THE ARBITRATION AGREEMENT, SEAT AND JURISDICTION

1 The role of private international law in arbitration - Of course, under most arbitration acts arbitrators are free to apply the law they deem appropriate. One could wonder, however, whether such freedom should also be granted in the context of finding the law applicable to the arbitration agreement. Such agreement is of course severable from the main contract, and concerns the rather fundamental choice of a party to give up his right to access to the state courts. In view thereof it could be argued that arbitrators should apply private international law in order to find the law applicable to the arbitration agreement. That, however, brings up a new question: which is the PIL that the tribunal should apply? Is that the PIL of the seat or the PIL of the law applicable to the main contract?

2 The creditor is a non-Russian resident company and the debtor is a resident of the Russian Federation. According to the contract between these two companies the applicable law is the law of England and Wales, the London Court of International Arbitration.

The creditor waives the right in action to a resident of the Russian Federation, and thus it turns out that business relations of residents are governed by foreign law, and disputes should be resolved in London. The agreement is subject to English law.

In this case does the arbitration clause remain valid?

3 Pathological arbitration clauses - How “incorrect” can an arbitration clause be for it to still be enforceable? Any war stories? Comments to the ruling below?

In a judgment dated 14 July 2011, the German Federal Supreme Court has confirmed its approach to pathological arbitration clauses. The court held that an arbitration agreement that stipulates a non-existing arbitration institution is not per se unenforceable.

Ironically, the defective clause was part of an agreement between lawyers for the sale and transfer of a law practice: The parties to the agreement in dispute had made reference to a “Lawyers Arbitration Tribunal” (Anwaltsschiedsgericht) to be constituted in accordance with the rules of the Cologne Bar Association (Rechtsanwaltskammer Köln). However, neither such tribunal nor such rules exist.

4 The arbitrability of disputes governed by mandatory rules (e.g. agency law, Belgium’s 1961 Act on the termination of distributorships, etc.). There are diverging views in this respect and the issue is hot (at least in Belgium.

5 Can an arbitral tribunal order a consolidation of the proceedings in the absence of an agreement between the parties to that effect in a scenario where several claimants initiated separate arbitration proceedings against the same respondent regarding related claims and on the basis of almost identical arbitration clauses?

6 Is arbitration the most effective and secure solution in the transnational multi – party M&A disputes?

7 The ever-evolving scope of the term "investment" in investment arbitrations.

8 Development of Arbitration at National Level; Need for Regulatory Institutions?

9 Involvement in pre-arbitration - At what point should counsel for a potential arbitration (as final dispute resolution method), become involved in a technical loss adjustor process preceding the potential arbitration? And how is it best communicated to a client that it is advisable to include legal counsel (even) in such technical proceedings that may have an evidentiary impact on a potential subsequent arbitration? (This entire issue may well be bundled up in discussion of tiered arbitration clauses that involve pre-arbitration dispute resolution mechanisms).

10 The next instalment in the West Tankers' saga – an anti-suit injunction in all but name?

11 YIAG/IBA Programs; making an African destination a reality.

12 Would those experienced in Scandinavian arbitration practice say that the Scandinavian model is more focused than its common law counterpart on achieving a commercial resolution of disputes, in other words on prioritising the client's business desire to resolve disputes quickly rather than seeking to win by relying on legally superior submissions in arbitration? My impression from discussions with those experienced in Nordic dispute resolution is that arbitration is favoured over litigation in Scandinavian commerce and that awards (as in many other forums) remain unpublished, in part contributing to the lack of cases to guide the legal practice, but that such lack is considered unproblematic given the commercial focus of the practice.

THE ARBITRAL TRIBUNAL

13 How do you select your arbitrator? Is it better to appoint a renowned arbitrator, who is likely to have less time to deal with your case, or a young arbitrator, who will be less experienced?

14 Is there a trend for parties and their counsel to interview arbitrators prior to their designation? How impartial can an arbitrator be when prior contacts with a party have occurred in relation to the dispute? Will arbitral institutions confirm such appointments when challenged by the other party?

15 What are the risks with appointing an expert (non-lawyer) as an arbitrator in a tribunal?

16 What is the law applicable to the contractual relation (under Dutch law: a contract of commission) between the parties and the arbitral tribunal

17 Liability of arbitrators - When does behaviour by a (party appointed) arbitrator constitute breach of duty or gross negligence?

PRACTICE AND PROCEDURE – THE CONDUCT OF THE PROCEEDINGS

18 Arbitrators' Flexibility and Rigidity on Procedural Issues - How may this impact substantive rights?

19 International Arbitrational in a Civil Law setting - My experience of arbitrations in the Middle East, particularly

where the Tribunal is dominated by Civil Law lawyers who may have limited experience of international arbitration, is that the case is usually managed as if it were before the Courts. This impacts on such as issues as disclosure, witness statements and the hearing of witnesses

20 When should the Arbitral Tribunal appoint an expert? The specific situation of an audit in the frame of financial disputes (agency, brokerage contracts): is an auditor an expert? What is the purpose of an audit: give an answer to a technical problem or “fish” evidences? Is a request for an audit an issue of substance or of procedure?

21 Why are you common lawyers so afraid of tribunal-appointed experts? Does something like the Sachs-Protocol give you any comfort?

22 Have the IBA Guidelines on Conflict of Evidence become "standard" and/or "mandatory" rules applicable to every arbitral panel? Do they implicitly impose a duty on the arbitrators to disclose situations falling under the red or orange lists, even when they do not automatically apply? What about the green list, will there not be soon or late an obligation to discuss situations falling under such category.

23 Privileges: how do you deal with the production of documents such as contracts with third parties?

24 The relevance and weight of written witness statements in international arbitration (e.g. what weight should be put to a written witness statement if the witness is unable to attend to the hearing; who should draft the witness statements etc.)

25 Cross-examination (e.g. the rules of conduct and tactics)

26 Prescription in arbitration - In some systems, prescription is provided for in substantive laws (The Netherlands) whereas in other jurisdictions it is a part of civil procedural law (U.S.). What is the applicable law here? This question seems particularly relevant as the applicability of civil procedural law is generally excluded in arbitration acts.

27 Bifurcation of issues other than jurisdiction seems to be uncommon in commercial arbitration, but may in certain cases be fully justified. In which circumstances should a Tribunal decide in order to ensure the efficiency of the proceedings, to bifurcate and consider one or several issues as preliminary issues?

28 Currently, an accepted (but perhaps not universal) view is that arbitrators that are asked to order interim measures, while facing an unresolved/pending jurisdictional challenge, should satisfy themselves that, prima facie, they have jurisdiction to hear the substance of the dispute prior to ordering or deciding on any interim measures. Should arbitrators sitting in an arbitration conducted under the auspices of the LCIA meet a higher standard than "prima facie jurisdiction" when considering the ordering of interim measures under Article 25 of the Rules while a jurisdictional challenge is unresolved given that the LCIA Court does not have a mechanism or screening process by which to weed out cases in which there is prima facie no jurisdiction (in comparison to arbitrators sitting under the auspices of other institutions that have such a mechanism, for example, the ICC under articles 6(3) and 6(4) of its rules))? If so, what should that standard be?

29 Enforcement of an interim measure given in the form of an order (e.g. can and/or should the non-compliance of an interim order by a party affect the outcome of the main case)

30 Default judgment in arbitration

In many jurisdictions it is possible to issue a default judgement against non-participating parties. Non-participating parties are also increasingly common in international arbitration. Is it possible to issue a default judgement against a non-participating party in international arbitration? If not, why not? Would it be desirable to introduce this concept in arbitration?

31 Assistance by Courts other than those at the seat of the arbitration - The new Dutch arbitration act that is currently at the earliest stages of academic (not: parliamentary) discussion provides for assistance by Dutch courts in arbitrations that are situated outside of the Netherlands. Court assistance (for instance in taking evidence, hearing witnesses, conservatory measures etc.) more generally seems an interesting topic of discussion. How can arbitrators ensure that the possibilities in this respect are not misused.

32 Under Swedish law, a party may ask the arbitral tribunal for permission to go to court in order to get a court decision on security measures. The decision by the court is enforceable in Sweden but it is not per se enforceable in all jurisdictions, as all jurisdictions do not agree to enforce procedural orders by Swedish courts.

Our question relates to the consequences if the court decision is not willingly adhered to. In cases of production of evidence, if the party ordered to produce documents does not willingly comply with the decision of the court, a remedy for the other party could be that the arbitral tribunal may draw negative inferences from the non-cooperating party's conduct.

As this question of enforceability is relevant also for other security measures, such as attachment, where the consequences of non-enforceability could be detrimental for the claiming party, this solution is generally not practical.

Is there a future risk that non EU-parties might abuse this possibility? How can this problem best be addressed? It would also be interesting to know how and if this question has been addressed in Switzerland.

33 The IBA Rules on the Taking of Evidence provide in Art. 2(3) that the arbitral tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues that it may regard as relevant to the case and material to its outcome and/or for which preliminary determination may be appropriate. While this would appear to be a very welcome tool for controlling time and cost in arbitration, tribunal's seem to be very reluctant in applying this or similar rules. Do we as counsel push enough for such rules being applied? Or are we too afraid of missing an opportunity to present our client's case? Or is it even that we fail to inform our clients of such possibilities because they do not necessarily correspond with our own interests?

34 If the parties request a stay of arbitration proceedings pending settlement discussions, should the Tribunal grant a stay for an indefinite period of time? How should one account for a Tribunal's considerations of potential conflicts of interest that may arise with new matters if an arbitration remains pending for an indefinite period of time?

ORDERS, AWARDS AND ENFORCEMENT

35 Making arbitration even better

Everything can be improved. In what ways can we help improve arbitration as a dispute mechanism?

Let's think outside the box. Suggestions may range from more academic input (revisions/comments to existing Rules etc.) to administrative advise (the use of submitting a "summary of the relief sough – as the tribunal understands it" for the parties to confirm before the final hearing). No suggestion is too crazy and all current examples welcomed. Some ideas below.

- To help catch errors such as arbitrators exceeding their mandate (and hopefully help reduce proceedings concerning the invalidity or setting aside of an award), would it be a catastrophic idea to have the tribunal to submit a "draft award" to the parties (under a "no obligation to consider comments" and for certain objections only) before issuing an award that is final and binding upon the parties?

- In light of the suggestion that for many users confidentiality may not be as important after all (see, inter alia, research from Queen Mary University in 2010 International Arbitration Survey: Choices in International Arbitration, p.30) is it better to skip confidentiality? (And by doing so create a large pool of public awards to facilitate scrutiny, foreseeability etc.).

If we consider confidentiality as one of the leading attraction of arbitration – is it a satisfying default that in many cases confidentiality is observed as a matter of practice or derived from non-related bodies of law rather than expressly addressed? (Under Swedish law parties are not under an obligation to keep the proceeding confidential (i.e. there is no general duty of confidentiality) unless the parties enter into a specific agreement of confidentiality. Also consider the UNCITRAL Model Law whose drafters made it clear that confidentiality may be left to the agreement of the parties or the arbitrations rules chosen by the parties).

Confidentiality vs. public awards – what serves the users best? And should the approach be unified (rather than the current system by which confidentiality is left to the agreement of the parties, the arbitration rules chosen by the parties or under domestic statutory regulations)?

36 To what extent do we or our clients want the institution to look into and comment on the merits of the tribunal's award? We know that scrutiny of the merits of the award annoys arbitrators. But is it really such a bad thing?

37 To what extent can an arbitral tribunal order remedies that are not available under the law governing the dispute (procedural and substantive relief)?

38 Quantum - may a tribunal award damages in a different amount to that argued by either party?

39 The principle of "substance over form": Does a state court faced with a request for confirmation, *vacatur*, appeal or enforcement of a decision by an arbitral tribunal really look at the substance of the decision over its form as is often suggested, or is this a myth? Or in other words, where the applicable arbitration law or rules give the tribunal discretion to grant, e.g., interim measures in the form of an order or an award, to what extent should we fight for an award?

40 Is recognition of an arbitral award contrary to public policy if it would lead to bankruptcy of an entity? What if the entity is vital for the welfare of a city and employs most of its inhabitants? What if the party, against which enforcement is sought, is a state enterprise and amount of the award represents significant percentage of the GDP?

41 Procedural public policy - is it recognized in case law of the Central and Eastern Europe? Shall public policy cover procedural violations, or opposition to recognition of an award shall be made under Arts. V(1)(b), V(1)(d) of the NY Convention?

42 According to the Russian Arbitration Procedure Code the decisions of courts of foreign states issued in relation to the disputes and other cases arising as a consequence of business or other economic activity (foreign courts), as well as the decisions of arbitral tribunal and of international commercial arbitrages adopted on the territory of foreign states on disputes or on other cases, arising on the territory of foreign states during the performance of business or other economic activity (foreign arbitrage decisions), shall be recognized and executed in the Russian Federation by the Russian commercial court (so called Arbitrazh court), if the recognition and the execution of such decisions is provided in an international treaty of the Russian Federation or in federal law.

In order to commence the enforcement proceedings, the party seeking enforcement has to file an application at a state commercial court (Arbitrazh court) at the place of the debtor's domicile or, if such place is unknown, at the location of the assets.

Mentioned procedure of enforcement of the arbitral award points out difficulties in enforcing arbitral awards in Russia.

43 Giving emergency arbitrator decisions teeth: Can measures granted by emergency arbitrators be enforced in state courts? And does it make a difference whether they are granted in the form of an order or an award?

44 Challenge to a legal counsel representing a party is gaining recognition not only in international investment arbitration (Hrvatska Elektroprivreda, The Rompetrol Group cases), but also in international commercial arbitration (as mentioned by Luttrell in Bias Challenges in International Commercial Arbitration). What is the likelihood that award rendered will be set aside or denied enforcement due to inability of a party to present its case?

COSTS

45 Advance on costs: what advise do you give to your client (Claimant) when the opposing party (Respondent) refuses to pay its share of the advance? Do you engage further expenses considering that the opposing is likely to refuse to execute any unfavourable award?

46 Arbitral tribunal's decision as to costs when the other party has tried to proceed in an expeditious and cost effective manner but the other party has delayed and obstructed the proceedings (e.g. what proportion should be borne by the party who has won his/her case but who has delayed and obstructed the proceedings; how a party should argue his/her case as to costs if the other party has delayed and obstructed the proceedings; can a party's aim to delay and obstruct the proceedings be taken into account in the decision as to costs if the applicable arbitration rules does not govern this question etc.)

47 Can "the Cost Follows the Event" Principle be considered a universal principle? What are the exceptions to this principle?