INTERNATIONAL COMMERCIAL ARBITRATION

Colloquium
2016
University of Zurich

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I. INTRODUCTION

In the course of the colloquium, participants will explore central issues in the current practice of international arbitration on the basis of recent case law in Switzerland and elsewhere. The colloquium will involve participants in a discussion about the facts, legal issues and policies underlying these cases, in order to deepen their understanding of international arbitration law and practice.

II. PREPARATION AND MATERIALS

Participants will draw maximum benefit from the colloquium if they prepare for it. For each case, a small number of mandatory reading materials is provided, which participants are recommended to read in advance in addition to relevant sections in the textbook of Girsberger/Voser. Participants are asked to bring to the course English copies of (i) the Swiss Private International Law Act of 18 December 1987 (“SPILA”); (ii) the New York Convention; and (iii) the ICC and Swiss Arbitration Rules. All of these texts can be easily retrieved from the internet.

Additional reading materials are also provided below, or can be provided upon request, for those particularly interested in a case or subject matter.

If you have any questions you may reach us via e-mail at anne.hossfeld@kapellmann.de and a.rombach@klinkert.pro.
III. TOPICS

Topic 1: The Arbitration Agreement

A) Mandatory Reading

a. Cases:
   - SFT 4A_428/2008 dated March 31, 2009 (Vivendi)
   - SFT 4A_50/2012 dated October 16, 2012 («Vivendi revisited»)
   - SFT 4A_676/2014 dated June 3, 2015
   - SFT 4A_84/2016 dated February 16, 2016
   - SFT 4A_388/2012 dated March 18, 2013
   - SFT 121 III 38 16 dated January 1995

b. Girsberger/Voser, pp. 54-62; 65-104

c. Art. 176-178 PILS

d. Art. II, V, VII New York Convention

B) Discussion

[1] What are the essentialia negotii of an arbitration agreement?

[2] Which elements determine the validity of an arbitration agreement?

[3] What are the formal requirements for a valid arbitration agreement a) under Swiss law? b) under the New York Convention?

[4] What is the relationship between Swiss law and the New York Convention in this regard?

[5] What laws can conceivably be applicable to the arbitration agreement?

[6] What is the role of the “seat” or “place” of the arbitration?

[7] What is the meaning and purpose of Article 178(2) of the Swiss Private International Law Act?

[8] What does capacity to conclude an arbitration agreement mean? What law is applicable to this question? What is the impact of Art. V (1) (a) NYC?

[9] The Supreme Court’s decision (Vivendi) and the underlying award were heavily criticized by commentators (see further reading). Why do you think that is? What solution would you propose and why?
C) Further Reading

b. Voser, Insolvency and Arbitration: Swiss Supreme Court revisits its Vivendi vs. Elektrim decision, kluwerarbitrationblog.com
f. Georg Naegeli, The impact of bankruptcy on a pending arbitral proceeding – comments on a recent decision of the Swiss Federal Supreme Court, IBA Arbitration News, Vol. 14 No. 2 (September 2009), 57
**Topic 2: Pathological Arbitration Clauses**

**A) Mandatory Reading**

a. Cases:
   - SFT 4A_676/2014 dated June 3, 2015
   - SFT 4A_240/2012 dated August 20, 2012
   - SFT 4A_246/2011 dated November 7, 2011
   - SFT 4A_388/2012 dated March 18, 2013
   - SFT 4A_279/2010 dated October 25, 2010
   - SFT 4A_390/2014 dated February 20, 2015


c. Girsberger/Voser, pp. 60-61

d. Bärtsch/Eschment, Clause referring to “International Chamber of Commerce, Zürich”, practicallaw.com

**B) Discussion**

[1] What is a “pathological” arbitration clause?
[2] How would you evaluate a case, in which multiple (different) arbitration agreements exist between the same parties? (4A_390/2014)

**C) Further Reading**

Luca Beffa, Decision 4A_246/2011 or the Leniency of the Swiss Federal Tribunal Towards Pathological Clauses, ASA Bulletin 1/2012, 169-176
Topic 3: Jurisdiction of the Arbitral Tribunal and Third Parties

A) Mandatory Reading

a. Cases:
   - SFT 4A_128/2008 dated August 19, 2008 (application of arbitration agreements to non-signatories)
   - SFT 4A_450/2013 dated April 7, 2014 (extension of agreement to non-signatories)
   - SFT 4A_438/2013 dated February 27, 2014 (Separability)


c. Art. 186 PILS

d. Art. II and V New York Convention

B) Discussion

[1] What does the term “jurisdiction” mean in international arbitration? What is jurisdiction *ratione personae* and *ratione materiae*?

[2] What is the source of an arbitral tribunal’s jurisdiction?

[3] What are the consequences if a tribunal does *not* have jurisdiction?

[4] What are the consequences if a tribunal *has* jurisdiction over parties in a dispute?

[5] In your view, should a tribunal apply a strict or a relaxed test to determine whether it has jurisdiction? Why? What is the position under Swiss law?

[6] What are the reasons for and against extending arbitration agreements to third parties/non-signatories?

[7] What is the Group of Companies doctrine?

[8] What is the position of the Swiss Supreme Court? Do you agree? Can you imagine other cases where this might be appropriate?

C) Further Reading


c. SFT 4A_124/2014 dated July 7, 2014 (mandatory FIDIC DAB pre-arbitration procedure)

d. SFT 4A_118/2014 dated July 23, 2014 (appeal against interlocutory award)
**Topic 4: The Arbitrators – Independency/Impartiality**

**A) Mandatory Reading**

a. Cases:
   - SFT 4A_506/2007 dated March 20, 2008 (Swiss Supreme Court on IBA Guidelines)

b. Girsberger/Voser, pp. 132–164; 166-168; 333-334

c. Art. 179, 180 PILS

d. Art. V New York Convention

**B) Discussion**

[1] What is the role of the arbitrators?

[2] What are the advantages or disadvantages of a sole arbitrator vis-à-vis a tribunal of three arbitrators?

[3] What is the meaning of the arbitrator’s “impartiality” and “independence”?

[4] As an arbitrator, how do you need to assess your relationship with the parties and the dispute before you can accept an appointment? What are the relevant standards of disclosure under (i) Swiss law; (ii) the ICC Rules; (iii) the Swiss Rules?

[5] What are the remedies against an arbitrator who is not impartial and/or independent?

[6] How are arbitral tribunals usually constituted?

[7] How would you select an arbitrator?

[8] What is a “truncated” tribunal? How do the ICC, the Swiss Rules and Swiss law deal with this issue?

**C) Further Reading**

a. IBA Guidelines on Conflicts of Interest in International Arbitration
**Topic 5: Interface Arbitral Proceedings and State Courts, Interim Measures**

**A) Mandatory Reading**

a. Cases:
   - SFT 4A_446/2014 dated November 4, 2014 (challenge of procedural orders)
   - SFT 5A_843/2014 dated March 17, 2015
b. Girsberger/Voser, pp. 239-265
c. Art. 183 PILS; Art. 26 Swiss Rules

**B) Discussion**

[1] What is the purpose of interim measures? What are the different types of interim measures?
[2] In what ways are arbitrators limited with regard to granting interim measures?
[3] What are the legal provisions in Switzerland dealing with interim measures in international arbitration (PILS/Swiss Rules)? What is concurrent jurisdiction?
[4] How are interim measures enforced?

**C) Further Reading**

Topic 6: Particular Problems in Sports Arbitration

A) Mandatory Reading

a. Cases:
   - CAS 2009/A/1912 & CAS 2009/A/1913 dated November 25, 2009 («Claudia Pechstein»)
   - SFT 4A.612/2009 dated February 10, 2010 («Claudia Pechstein II»)
   - SFT 4A_144/2010 dated September 28, 2010 («Claudia Pechstein III»)
   - Regional Court of Munich, 37 O 28331/12 dated February 26, 2014, SchiedsVZ 2014, 100 («Claudia Pechstein IV»)
   - Higher Regional Court of Munich, U 1110/14 Kart dated January 15, 2015, SchiedsVZ 2015, 40 («Claudia Pechstein V»)


c. Rombach, The “Pechstein-judgment” of the OLG München: What does it mean for international sports and commercial arbitration?


B) Discussion

[1] Does “consent” in sports arbitration truly exist and is it even necessary?
[2] What are the justifications for the imposition of arbitration agreements on athletes by sports federations?
[3] Does the German jurisprudence in the Pechstein case endanger the sports arbitration in generally and/or – more specifically – the CAS?
[4] What are the major critics against the CAS and do you agree with them?
Topic 7: Legal Aid/Costs

A) Mandatory Reading

a. Cases:
   - SFT 4A_178/2014 dated June 11, 2014 (inoperability of arbitration agreement due to lack of legal aid)

b. Girsberger/Voser, pp. 32-33; Redfern/Hunter, pp. 544-548.

B) Discussion

[1] Which elements could make arbitration less expensive than litigation?
[2] Can you explain why arbitration now is referred to as “Rolls Royce Justice”?

C) Further Reading

a. Redfern/Hunter/et al., Redfern and Hunter on International Arbitration (Kluwer 5th ed. 2009), pp. 545-549
Topic 8: Revision, Recognition and Enforcement of Awards

A) Mandatory Reading

a. Cases:
   - SFT 133 III 235 dated March 22, 2007 («Cañas»)
   - SFT 4A_688/2012 & SFT 4A_126/2013 dated October 9, 2013
   - SFT 4A_250/2013 January 21, 2014
   - SFT 4A_490/2013 January 28, 2014

b. Voser/Truttmann, Annulment of ad hoc award rendered after expiry of agreed deadline (4A_490/2013)

c. Girsberger/Voser, pp. 343-348; 353-376

d. Art. 190 PILS et seq.

B) Discussion

[1] In which ways is the review of arbitral awards limited in Switzerland?
[2] What are the grounds for annulment under Swiss law?
[3] What are the requirements for waiving the action for annulment?
[4] What is the certificate of enforceability?

C) Further Reading


c. Alexis Mourre, Courts in France and Belgium confirm limited review of awards under European competition law, Kluwer Arbitration Blog, 7 February 2010
Topic 9: Challenge of Awards on the Ground of Public Policy, *Res iudicata*

A) Mandatory Reading

a. Cases
   - SFT 4P_278/2005 dated March 8, 2006 (Tensacciai, BGE 132 III 389)
   - SFT 4A_203/2014 dated April 9, 2015 (Corruption)
   - SFT 4A_374/2014 dated February 26, 2015 (*res iudicata*)

b. Voser/Raneda, Supreme Court rejects res judicata defence as foreign arbitral award is not entitled to recognition in Switzerland


d. Girsberger/Voser, pp. 324-342; 374-376

e. Art. V New York Convention

B) Discussion

[1] What is the available remedy against an arbitral award under Swiss law, and on what grounds can this remedy be advanced?

[2] How does the enforcement of an arbitral award work under the New York Convention, and on what grounds can enforcement be resisted?

[3] What is the purpose of “public policy” grounds to challenge an award or to resist its enforcement?

[4] In your view, are there any problems with that concept?

[5] How was “public policy” defined in *Tensacciai*? How was “public policy” defined in *Ecoswiss*?
   Which view do you prefer, and why?

[6] What areas should be included in the notion of “international public policy”?

C) Further Reading
