit injunctions indicates that he has been lured into this thinking. The Swiss federal government's invocation of the maintenance of confidence in arbitration, which is important from both an economic standpoint and for the international reputation of Switzerland, would appear to have in mind not the economic interests of all States in

the promotion of arbitration but the assumed peculiar interests of Switzerland. If that is true, it is to be regretted. But the statement is correct in identifying the increased prestige of the State as being amongst and perhaps even foremost amongst the relatively modest advantages to be captured from hosting arbitrations.

In both *West Tankers* and the Swiss amendment there is the concern to ensure that local arbitration is shielded from complications arising out of what foreign courts may decide. Such intervention, or in the Swiss case non-intervention, is certainly praiseworthy in and of itself, for its concern to ensure the efficacy of arbitral proceedings.

Both situations relate to who will determine the parties' intentions about whether or not there is arbitral jurisdiction. In the Swiss amendment letting the arbitrators make this determination is consistent with State support of arbitral jurisdiction. In *West Tankers*, the competition to make this determination is as between two courts. The only reason to favour one court over another in this regard is if that other court will not give sufficient opportunity to arbitral jurisdiction. If, however, that court is bound by Article II(3) of the New York Convention, absent specific grounds, it should be given the benefit of the doubt.

Finally, concern for the efficiency of arbitral proceedings does not seem to provide a justification for anti-suit injunctions. To prevent the inconvenience of proceedings before a foreign court, proceedings seeking an injunction are entertained. Anti-suit injunctions simply expand the range of potential proceedings which parties to arbitrations must contend with.

Our client's opponent is incorporated in Bermuda, but challenged the right of the courts in Bermuda to exercise jurisdiction over them in this way. The main issue was whether the Bermudian court was entitled as a matter of law or jurisdiction to issue an injunction of this nature on the basis of *in personam* jurisdiction only, or whether it must, in addition, have another "sufficient" interest before it can do so.

The court relied on the following reasons to give its conclusion:

- (i) An exclusive jurisdiction or arbitration clause contains an implied covenant not to litigate in any other forum. It has long been established that the courts of equity will enforce a negative covenant by way of injunction.
- (ii) It is common ground that damages are not an adequate remedy for breach of an arbitration clause. An injunction will be granted when damages are not an adequate remedy.
- (iii) The court can grant an injunction provided that it has jurisdiction *in personam* over the defendant. The clearest possible case of *in personam* jurisdiction is where the defendant is domiciled within the jurisdiction of the court.

The role of the courts of the seat of arbitration is to supervise the arbitration itself. It is not only the courts of the seat of arbitration which can issue the anti-suit injunction and prevent a party breaking its contract to arbitrate. In this case, Switzerland did not have a similar regime as Bermuda. Accordingly, the court concluded that *in personam* jurisdiction alone based on our opponent's domicile in the jurisdiction sufficed and it was not necessary to require our client to go to a jurisdiction which did not have the remedy available.

ADR IN BLOOM



Per Runeland
Consultant, International
Arbitration Group
SJ Berwin LLP, London
E per.runeland@sjberwin.com

9th Annual ABA Section of Dispute Resolution Spring Conference

Attitudes and Latitudes: A European Perspective on Arbitration

1. This session takes a broad approach to the discussion of issues of interest to lawyers involved in international arbitration or in cross-border transactions. There is no doubt that if we engage in international construction contracts, joint ventures, engineering projects, licensing of intellectual property, etc., we cannot live without arbitration. On the other hand, if we only work for banks or financial institutions, there is a fair chance that our banking clients will prefer the courts to arbitral tribunals, but even that is becoming less likely. As an example, the European Bank for Reconstruction and Development ("EBRD"), whose biggest shareholder is the United States, has made it known that its standard approach to dispute resolution in sovereign operations include the following:

- arbitration at either party's option;
- ad hoc arbitration, using UNCITRAL Rules;
- appointing authority is the President

- of the International Court of Justice;
- place of arbitration is The Hague, The Netherlands;
- privileges and immunities of EBRD are expressly reserved; and
- any power of arbitrators to enforce consolidation requires EBRD approval.

2. The EBRD's usual approach to dispute resolution in private sector operations is focused on a less august level:

- arbitration at either party's option;
- in addition, EBRD only has the right to litigate in the courts of England or any court having jurisdiction;
- ad hoc arbitration, using UNCITRAL Rules;
- appointing authority is the London Court of International Arbitration (LCIA);
- place of arbitration is London;
- parties waive access to English courts on points of law;
- privileges and immunities of EBRD expressly reserved; and
- any power of arbitrators to enforce consolidation requires EBRD approval.

3. This concrete example of a formulated policy for arbitration raises several of the standard questions that need to be dealt with when drafting an arbitration clause. This session covers specifically arbitration in England, China and Russia. It falls to me to pick up interesting points reflecting the practice of arbitration in Western Europe, including Scandinavia. But I may not be able to stay away from Russia and the Ukraine completely, considering that many of the interesting arbitrations that are going on at this moment involve those countries even if the legal entities involved may be incorporated in Switzerland, Cyprus, the BVI or other off-shore jurisdictions.

4. The Swiss Arbitration Association has published a brochure on Do's and Don'ts in International Arbitration. Among its conclusions, the brochure suggests that we should not believe everything we hear about international arbitration and states a number of almost universal untruths.
5. The first is that "arbitration clauses should be elaborate". I have seen elaborate arbitration clauses that must have cost the client at least \$10,000 cause further delay and expense when an attempt is made to apply them. An interesting example involved an intricate arbitration clause that intended to make certain that several contracts in a joint-venture would be subject to the same dispute resolution procedure, in fact to one single arbitral tribunal, whether the dispute arose under the Supply Agreement, the Licensing Agreement or the Corporate Joint-Venture Agreement. The clause provided for arbitration under the rules of the International Chamber of Commerce ("ICC"), and this was probably a good idea because the intervention of the ICC made it impossible to get the multi-party situation off the ground. What could have been a very complicated arbitration involving many parties with diverging interests turned into two separate arbitrations which were big but manageable. I learnt from that experience, where I was not involved in drafting the pathological arbitration clause but in getting the arbitration under way, that happiness is not a complicated arbitration clause, or the biggest possible arbitration.
6. The Swiss want to underline that it is incorrect to assume that all ICC arbitrations are conducted in Paris. In fact, ICC arbitration is possible anywhere in the world, and Switzerland is a more frequent venue than France. It

is true, however, that if no place of arbitration has been specified in the arbitration clause, it is possible that an ICC arbitration will be conducted in Paris if there are no circumstances that make France unsuitable. One reason why France is often suitable is that France has arbitration laws that are some of the most arbitration-friendly in the world, with great freedom given to the arbitral tribunal in respect of the organisation and conduct of the arbitration. The point of freedom in this context is not just that the parties and the arbitrators can have the kind of arbitration they want. The most interesting point is that where there is an absence of mandatory rules, there is little room for the kind of procedural irregularities committed or permitted by the tribunal that may be grounds for a later challenge or for difficulties at the enforcement stage. In that context we have to take into account that parties are rarely so much upset by the conduct of the arbitration as they are keen to escape the enforcement of an award that goes against them. We can forget any notion of gentlemanly parties accepting a fair award if there is a possibility of attacking it. Fortunately, for the binding force of an arbitration clause and the finality of an award, it is true throughout Europe that it is extremely difficult to persuade a court to set aside an arbitral award. The arbitration-friendly climate in fact starts with the interpretation of arbitration clauses where any doubts are often resolved in favour of arbitration.

7. There are hundreds of arbitration courses, academic programmes and seminars every year, so we might be led to believe that there must be enormous numbers of actual arbitrations going on in various places. This is only true to a degree. At the same time as a number of arbitrators

are very busy, there are many disappointed candidates among the thousands of graduates with a specialisation in arbitration that wish to join the practice of arbitration every year. This is obvious even from a cursory look at the numbers of arbitrations dealt with by arbitral institutions. The ICC has around 500 or 600 new cases per year, close to half of which are likely to be settled at some point, often in the early stages. If we look at the other major institutions, we find that the Stockholm Chamber of Commerce Arbitration Institute has around 100 new cases per year, and the London Court of International Arbitration comes close to that number. The combined number of cases for all of the Swiss Chambers of Commerce that now operate a uniform set of rules, the Swiss Rules of International Arbitration, had approximately 60 new cases in the past year. Various attempts have been made to estimate the number of ad hoc arbitrations, including arbitrations under the rules of various trade associations, maritime arbitrations, commodity arbitrations etc that are commenced every year. In London alone, we are talking several thousand ad hoc arbitrations per year according to statistics collected by the London Chamber of Commerce. It needs to be said that many commodity arbitrations do not provide employment for arbitration lawyers, and some trade association rules prohibit the involvement of lawyers in the resolution of disputes. Based on my own experience from arbitrations under the rules of the London Metal Exchange, this is not an approach I recommend.

8. Arbitration was the accepted method of resolving foreign trade disputes in the Comecon area from Central Europe to Asia. This has led to the development of very solid arbitration practices at the arbitration courts

attached to the Chambers of Commerce in those countries. The biggest show was, of course, in Moscow, but after the collapse of the Soviet Union, arbitration courts were rapidly established in the outlying Republics of the former Soviet Union, such as the Ukraine, Kyrgyzstan etc. In particular, the Ukrainian experience has been very positive with the number of cases exceeding 800 in certain years around the millennium.

9. A brief overview of European arbitration would not be complete without a look at the cost of arbitration, meaning the fees of the tribunal and the administrative charges of any institutions involved. The institutional approach is typically to charge fees reflecting the value of the dispute. The alternative, also used in ad hoc arbitrations, is to charge for the time spent, which often results in a higher charge to the parties. It is sometimes said that ICC arbitration is particularly suited for important disputes, but at least from the financial point of view I would disagree. The parties get very much for their money when they refer low value disputes to ICC arbitration. Because of its cachet, the ICC commands the services of respected arbitrators from all corners of the world, even if the fees they earn in small cases are modest. At the other end of the value scale, the LCIA provides an economical alternative for high-value disputes. This is because the LCIA does not charge fees reflecting the amount in dispute. It charges an hourly fee for the services of the LCIA itself and variable hourly fees, agreed in advance, for the arbitrators involved. If the hourly rate goes above £350 (approximately US\$700), the LCIA refers back to the parties for their approval of the higher fee. This has the effect of imposing a

practical upper limit on fees of £350 in most cases. Further, the hours spent are informally monitored by the LCIA, all of which makes it possible to get a very economical service from the LCIA in cases where large amounts of money are at stake. In the former Soviet Union, arbitration costs have typically been low and even after the recent increase of tariffs at the International Commercial Arbitration Court in Moscow, costs are still lower than average. Interestingly, in Moscow, the proportions are reversed, so that the institution, that is to say the Court of Arbitration in Moscow, gets 70% of the costs of arbitration, with 30% being allocated to the three arbitrators. This means that even in a reasonably important commercial case, the fee of an arbitrator may amount to just a few thousand dollars. If arbitrators are appointed from outside Russia, travel expenses are collected from the party appointing the foreign arbitrator, and they are often a multiple of the fee. The Ukrainian International Commercial Arbitration Court works on the same principles, but the institution takes a smaller proportion, and the entire cost is lower. This situation cannot result in arbitration quite as we know it, with hearings lasting for a week or even several weeks. Justice is pretty swift in those cases, and my conclusion is that parties still get a lot for their money, with experienced and competent arbitrators dedicated to the resolution of their disputes, but without the financial tools to do a complete job, the arbitrators can hardly achieve the same results as in Western Europe.

10. I cannot leave the subject without saying something about Scandinavia, where the oldest, biggest and most experienced arbitration institute is that of the Stockholm Chamber of Commerce. It works on a tariff system

which results in arbitration costs at maybe 75% of ICC costs in a typical case. Combined with the intuitive simplicity of arbitration procedure in Sweden and the reasonable fees of local lawyers, there is much that recommends Stockholm as the place for international arbitration, especially as it is a venue that enjoys broad acceptance throughout Europe and the former Soviet Union.

ARBITRATING COMPETITION LAW ISSUES



Gordon Blanke MCI Arb
Associate, International
Arbitration Group
SJ Berwin LLP, London
E gordon.blanke@sjberwin.com

The Dublin Forum on Arbitration and Competition Law 2007

Thanks to the initiative of James Bridgeman, a Chartered Arbitrator and leading barrister of the Irish bar, the Dublin Forum on Arbitration and Competition Law had its first gathering at Chambers Ireland in Dublin on 15 June 2007. Attendance at this first Forum was confined to members of the former International Chamber of Commerce (ICC) Task Force on Arbitrating Competition Law Issues, which completed its mandate in late 2006, and some select few from outside the institutional framework of the ICC. Participants included, to name but a few, Andrew Burr, a London-

based barrister; Karl Johann Dhunér of Dhunér Järvengren Advokatbyrå, Stockholm; Antti Järvinen of Hannes Snellman, Helsinki; Assimakis Komninos of White & Case, Brussels; Noreen Mackey, Legal Advisor of the Irish Competition Authority; Daniel Margolis, a U.S. arbitrator and antitrust specialist; John Tirado of Norton Rose, London; and Charles Verill of Wiley Rein, Washington. Lead discussion papers were presented by Diederik de Groot of DLA Piper, Amsterdam, Gordon Blanke of SJ Berwin LLP, London, and Michael Blechman of Kaye Scholer LLP, New York. Andrew Whittaker attended the Forum in his capacity as publisher and editor of Ireland's leading competition law journal "Competition".

The intended mission of the Dublin Forum is to provide a permanent, yet flexible and deliberately non-institutional discussion forum for the ongoing discourse on arbitration and competition law. The relationship between these two domains has proven to be highly evolutionary over the past two decades, showing a strong potential to develop into an academic and professional discipline in and of its own right. The Forum subscribes to the furtherance of this evolution and the increased specialism and professionalism that accompany it.

The first Forum was carefully designed to set the stage for future Fora, introducing the main themes of the discourse on arbitration and competition law in both Europe and the United States of America. Diederik de Groot led the first round of discussions on the "second look" in the aftermath of the legendary *Eco Swiss*

Benetton judgment of the European Court of Justice⁹. Appearing as former Benetton counsel before the Dutch judiciary in this case, de Groot gave an insider account of the proceedings before the Dutch and Luxembourg courts, culminating in the ECJ's famous conclusion that Article 81 of the EC Treaty falls within the notion of "public policy" under Article V of the New York Convention, thus laying the grounds for the application of the "second look" doctrine in Europe. In de Groot's view, the Court effectively used the "public policy" concept under the New York Convention¹⁰ to "unlock the second look" and the European law principle of *effet utile* to allow it to broaden the review undertaken by the member state courts, which may well suffer from domestic rules of procedural inertia or passivity. The principle of effectiveness thus supersedes any procedural allowances at the national level to avoid a review if such allowances imply that the enforcement of a company's rights under European (competition) law is rendered exceedingly difficult or impossible¹¹. In this context, de Groot highlighted the varying intensity of the national courts' reviews, ranging from "minimalist" in case of the Paris Court of Appeal in *Thalès v. Euromissile*¹² to "maximalist" in the recent Dutch case of *Van Raalte v. MDI*¹³.

In Komninos's view, the Paris Court of Appeal's assessment carries more weight given the French court's exposure to the ICC in Paris and its considerable experience in competition law matters. Blanke raised the issue of the exact meaning of a "substantive review" in this context, it being understood that an arbitrator faced with a competition law

issue will have to provide detailed reasoning in the award on the competition law considerations made by him. Reviewing such an award in detail, even without re-opening the case *per se*, may well amount to a substantive review within the ordinary meaning of that term. Discussions continued on the arbitrator's *ex officio* duty to raise competition law issues of his own motion, the participants being split as to the existence of such a duty. De Groot emphasised that no such duty was expressly laid down by the ECJ in its judgment in *Eco Swiss*. Michael Blechman voiced his concern that as compared to the American approach since *Mitsubishi*¹⁴, European arbitrators seemed to have surprising difficulties in dealing with antitrust issues brought before them. In the United States, antitrust issues would be treated by the arbitrator like any other statutory infringement and in case the parties prevented him from dealing with an antitrust infringement in the arbitral proceedings, he would simply resign. Blanke explained that one of the reasons why the treatment of competition law was so sensitive from a European perspective may well be the underlying idea of European integration, of which the competition law provisions form an inseparable part. Under the EC Treaty, European citizens have rights and duties, including compliance with the EC competition law provisions. Komninos confirmed that an arbitrator endorsing a competition law infringement through an award could potentially be treated as an undertaking within the meaning of Community law and fined by the European Commission accordingly.

⁹ Case C-126/97, *Eco Swiss China time Ltd. v. Benetton International NV*, [1999] ECR I-3055.

¹⁰ Convention on the Recognition and Enforcement of foreign arbitral awards, done at New York, on 10 June 1958.

¹¹ Citing, by way of example, the ECJ's judgment in Case C-312/93 - *Peterbroeck Van Campenhout & Cie SCS v. Belgian State*, [1995] ECR I-4599.

¹² Paris Court of Appeal, Decision of 18 November 2004, *Thalès Air Défense v. Euromissile e.a.* In this case, the Paris Court of Appeal upheld an award that did not discuss relevant competition law issues at all given that these had not been raised by either the parties or the tribunal during the arbitral proceedings.

¹³ *Marketing Displays International Inc. v. VR Van Raalte Reclame B.V.*, Judgment of the Court of Appeal of The Hague of 24 March 2005. In this case, the Dutch Hooge Raad undertook a detailed substantive review of an award discussing and adjudicating upon relevant competition law issues.

¹⁴ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The Mitsubishi decision sanctions the arbitrability of antitrust law issues in the U.S.

Gordon Blanke led the second round of discussions on the latest developments of the use of international arbitration in EC merger control. Blanke provided a general introduction to the core concepts of the Commission's practice in this field and how a typical arbitration commitment for the correct implementation of a behavioural remedy works. Blanke stressed that most of these remedies constitute access commitments, which require medium- to long-term monitoring. Arbitration commitments impose a unilateral *erga omnes* obligation on merging parties to submit to arbitration vis-à-vis a third party beneficiary of rights flowing from the merger remedy package. Non-compliance by the merged entity is likely to trigger the Commission's own investigations, given that as "guardian of the Treaties", the European Commission remains responsible for the correct implementation of the remedies at hand. Blanke further emphasised that in adjudicating the correct implementation of the remedies, the arbitrator does not usurp the Commission's regulatory function. In fact, the arbitrator's mandate is complementary to the role played by the Commission, which preserves its prerogative to impose traditional public law sanctions on an intransigent merged entity. The arbitrator, in turn, is entitled to award private law remedies, including compensatory damages and ordering specific performance of the remedies under the merger clearance decision. Blanke discussed the Commission's latest merger clearance decision incorporating arbitration commitments¹⁵. It appears from some of these decisions¹⁶ that the Commission is developing a new role for the so-called

monitoring trustee, whose main function used to be confined to overseeing the implementation process of the remedies. The monitoring trustee is now attributed an active role in the dispute resolution mechanism, making settlement proposals during the preliminary negotiations phase and providing his assistance to the arbitral tribunal during the arbitration proceedings. These new functions of the monitoring trustee are not clearly defined and it remains questionable to what extent the tribunal becomes exposed to undue interference by the monitoring trustee, *quod non debet*. Blanke concluded by praising the Commission's recent move to formalise its arbitration policy in the new draft Notice on Remedies¹⁷, cautioning, however, that the Commission would be well-advised to clarify the role of the monitoring trustee in any of the dispute resolution mechanisms foreseen under the Remedies Notice.

In the ensuing discussions, Noreen Mackay confirmed that it would be very important for the European Commission to clarify the role of the monitoring trustee in the dispute resolution commitment in order to avoid motions for setting aside or non-enforcement before the national courts. Komninos also emphasised the need for clarity and warned that competition authorities had to be careful not to use dispute resolution mechanisms nonchalantly, making reference to the recent use by the Office of Fair Trading of a "resolution" clause in its "undertakings in lieu of reference" and the confusing use by the French Competition Authority of third-party expertise in its recent Merger Guidelines.

Michael Blechman led the third round of discussions, giving a *tour d'horizon* of current issues in the U.S. on arbitrating antitrust claims. Following a brief historical overview and a distinct reference to the famous *Mitsubishi* decision, which, in retrospect, has been interpreted as the *fons origo* of the arbitrability of antitrust laws in the U.S., Blechman set out some *sine qua non* conditions for an antitrust dispute to be arbitrable in the U.S., including the availability of treble damages, the wording of the underlying arbitration clause, the ambit of U.S. discovery provisions in arbitration proceedings and the enforcement of the resulting arbitral awards. Most recently, the U.S. courts held that "[p]articipating in arbitration may result in limited discovery."¹⁸ Interestingly, in another more recent case¹⁹, the U.S. courts held that a district court of the district in which a person resides or is found may order that person to give its testimony or statement or produce a document or other thing for use in a non-U.S. arbitration. As regards the unique availability of class actions in the U.S., the First Circuit recently refused in *Kristian v. Comcast*²⁰ to enforce a class action bar where enforcement would "shield [the defendant] from private consumer antitrust enforcement liability, even in cases where it has violated the law" and would render plaintiffs "unable to vindicate their statutory rights." It would appear, however, that a class action bar stands where the amount claimed is minimal²¹. As regards the enforcement of antitrust awards, review by the U.S. courts is minimalist: The award will therefore be enforced provided the tribunal did consider the underlying antitrust issue.²²

¹⁵ Comp/M.3998 - *Axalto/Gemplus*, Commission decision of 19 May 2006; Comp/M.4180 - *Gaz de France/Suez*, Commission decision of 14 November 2006; Comp/M.3916 - *T-Mobile Austria/Tele.ring*, Commission decision of 26 April 2006; and Comp/M.4314 - *Johnson & Johnson/Pfizer Consumer Healthcare*, Commission decision of 11 December 2006.

¹⁶ See *Axalto/Gemplus*, cited *supra*; *Gaz de France/Suez*, cited *supra*; and *T-Mobile Austria/Tele.ring*, cited *supra*.

¹⁷ Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2007/), electronically accessible at http://ec.europa.eu/comm/competition/mergers/legislation/draft_remedies_notice.pdf.

¹⁸ *Kristian v. Comcast Corp*, F3d, 2006 WL 1028758 (1st Cir. Apr. 20 2006).

¹⁹ *Re Application of Roz Trading Limited*, (N.D.Ga. 2007).

²⁰ Cited *supra*.

²¹ *Muhammad v. County Bank of Rehoboth Beach*, (N.J. 2006).

²² *Baxter International v. Abbot Laboratories*, 3157.3d 829 (2003).

Komninos observed that the French approach to the enforcement of antitrust awards seemed even more “liberal” than the American one, recalling that in the recent *Thalès* decision²³, the *Cour d’Appel* of Paris held that an award would stand even where relevant competition law issues had not been discussed by the arbitral tribunal at all.

To mark the occasion, the Forum closed with a convivial dinner of all participants and their better halves at the Hibernian Gentlemen’s Club on Stephen’s Green in Dublin, which was kindly hosted by James Bridgeman.

Special ICC UK Working Session on Arbitrating Competition Law Issues

Coinciding with the American Independence Day, the ICC United Kingdom – in partnership with Addleshaw Goddard LLP and SJ Berwin LLP – held a special working session on the key issues of arbitrating competition law issues on 4 July 2007, giving the floor to an array of distinguished speakers in the field. SJ Berwin kindly hosted the event, which was attended by leading counsel and legal advisors from the City of London.

Following some introductory remarks by John Merrett, the Arbitration and ADR Consultant of the ICC UK, who emphasised

the ICC’s particular interest in the subject-matter, and Carl Nisser of SJ Berwin LLP, who underlined the importance of competition law in international arbitration more generally, Mark Clough QC of Addleshaw Goddard took the chair.

Nicholas Green QC of Brickcourt Chambers and Michael Bowsher QC of Monckton Chambers started off the session by giving their personal views and experiences of arbitrating competition law issues. Green emphasised that arbitration issues arise with increasing regularity in international commercial disputes and need to be dealt with adequately by the tribunal. More specifically, Green discussed the frequently raised Euro-defence to avoid the enforceability of a contract that is claimed to be illegal and void *ab initio* under Article 81 of the EC Treaty, which he metaphorically referred as the “rogue’s charter”. In Green’s view, arbitrations arising in the context of EC merger control to monitor the correct implementation of behavioural remedies constitute – as opposed to ordinary antitrust arbitrations – an entirely transparent process, as the facts of and parties to the case are known from the outset, i.e. since adoption of the original conditional merger clearance decision.

Michael Bowsher QC framed his personal view of the subject-matter against the background of the fundamental principles of international arbitration, discussing all sacrosanct principles of arbitration and their significance in competition law arbitrations. In particular, Bowsher queried the existence of an *ex officio* duty on part of the arbitrator to raise competition law issues of his or her own motion in the aftermath of the *Eco Swiss*²⁴ jurisprudence of the Community courts in Luxembourg

and in how far an answer to this question may be guided by the arbitrator’s duty to render an enforceable award. Bowsher further highlighted the controversial rift between the parties’ private interests pursued in arbitration proceedings and the public interest that lies at the heart of competition law investigations.

Dr. Assimakis Komninos of White & Case, Brussels, spoke about practical issues that arise in ordinary antitrust arbitrations involving Articles 81 and 82 of the EC Treaty. Starting off with an explanation of the basic principles of the interrelation of EC competition law and arbitration, Komninos explained that arbitration as a private dispute resolution mechanism is perfectly compatible with the free trade ideas of the internal market, especially given that the Treaty of Rome already provided for a mechanism to be developed for the free movement of arbitral awards throughout the internal market²⁵. According to Komninos, sham arbitrations, whereby the parties try to resort to a place of arbitration which allows them to avoid the resolution of any competition law issues that may arise from an ordinary commercial dispute, have become a phenomenon of the past. For Komninos there is no doubt that an arbitrator has a duty to apply Article 81(3) EC when dealing with contractual illegality claims under Article 81 EC. He also underlined



Stuart Davis and Carl Nisser

²³ Cited *supra*.

²⁴ Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton International NV*, [1999] ECR I-3055.

²⁵ Cf. Art. 220 of the Treaty of Rome of 25 March 1957.

that in most leading European jurisdictions, competition law is, no doubt, arbitrable, the defining parameter being the scope of the underlying arbitration clause along the lines of the English High Court's decision in *ET Plus SA v. Welter*²⁶. Komninos concluded by giving some practical guidance, including, most importantly, that arbitrators should and do respect the competition law rules and are usually very competent in their application and that an arbitral tribunal is very unlikely to uphold a hard core restriction, such as a cartel.

Speaking in his private capacity, Dr. Renato Nazzini of the Office of Fair Trading, London, discussed the role played by the European Commission and national competition authorities in antitrust arbitrations. Nazzini distinguished merger-remedy-related arbitrations as these expressly allow the intervention of the European Commission to the extent provided for in the arbitration commitment. With respect to ordinary antitrust arbitrations, Nazzini advocated as little intervention by the public authorities as possible, Regulation 1/2003²⁷ not being applicable in the arbitration context. The authorities should, in fact, only intervene at the enforcement stage of the final award, and not during the arbitration proceedings themselves. As regards parallel proceedings before an arbitral tribunal and the European Commission, Nazzini suggested that an arbitrator is not obliged to stay the arbitral proceedings, pending the Commission's decision, but cautioned that according to Cooke J in *Lauritzen v Lady Navigation, Inc*²⁸, an arbitration award that was incompatible with a Commission decision would be set aside. Against this background, it is best practice for the arbitrator to take a relevant

Commission decision into account when rendering an award. By way of conclusion, Nazzini stressed that arbitrating parties should not worry about competition law issues arising in an arbitration, as arbitrators would be perfectly capable of dealing with competition law issues as they arise.

Gordon Blanke of SJ Berwin LLP, London, spoke about the Commission's recent use of international arbitration in EC merger control. According to Blanke, international arbitration is an ideal self-enforcement mechanism for behavioural remedies that give enforceable rights to third-party beneficiaries. Most of such remedies constitute so-called access commitments, whereby the merged entity promises to give access to an essential facility, key technology or key infrastructure it controls to third-party competitors. Blanke emphasised that the Community courts' express approval of the use of arbitration in behavioural merger remedies in *easyJet v. Commission*²⁹ and the Commission's increased use of behavioural remedies since the European Court of First Instance's landmark ruling in *Gencor v. Commission*³⁰ meant that merging parties could now propose to the Commission behavioural remedies backed up by an arbitration commitment as a monitoring mechanism and producing quasi-structural effects on the internal market, rather than offering more burdensome structural remedies. Third-party competitors, in turn, could trigger the arbitration mechanism as an effective and cost-efficient means to enforce their rights of e.g. access to the merged entity's essential facility, recovering private law damages caused by the merged entity's intransigence and specific performance

of the relevant behavioural remedy concerned.

Stuart Davis, Competition Counsel of BG Group, London, offered a user's perspective on arbitrating competition law issues. Davis underlined that in business reality, commercial parties may well agree to enter into illegal agreements on the basis or in the hope that the contracted parties may never need to enforce the agreement in the future. He also confirmed that a company would not hesitate to use a Euro-defence in international arbitration proceedings. With respect to the use of arbitration commitments in EC merger control, Davis emphasised that even though the arbitration mechanism is a viable and efficient way to monitor the medium- to long-term implementation of behavioural remedies, the Commission should caution not to accede to behavioural remedy offers all too readily as their quasi-structural effect on the market may be deceiving and not carry through in a real market environment.



Judge Nicholas Forwood and his daughter Geneva

Judge Nicholas Forwood of the European Court of First Instance concluded the working session with a view from the bench. By way of introduction, Judge Forwood explained that his understanding of the *Eco Swiss* jurisprudence was

²⁶ *ET Plus SA & Ors v Welter & Ors*, [2005] EWHC 2115 (Comm).

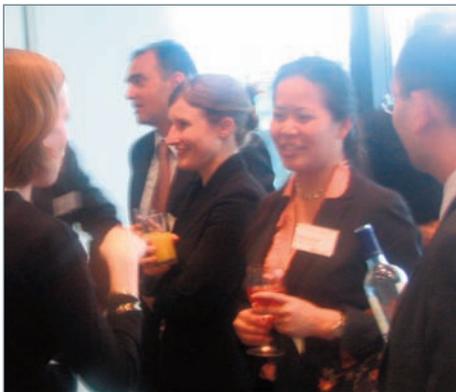
²⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1, at p. 1.

²⁸ *Lauritzen Cool AB v Lady Navigation Inc*, Judgment of the Commercial Court of 12 November 2004, [2004] EWHC 2607.

²⁹ Case T-177/04 - *easyJet v Commission*, Judgment of the Court of First Instance of 4 July 2006.

³⁰ Case T-102/96 - *Gencor v Commission*, Judgment of the Court of First Instance of 25 March 1999, [1999] ECR II-753.

that the notion of EC competition law as public policy was not absolute and counterbalanced by the procedural requirements of the supervisory courts at the national level. However, he also cited the recent case of *Mostaza Claro*,³¹ on the basis of which the public policy concept appeared to receive a wider interpretation than in the European judiciary's previous case law. Judge Forwood also confirmed that the use of arbitration commitments as monitoring mechanisms to ensure the implementation of behavioural mechanisms in EC merger control was no doubt very useful. He further queried whether the European Commission could impose an arbitration obligation within the context of Articles 81 and 82 EC, this problem currently being under consideration by the European courts. Pursuant to *Ford Right-Hand Drive*, companies should have the freedom to decide *how* to bring an antitrust infringement to an end.



Dr. Assimakis Komninos, Geneva Forwood and Tania Baumann of the ICC UK

SWEDEN



Per Runeland
Consultant, International
Arbitration Group
SJ Berwin LLP, London
E per.runeland@sjberwin.com

SCC Institute has Adopted New Rules

Effective 1 January 2007, new rules have been adopted by the SCC Institute, replacing the previous rules dating from 1999. No dramatic changes have been introduced, but the new rules have been redrafted so as to be understood more easily. They strengthen party influence over the arbitral process in certain respects. Further, there is now a limited possibility to consolidate proceedings involving the same parties and legal relationship. The rules on evidence have been changed, partly to reflect current Swedish practice which conforms to mainstream international arbitration. A separate award may now be given in course of the arbitration in order to force a recalcitrant party to pay required advances on costs. Interim relief may be granted in the form of an order or an award. Full details are available on the SCC Institute web site, www.sccinstitute.com. An article on the subject authored by Annette Magnusson and Patricia Shaughnessy has been published in Volume 2006:3 of the *Stockholm International Arbitration Review*, pp 33 -66.

SJ BERWIN'S INTERNATIONAL ARBITRATION GROUP



Dr. Susanne Heger, FCI Arb
Consultant, International
Arbitration Group, SJ Berwin LLP
Attorney-at-Law, Partner,
Heger & Partner Attorneys at Law
E susanne.heger@hegerpartner.com

Profile of Susanne Heger

Susanne was born in Vienna, where she went to school and studied law at Vienna University. Having finished her studies with the degree of a "magister iuris", she decided to continue postgraduate studies at Moscow State University, making use of the Russian language skills she had obtained at the "gymnasium". Living in Moscow was very exciting in the times of Gorbatschow's "Perestroika". For a year, Susanne went to Lomonosov State University, studying "joint ventures", which allowed the first foreign investments in the Soviet Union and their legal environment. For her legal analysis of Soviet legislation she was awarded a doctor's degree at the University of Vienna, her work was also published as one of the first studies of Soviet business law from a Western point of view.

Back in Vienna, Susanne gained her first professional experience in the field of international project finance in one of Austria's major banks. An offer of the law firm Clifford Chance to work in Moscow

³¹ Case C-168/05 - *Mostaza Claro v. Centro Móvil*, Judgment of the European Court of Justice of 26 October 2006.

was very tempting, so Susanne decided to return to Moscow. During her Moscow years, Susanne practised in a permanently changing legal environment. She witnessed the collapse of the Soviet Union and the total overthrow of the political, economical and social system. At the same time, she gained significant professional experience, leading teams of lawyers in major cross-border transactions. In addition to her practical work at Clifford Chance, Susanne studied at the Institute of State and Law of the Russian Academy of Sciences, which she completed with a doctorate in Russian law.

After such an exciting and tense period of life, it wasn't easy for Susanne to return to Vienna. The strict and conservative rules of the Austrian legal profession required her to practise at Austrian courts and Austrian law firms to become admitted to the Vienna Bar. She completed that process, accepting it as an unavoidable necessity and making the best out of it.

In 1999, Susanne felt confident enough to open her own office. Soon she started to specialise in international arbitration. Within a few years Susanne gained significant experience in that field, acting as sole arbitrator, co-arbitrator, presiding arbitrator and party representative in numerous arbitrations under the "Vienna Rules" of the Vienna International Arbitral Centre, under the rules of the ICC and the Moscow International Arbitration Court and in ad hoc arbitrations under the UNCITRAL Rules.

In addition to her contentious work, Susanne spends a significant amount of time working on general commercial matters and real estate transactions.

Susanne's history with SJ Berwin began in June 2003, when she met David Goldberg at an arbitration conference in Vienna. Initially, she helped David as a tutor to run training courses for Russian

lawyers under the auspices of the Anglo-Russian Law Association and the Chartered Institute of Arbitrators. When SJ Berwin established its International Arbitration Group, Susanne was invited to join it as a consultant.

Susanne is one of the four members of the Presidium of the Austrian Arbitration Association and, in addition to being a Fellow of the Chartered Institute of Arbitrators (FCIArb), an approved tutor of the Institute in London.

Susanne has been married for 17 years and she has a 13-year-old daughter and a 9-year-old son.

It follows quite naturally from Susanne's professional development that she decided to present to the Russian speaking world a book on the new Austrian arbitration legislation, which came into force in July 2006. Her book was published by Wolters Kluwer Moscow. It contains a Russian translation of the Austrian arbitration legislation and a short commentary on it, as well as a Russian translation of the "Vienna Rules" of the Vienna International Arbitral Centre.



"Commentary on New Austrian Arbitration Law"

Published by:

Wolters Kluwer Moscow

ISBN: 5-466-00210-0

200 pages

Price: RUR400

FORTHCOMING EVENTS

Hot Topics in International Arbitration 2007

Monday, 24 September 2007

at SJ Berwin LLP, 10 Queen Street Place,
London EC4R 1BE, UK

The International Arbitration Group of SJ Berwin LLP has pleasure in inviting Sans Frontières readers to an evening seminar looking at the hot topics in international arbitration in 2007, including the use of anti-suit injunctions to enforce arbitration agreements; the use of money laundering defences in arbitration; obtaining discovery in the U.S. in aid of international arbitration using the 1782 procedure; and recent challenges to arbitral awards.

The highly-esteemed chairman of this event is Lord Gabor QC, Head of Chambers at One Essex Court Chambers, and our impressive array of pre-eminent speakers include Dr. Balz Gross, Partner at Homburger; H. Bradford Glassman, Partner at Baach, Robinson & Lewis PLLC; Khawar Qureshi QC, Barrister at Serle Court Chambers; and Justin Michaelson, our own International Arbitration Partner.

The event will start with registration at 18.15hrs, seminar commencement at 18.30hrs and will be followed by a drinks reception from 19.30hrs.

SJ Berwin is accredited as a provider of continuing professional development by the Law Society and other professional bodies.

Attendance at each seminar qualifies as 1 CPD hour, quoting reference 012/SJBE.

RSVP by email to martin.punt@sjberwin.com including in the message your name and organisation or alternatively by fax on 020 7111 2000. Colleagues are welcome to come with you or in your place.

We hope you will be able to join us in what promises to be an unmissable event in the arbitration industry calendar!



Mediation in Resolving Commercial Disputes

Friday, 12 October 2007

at the Moscow District Arbitration Court

SJ Berwin LLP and Mediation and Law Centre with support of the Association of Russian Lawyers and the Anglo-Russian Law Association are organising a conference on "Mediation as a method of resolving commercial disputes" to be held on 12 October 2007 at the Moscow District Arbitration Court.

Nowadays, mediation is gradually integrating into the business tool kit of Russian companies. This is caused not only by the necessity of being involved in international activity, but by positive trends of Russian business and society as a whole.

The conference "Mediation in resolving commercial disputes" will provide an opportunity to familiarise the participants with extensive experience of British colleagues in the field. Mediation has become one of the most popular methods of dispute resolution in Britain.

David Shapiro, who is a well-known mediator in Britain and USA, will be one of the speakers at the event. David is a member of the Panel of Independent Mediators, solicitor, accredited member of Centre of Effective Dispute Resolution (CEDR) and a member of the International Academy of Mediators.

Other speakers at the conference will include British solicitors and Russian lawyers with experience in alternative dispute resolution.

The conference will include a practical demonstration (mock case) in resolving a complicated commercial dispute.

If you would like to attend the conference, please contact us to confirm your participation before 30 September 2007. RSVP to Ksenia Velikina and Irina Vinogradova by email at pr@mediacia.com or by telephone; +7(495)253-11-11, 656-45-33, 544-81-84.

SJ Berwin LLP

www.sjberwin.com

Berlin

Kurfürstendamm 63
10707 Berlin
T +49 (0)30 88 71 71 50
F +49 (0)30 88 71 71 66
E berlin@sjberwin.com

Brussels

Square de Meeûs 1
1000 Brüssel
T +32 (0)2 511 5340
F +32 (0)2 511 5917
E brussels@sjberwin.com

Frankfurt

Poseidon-Haus
Hamburger Allee 1
60486 Frankfurt am Main
T +49 (0)69 50 50 32 500
F +49 (0)69 50 50 32 499
E frankfurt@sjberwin.com

London

10 Queen Street Place
London EC4R 1BE
T +44 (0)20 7111 2222
F +44 (0)20 7111 2000
E info@sjberwin.com

Madrid

C/Claudio Coello, 37, 1ª Planta
28001 Madrid
T +34 91 426 0050
F +34 91 426 0066
E madrid@sjberwin.com

Milan

Corso Matteotti 3
20121 Milan
T +39 02 36 57 57 01
F +39 02 36 57 57 57
E milan@sjberwin.com

Munich

Maria-Theresia-Str. 5
81675 München
T +49 (0)89 89 0 81 0
F +49 (0)89 89 0 81 100
E munich@sjberwin.com

Paris

64, avenue Kléber
75116 Paris
T +33 (0)1 44 346 346
F +33 (0)1 44 346 347
E info-paris@sjberwin.com

Turin

Via Lamarmora 39
Turin 10128
T +39 02 36 57 57 01
F +39 02 36 57 57 57
E turin@sjberwin.com

For general enquiries contact:
Tim Taylor or **David Goldberg** on
tim.taylor@sjberwin.com or
david.goldberg@sjberwin.com

Editor: **Gordon Blanke** MCI Arb
gordon.blanke@sjberwin.com

This bulletin is not intended to offer legal advice and you should not act upon the matters referred to within it without taking specific advice.

© SJ Berwin 2007. All rights reserved

Unsubscribe: *If you do not wish to receive either this newsletter or any of SJ Berwin's other marketing material, please email interaction@sjberwin.com (including your name and address in the body of the email), clearly stating in the subject header either 'unsubscribe Sans Frontières' or 'unsubscribe all SJ Berwin marketing material' as appropriate.*

SJ Berwin LLP is a limited liability partnership registered in England no OC313176. It is regulated by the Solicitors' Regulation Authority. A list of the members of SJ Berwin LLP is open to inspection at 10 Queen Street Place, London, EC4R 1BE, its principal place of business and registered office. Any reference to a partner in relation to SJ Berwin LLP is to a member of SJ Berwin LLP.

SJ Berwin LLP or an affiliated undertaking has an office in Berlin, Brussels, Frankfurt, London, Madrid, Milan, Munich, Paris and Turin.