The enforcement of dispute resolution clauses

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The Dispute Resolution Section opened its programme at the IBA conference in Singapore on Monday 15 October 2007 with an extremely well attended session on the enforcement of dispute resolution clauses. The session was chaired by Michael Hales (Nabarro, London), who began by noting that dispute resolution clauses and related provisions of complex commercial agreements often are the result of inadequate attention or, worse, compromises which are intended to get the deal done rather than produce rational dispute resolution processes.

Litigation forum clauses

The first speaker, Professor Janet Walker (Osgoode Hall Law School, Toronto), addressed the topic of forum selection clauses which provide for litigation of disputes before local courts. She discussed Articles 6 and 9 of the Hague Convention on Choice of Court Agreements and common law jurisprudence which establish the 'strong cause' test for refusing to enforce a contractual choice of forum. She noted that all of the normal defences to the enforcement of any contractual term (such as fundamental mistake, frustration, *force majeure*, and unconscionability) may also be invoked.

The next speaker, Stefan Rützel (Gleiss Lutz, Frankfurt), provided the perspective of European and German law on the issue of attornment clauses. Under the Brussels and Lugano conventions and under the Brussels Regulation, attornment clauses are recognised and enforced. Where legitimate issues of fairness of the foreign system are raised, a German court could interpret a forum selection clause to be non-exclusive or to include an implied condition which has not been fulfilled. In addition, concepts of estoppel and *ordre public* may be invoked. It is very exceptional for these types of arguments to succeed, however.

Multi-step dispute resolution clauses

John Townsend (Hughes Hubbard & Reed, Washington, DC) discussed step clauses that require parties to do something (usually negotiate or mediate the dispute) before resorting to litigation or arbitration. If such a clause is drafted with specific and objective standards, there is a good possibility that courts will hold the parties to their bargain and require the preliminary steps to be conducted. Townsend cautioned against the use of terms such as 'good faith' or 'meaningful' to qualify the type of negotiation or mediation that is required to take place before a party may proceed to litigation.

Siegfried Elsing (Hölters Elsing, Düsseldorf) presented a civil law perspective on step clauses, offering an analytical framework for the consideration of such provisions and suggesting that the first issue is to determine whether the step clause is a substantive or a procedural contract. If the clause is viewed merely as a procedural agreement, it is without prejudice to the substantive right to proceed to arbitration. He suggested that, in most cases, it is the better view to characterise the clause as a procedural agreement.

Anti-suit injunctions

After the break, Philipp Habegger (Walder Wyss & Partners, Zurich), then Vice-Chair of the Arbitration Committee, introduced the subject of anti-suit injunctions by discussing a recent case in Düsseldorf in which a court refused to allow service of process relating to an interlocutory anti-suit injunction.[1] Habegger noted that while the European court has barred the use of anti-suit injunctions to restrain court proceedings within the European Union, the door remains open for an anti-suit injunction to be used to prevent a lawsuit from proceeding in violation of an arbitration agreement.

Next, David Joseph QC (Essex Court Chambers, London) noted that there are various forms of anti-suit orders which are made by English courts. In a recent English case, rather than issuing an anti-suit injunction the court issued a declaration to the same effect.[2] Joseph pointed out that his comments regarding anti-suit injunctions did not apply to the European community in which anti-suit injunctions are generally not available in one court to restrain proceedings before the courts of another member of the EU. In a case pending before the European Court of Justice, the English House of Lords has requested a ruling as to whether the same principle applies to prevent a European court from issuing an anti-suit injunction in

support of arbitration.[3]

Teresa Cheng SC (Des Voeux Chambers, Hong Kong) considered anti-suit injunctions issued by arbitral tribunals. She suggested that a tribunal may be able to deal with competing proceedings by issuing an interim or conservatory order. However, in most jurisdictions such orders are not categorised as 'awards'. Also, many courts will consider that they have the final say as to whether proceedings before them are stayed, withdrawn or adjourned. In Hong Kong, a specific provision of the arbitration law allows a Hong Kong court to enforce an interim order.

Jurisdiction clauses in China

Finally, Ariel Ye (King & Wood, Beijing) offered a Chinese perspective on dispute resolution clauses. He noted that it is rare in China to encounter a contract that specifies the jurisdiction of a particular court. Rather, jurisdiction is determined by rules of procedure. One exception relates to Hong Kong, pursuant to a bilateral memorandum of understanding between the PRC and Hong Kong which will provide that in disputes involving monetary claims, if the parties agree to the jurisdiction of the Hong Kong courts, the agreement will be recognised and any resulting judgment will be enforced. In international agreements jurisdiction clauses may be enforced. It remains unclear, however, whether Chinese law will permit foreign arbitration institutions to administer arbitrations in China.

Notes

1 Decision of the Oberlandesgericht Düsseldorf published in IPrax 1997 page 260.

2 *Noble Assurance v Gerling* [2007] 1 Lloyds IR Plus 33; [2007] EWHC 253.

3 *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* [2007] UKHL 4.