TODAY AND TOMORROW'S TRENDS IN INTERNATIONAL ARBITRATION

LIST OF TOPICS

FIRST SESSION:

HARMONIZATION V COMPETITION IN INTERNATIONAL ARBITRATION: ARBITRATION LAWS, ARBITRATION RULES, REPORTS AND "CODES OF BEST PRACTICE"

Moderators:

Sébastien Besson, Python & Peter, Geneva
Simon Greenberg, ICC, Paris
Isabelle Michou, Herbert Smith, Paris
Reza Mohtashami, Freshfields Bruckhaus Deringer, Dubai

SEAT OF THE ARBITRATION AND NATIONAL ARBITRATION LAW

1. What is at stake behind the desire of a country to be the host of as many arbitration proceedings as possible?

Gautier Matray

2. At the end of the 20th century, the relevance of the law of the seat of the arbitration was put into question. Important authors have underlined that the seat was merely a question of convenience and that the national law was not meant to play an important role in the arbitration proceedings. Today we note however a strong tendency of national lawmakers and authorities to attract as much arbitration proceedings as possible. They advocate the use of their national law and they put forward how liberal and flexible their arbitration law is.

   Is the trend for delocalized arbitrations still alive?

Gautier Matray

3. If all national laws on arbitration were equally competitive (i.e. fully harmonized) how would the choice of the seat of arbitration occur? Would the question of the seat still matter?

Gautier Matray

4. Institutional Rules vs. national state interests to establish a "place of arbitration": what are the consequences of increased competition - quicker and cheaper or loss of legal certainty?

Ulrike Gantenberg

5. Over the past years, several countries have modernized their law on arbitration. Does it have an impact on the amount of arbitration proceedings they have hosted?

Gautier Matray

6. Does the business community really care for a new arbitration law?

   Do the parties really consider the national law on arbitration before choosing the seat of the arbitration proceedings?

Gautier Matray

REGIONALISATION OF ARBITRATION

7. For countries such as China, should we not harmonize to a certain extent arbitration law and practice with international standards before starting to talk about competition? Or, on the contrary, should we create a competition in the sense that we allow two complete different standards and cultures of arbitration to coexist on the international arbitration scene?

Clarisse von Wunschheim

8. What has been the impact of the creation of new regional arbitration centers on a) recourse to international arbitration in those regions and on b) the docket of "traditional" arbitration institutions?

Alexandra Johnson

9. Although international arbitration has been alive and kicking in Korea for some decades now, it was only really in the latter half of the 1990s following the Asian-economic crisis that it really took off. And although proceedings in Korea now take place under almost all rules, institutional and ad hoc, the ICC has been and remains by far most widely used in Korea for international arbitrations. Whether due to farsighted marketing by the ICC, historical/economic/cultural factors, luck or a combination of these, how do arbitral institutions go about penetrating regional markets in which there is one or more strong pre-existing local/international

institution(s)? Are there examples of other jurisdictions where newer market entrants have recently thrived despite strong pre-existing local/international institution(s) and, if so, what has been the secret of their success?

James Morrison

10. Regionalization of arbitration: the EU example, arbitration in the Brussels Regulation.

Alexandre Vagenheim

STATE COURTS –

11. Is arbitration friendliness of the national courts really a competitive edge?

Gisela Knuts

12. Should Switzerland adopt the French concept of *effet négatif de la compétence-compétence*? Would this boost and further promote Switzerland as a place of arbitration or would it rather strengthen arbitrations conducted in other jurisdictions?

Bernhard Berger

13. Is eliminating parallel proceedings concerning the validity of an arbitration clause a real concern for national legislatures or just a fancy topic for academics and scholars? Why not allow them without limitations? Would that not be an incentive for any instance seized with the question to deal with it in the most efficient way? If not, who should have the right to go first, if any: the arbitrator or the judge?

Bernhard Berger

14. Would it help for the harmonization of international arbitration to replace the principle of national *ordre public* with the notion of "transnational public policy"? And if this is the case, is it at all possible to achieve a harmonized/universal definition of transnational public policy within the framework of international instruments (UNCITRAL, New York Convention).

Franz X Stirnimann

SETTING ASIDE PROCEEDINGS

15. Why should countries harmonize their rules on setting aside proceedings - what is wrong with different approaches to challenging awards (and the resulting competition between seats)?

Chris Parker

16. Do we really need setting aside proceedings at the seat of the arbitration? Given that (i) the grounds for setting aside awards and the grounds for refusing enforcement of awards are nearly the same and that (ii) national courts sometimes enforce annulled awards, wouldn't it be sufficient and more efficient to have judicial control over arbitral awards at the enforcement stage only?

Philippe Bärtsch

17. Should judicial control over arbitral awards be left with the courts at the place of enforcement? Why do we give so much weight to what the courts of the seat think of the award? Is the fact that an award was made at a seat with a reputation for a well-working law and judiciary a sign of quality that enforcing courts take into account?

Joachim Knoll

18. The arbitration laws of Belgium, Switzerland, and now France allow parties to opt out of annulment proceedings. Is this a trend, or are these countries outliers? What are the advantages and disadvantages of this approach?

Erica Stein

19. Should judicial control over arbitral awards be taken away from national courts and be conferred upon a supra-national body?

Bernhard Berger

ARBITRATION INSTITUTIONS AND RULES

20. Is there any real competition between the various (institutional) rules of arbitration? If so, in what way? If not, how else can institutions differentiate themselves from each other or should they merge?

Chiann Bao

21. There is a real difference between the institutions in terms of costs (contrast, for example, the LCIA and the ICC) - but does that influence users?

Chris Parker

22. When was the last time your client's choice of institutional rules really made a positive difference to the conduct or outcome of the case?

Craig Tevendale

23. What are the elements taken into account by investors and their counsel when choosing among rules available in the corresponding BIT to govern their arbitration against a State (eg, ICSID, UNCITRAL, Stockholm, ICC)?

Dyala Jiménez

24. Is scrutiny of the arbitral award by the institution a competitive advantage of institutional arbitration rules?

Philip Dickenmann

25. What could or should arbitration institutions do to improve the handling of parallel proceedings?

Alexandra Johnson

ARBITRATION PRACTICE AND USE OF GUIDELINES

26. Do codes of "best practice" such as the IBA Rules on the Taking of Evidence guarantee an equal playing field or do they kill creativity? Whom do they protect: the parties? the arbitrators?

Domitille Baizeau

27. IBA Rules on the Taking of Evidence in Arbitration: what is the legal significance of applying the Rules as "Rules" or merely as "Guidelines." If the parties agreed to apply them as "Rules", can the arbitrator's failure to apply them lead to a challenge for violation of due process? What is the experience in different jurisdictions? Are there precedents (there exist scholarly opinion)?

Franz X Stirnimann

28. The DIFC Courts in Dubai have effectively adopted the IBA Rules on the Taking of Evidence Article 3 document production mechanism as their litigation disclosure regime. Are there other examples of national courts adopting rules or standards from international arbitration practice - if not, what is the 'best of arbitration' that should be adopted?

Craig Tevendale

29. Challenges and codes of best practice: should a state court or institution considering a challenge consider the IBA Guidelines on Conflicts? Will they help?

Chris Parker

30. Should arbitral institutions have a code of conduct that all participants of an arbitration have to subscribe to in order to professionalise/streamline proceedings? What is the benefit and how (should one?) sanction non-compliance?

Ulrike Gantenberg

31. Is there a need for a uniform code of ethics for counsel in international arbitration?

Alexandra Johnson

32. Is it important that we harmonize our position on confidentiality of the proceedings in Europe? Has the position in England offered any advantages that should make other countries consider taking a similar stance?

Jaime Gallego

COSTS IN ARBITRATION

33. Are lawyers aware of the differences among the different rules regarding costs, especially arbitrators' fees? If so, how much of an impact do they have in their clients' choice?

Dyala Jiménez

34. Would it be a competitive advantage if a set of institutional arbitration rules were to include a schedule of counsel fees to be applied by the arbitral tribunal? Would that even be to the advantage of arbitration in general?

Bernhard Berger

35. Is it desirable to have a more harmonized practice on the allocation of costs of the arbitration? Would it be possible?

Jaime Gallego

36. Do arbitral tribunals generally take into consideration the conduct of the parties during the proceeding when assessing the costs of the arbitration? Should they do so more often?

Roland Ziadé

SECOND SESSION:

TODAY AND TOMORROW'S ARBITRATORS: CURRENT TRENDS AND FUTURE DEVELOPMENTS IN THE SELECTION AND CONDUCT OF ARBITRATORS.

Moderators:

Matthew Gearing, Allen & Overy, Hong Kong
Dyala Jimenez Figueres, DJ Arbitraje, Santiago de Chile
Gabrielle Nater-Bass, Homburger, Zurich
Jakob Ragnwaldh, Mannheimer Swartling, Stockholm

SELECTION AND APPOINTMENT OF ARBITRATORS

37. Some arbitral institutes make use of a network of regional committees in appointing arbitrators. For those arbitral institutes that do not have such a regional network in place, to what extent should there be an obligation to look beyond "the usual suspects" in their own (local) contact network and how could this best be done?

Lise Bosman

38. Arbitrators appointed by the arbitral institutions: the institutional fog.

Michael Bösch

39. How can institutions or users judge whether an arbitrator has been truly proactive or efficient in the past (unless they have personal experience of him or her)?

Chris Parker

40. Calls have been made to eliminate the possibility of parties nominating their arbitrators in favor of tribunals being entirely constituted by third parties (e.g., arbitral institutions, appointing authorities). (This has been most recently proposed by Jan Paulsson, prior to that by Prof. Hans Smit.) Is this a workable approach?

Erica Stein

41. Pros and cons of party-appointed arbitrator: are unilateral appointments still defensible?

Alexandre Vagenheim

42. The death of the party-appointed arbitrator?

Gisela Knuts

43. Should an arbitrator be required to decline appointment if - as is the case for example in Germany - as an active judge he/she needs to get permission for the additional activity as arbitrator and he/she is aware that it will take up to 6 months to receive such permission? Do similar situations exist in other jurisdictions?

Claudia Krapfl

44. Should the arbitrators be better educated as to what appointments they should accept and what appointments they should refuse?

Gautier Matray

45. Interviewing of prospective arbitrators - how far can/should you go?

Andrea Meier

46. The practice of beauty contests has been endorsed by the IBA Rules of Ethics for International Arbitrators. Does this practice expand? What question is customary to ask to a prospective arbitrator? What is the purpose of interviewing an arbitrator? Why is it that you may interview an arbitrator but not a judge or a juror?

    Does it really matter to interview an arbitrator? What impact does it have on the proceedings?

    Isn't this practice fraught with danger with regard to the principle of due process and the arbitrator's obligation to remain independent and impartial?

Gautier Matray

IMPARTIALITY AND INDEPENDENCE / ETHICS OF ARBITRATORS

47. In arbitral proceedings involving English lawyers, whether seated in London or not, it is not unusual to see the appointment of more than one English barrister as an arbitrator where one or more barristers from the same chambers is or are already serving as arbitrator or counsel in the same proceedings. This is often treated as a 'special case' which should not give rise to serious concern. Is that position defensible from the perspective of civil law practitioners (and clients)?

Craig Tevendale

48. Arbitrators in big law firms: how thick are the Chinese walls?

Michael Bösch

49. In the past years, several cases have brought forward the risk of a conflict of interests arising during the course of an arbitration proceeding. This is

especially true for arbitrators practicing in large law firms with offices worldwide. Such incidents can have a disruptive effect on the arbitration proceedings since it can lead to the dismissal of one arbitrator or even to the annulment of the award. To prevent such occurrences from happening is it desirable to lower the threshold as to what circumstances would give rise to a conflict of interests? Is it more desirable to bar any lawyer practicing in a worldwide law firm from sitting as an arbitrator?

Gautier Matray

50. The arbitrator's existing know-how and his knowledge of facts/information which may be relevant to the case: how long is it a useful advantage, when can it become bias? If the knowledge of certain facts is relevant for the decision (and either the knowledge or the very facts are not known to the parties), is there a duty to disclose (to the parties, or only to the other arbitrators, if there are any), and in what manner?

Franz X Stirnimann

51. How should an arbitrator/chairman react if he has founded suspicions that another arbitrator is not independent, or even corrupt? First, he should take it up within the tribunal. But how to proceed if no solution could be found within the tribunal?

Franz X Stirnimann

52. Seeing as independence and impartiality are essentially universal obligations for arbitrators sitting under all rules, in so far as statements of independence and arbitrator disclosure are concerned, is this one area in which there should be less competition and more harmonization between institutions? For example, would it assist parties and arbitrators (and ultimately institutions) if standard forms useable in any arbitration were jointly developed by institutions for this purpose?

James Morrison

53. How could an arbitral tribunal punish the party who abusively tries to recuse an arbitrator?

Gautier Matray

EXPERIENCE AND BACKGROUND OF ARBITRATORS

54. Requirement that a sole arbitrator/chairman of the three-member arbitral tribunal be from a nationality different from the parties: is this requirement necessary?

Chiann Bao

55. Are "professional arbitrators" better or do they tend to lose touch with the reality of counsel work and with the existence of parties and clients behind each counsel?

Domitille Baizeau

56. Appointing non-lawyers as arbitrators: Is there a trend towards? Practical experiences and considerations? What are the pitfalls?

Christopher Boog

57. How specialized should an arbitrator be? Has specialization become a necessity or is it overrated?

Andrea Meier

CONDUCT OF PROCEEDINGS

58. "pro-format" arbitration procedure: does it increase efficiency or does it destroy the tribunal's open mind and ability to think of tailor-made procedural solutions? How important is predictability? Should arbitral institutions offer detailed sets of rules to be applied by default, in the absence of a tailor-made agreement by the parties?

Marc Veit

59. Do the institutions exercise sufficient control over poorly performing arbitrators? What control could they exercise?

Chris Parker

60. Freedom of parties (and their counsel's interest in earning fees) vs. efficiency/streamlining of proceedings through a strong/pro-active arbitral tribunal: determination and modification of deadlines through the arbitral tribunal? Is the "freedom of the parties" and "right to be heard" a perfect defence to slow down proceedings?!

Ulrike Gantenberg

61. Should arbitrators be stricter in enforcing deadlines/timetables/schedules previously agreed among the parties?

Christopher Boog

62. Should arbitrators be more proactive in encouraging the early identification and/or early resolution of merits-based questions, such as through the transposition into commercial arbitration of mechanisms like ICSID Arbitration Rule 41(5)? [Do such measures allow for the proper respect of fundamental procedural fairness requirements? Do such mechanisms really promote efficiency?]

Aren Goldsmith

63. Are pre-trial motions (document production requests, requests for interim relief) a useful tool to "push" arbitrators to acquaint themselves with the file as early as possible and therefore to increase the arbitrator's efficiency during the hearing and (likely) to reduce the time that they will need to draft of the award?

Franz X Stirnimann

64. How can patently bad alternative arguments be dealt with? Should they be determined at an early stage (even if they are not threshold issues) or is it important that they are fully argued?

Chris Parker

ARBITRATORS AS SETTLEMENT FACILITATORS

65. Is it permissible/advisable for the arbitral tribunal to encourage settlement?

Roland Ziadé

66. In recent years, have we seen an increased number of arbitrators facilitating settlement? If so, does the arbitrator's background influence her tendency to actively facilitate settlement?

    Should an arbitrator be promoting settlement? Is this compatible with her mission? Are arbitrators sufficiently trained to act as settlement facilitator?

    How should an arbitrator be facilitating settlement? By asking well-targeted questions at the right time, which will enable the parties to understand their weaknesses and which might trigger settlement discussions? By suggesting that the parties settle their dispute outside the arbitration proceedings? Or by being more pro-active and offering to provide her own assessment of the parties' position?

    If the parties agree that the arbitrator can act as settlement facilitator, what safeguards should be put in place, in particular to avoid (i) a threat to impartiality, (ii) a risk of breach of due process if the arbitrator meets privately with one of the parties, (ii) a risk that, in case the settlement discussions fail, the arbitrator will nevertheless be influenced by what the parties disclosed during the settlement process?

Should arbitration laws, arbitration rules and/or guidelines address these issues (more specifically than they do today)? If so, how?

Philippe Bärtsch

67. Is it permissible/advisable for the arbitral tribunal to give a provisional indication of its view on the merits of a particular issue? Under what circumstances?

Roland Ziadé

RIGHT TO BE HEARD – *JURA NOVIT CURIA*

68. The right to be listened to is inherent to the right to be heard: is there a current tendency for arbitrators to disregard this principle?

Ioannis Vassardanis

69. *Jura novit curia* – In England, arbitrators may not reopen a legal issue *sua sponte* (i.e. on their own motion). Nor may they apply on their own motion a legal provision that the parties did not invoke and that the arbitrators did not raise during the arbitration. If arbitrators proceed in this way (and fail to give the parties the opportunity to address this in their written submissions or at the hearing at the end of the arbitration), their award will normally be set aside. Conversely, in Switzerland arbitrators may – based on *jura novit curia/arbiter* – so proceed, always provided that the legal provision/principle applied does not come as a surprise to the parties in that it could not reasonably have been foreseen that the arbitrators would apply the provision/principle in question.

Should it be considered best practice to include a duty of the arbitrators to give the parties a chance to address a legal provision (be it statutory or contractual) which they did not address in the arbitration, but which provision the arbitrators intend to rely on and consider relevant to decide the merits of the case. In a recent arbitration in which I was involved, such duty was included in the Terms of Reference on the arbitrators' own motion. In fact, their draft ToR already included a provision to that effect, and the parties subscribed to it.

Should arbitrators always so proceed?

Or should the parties insist on including a provision to that effect in the ToR?

Should arbitral institutions revise their rules and include a provision of this type?

Manuel Arroyo

70. *Jura novit curia* – at what stage of the proceedings should arbitrators point the parties to the pertinent legal rule that has not (yet) been pleaded by any of the parties (assuming they feel that they need to point out such rule to the parties)? Does the efficient way of doing so very early interfere with the parties' right to present their case in the way they wish (and to adopt the procedural strategy they wish)?

    How can arbitrators deal with significant differences in the quality of counsel advising the parties?

Joachim Knoll

EVIDENCE

71. The extent and nature of questions from the tribunal to witnesses - what is appropriate?

    (Arbitrators with different backgrounds have strongly differing practices in asking questions from witnesses. At one extreme we find a passive sole arbitrator who fails to ask a single question throughout the entire hearing (sometimes even failing to intervene in quarrels between counsel), giving the parties no feel for the tribunal and leaving them very uncertain as to who the person adjudicating their case is and whether he or she is worthy of the trust inherent in the role of an arbitrator. At the other extreme is an arbitrator who carelessly poses long series of questions which (appear to) reveal how the arbitrator views the case, or in the worst case an arbitrator who consistently asks questions helpful to only one of the parties, thus making the other party uneasy or even eager to settle. While the first of the above extremes is certainly less risky from the tribunal's perspective, neither is satisfactory from the parties' viewpoint. Arbitrators obviously have the right to ask questions and are even well advised to make use of it, but what are the limits?)

Aapo Saarikivi

72. Questioning by arbitrators at the end of a witness's examination: do the arbitrators have the last word? What are the rules for counsel, can and should counsel "re-cross", respectively "re-direct"?

Franz X Stirnimann

73. Is there a real danger that comments exchanged between a party and its party-appointed expert on a draft expert report, as well as various drafts of the expert report will have to be produced (as appears to be the case in some common law jurisdictions) in international arbitration proceedings with their seat in a civil or common law jurisdiction?

Claudia Krapfl

TIME LIMIT ON ARBITRATORS

74. Various arbitration laws impose a time limit on the duration of an arbitration, subject to an agreement to the contrary. Spain requires that an award be rendered within 6 months from the answer to the request. Italy requires that the award be rendered within 240 days after the acceptance of the nomination by the arbitrators. The UAE has a similar provision. French, English and Swiss laws do not have this requirement. Although imposing a time limit that is to cover the part of the proceedings for which the lawyers and parties are responsible may not be the best solution, is there something to be said for imposing a time limit on the rendering of the award from the moment of final hearing or the last submission by the parties?

Jaime Gallego

FLEXIBILITY IN ARBITRATION

75. The pregnant arbitrator / counsel: is there a need / room for special rights or exemptions?!

Ulrike Gantenberg