that legal advice privilege had been waived because the state of mind of the claimant's managing director had been put in issue. The defendant applied to strike out allegations of economic duress in the absence of relevant disclosure. Ramsey J. reviewed the authorities and commentaries and held that the mere pleading of economic duress and putting Mr Hepworth's state of mind in issue did not constitute a waiver.

Vitpol Building Service v Michael Samen [2008] EWHC 2283 is another case concerning the interplay between the parties' rights to refer disputes to litigation and adjudication. Shortly after the commencement of proceedings, Coulson J. was asked to decide whether the TCC had jurisdiction to decide a dispute as to the terms of a contract in circumstances where the decision would determine whether the claimant could refer the dispute to adjudication. The point arose notwithstanding that no adjudication had been commenced and the parties had all but concluded the pre-action protocol procedures. Coulson J. held that the court could decide the point and that guidance in the TCC Guide did not limit the court's jurisdiction in this regard.

In our book review section, we include an enthusiastic review by Andrew Burr of Tibor Varady's publication with the all encompassing title *Language & Translation in International Commercial Arbitration, from the Constitution of the Arbitral Tribunal through Recognition and Enforcement Proceedings*. Robert Morgan reviews Anthony Connerty's book more pithily entitled *A Manual of International Dispute Resolution*.

Finally in the Technology and Construction Law Reports, we report the Court of Appeal's decision in *Furmans Electrical Contractors v Elecref Ltd*, which, as the commentary points out, ably illustrates the maxim that the smaller the case, the greater the difficulties. A first instance judgment in favour of the claimant cabling contractor for £7,751.31 gave rise to a consideration of the applicable principles where sums are overpaid on invoices. The Court of Appeal proceeded on the basis that because the subcontractor had made a substantial payment after voicing doubts as to the sums claimed, it had wavied its rights to recover the payment in the event that the sums proved not to be due.

Stripping Arbitration Agreements of Their Economic Value in the Overloaded Courts of Latvia

By Daimars Skutans*

LT Arbitration agreements; Assignment; Binding force; Conflict of laws; Contractual rights; International commercial arbitration; International investment disputes; Latvia

Introduction

With the global economy in recession, litigation is likely to increase. Increasing litigation has become almost like a trade mark for any economy facing hardship and Latvia is no exception in this regard. Latvian state courts have never been renowned for delivering speedy justice in commercial disputes, and the expected increase in litigation is unlikely to improve the situation any time soon.

One would think that reputable arbitration, usually delivering speedier justice, may be a proper solution in these circumstances. After all, under the widely accepted 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] (the "1958 New York Convention") and other similar international instruments, a state court would be expected to refer the parties to arbitration should a dispute between them as the original parties to the underlying agreement governed by a valid arbitration agreement turn out to be subject to arbitration. Moreover, no voluntary assignment of a contractual right emanating from the underlying agreement ought to change the venue from arbitration to state courts. As long as the assignment as such is permitted, a voluntary assignee would normally be bound by the arbitration agreement concluded between the original parties to the underlying agreement if it wanted to invoke the assigned right. This would appear to be the prevailing practice in the western part of the world,[2] in particular in such countries as Austria,

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38 (1959).

[2] For a thorough reference to the authority see for example, J.D.M. Lew, M.A. Loukas, S.M. Kröll, *Comparative International Commercial Arbitration* (Hague: Kluwer Law International, 2003), pp.147–148. On Germany in particular also see: Decision of the Hanseatic Court of

Germany, Sweden, Switzerland or the United States. Paragraph 2 of s.82 of the 1996 English Arbitration Act provides that references in the law to a party to an arbitration agreement include any person claiming under or through a party to the agreement, and suggests a similar approach in England. A French court even appears to have considered this binding nature of the arbitration agreement on the voluntary assignee a principle of arbitration.[3]

With the accession of Latvia to the European Union, one might have expected the country to follow the same principles. However, several recent decisions of the Latvian Supreme Court and lower courts of appeal suggest that a voluntary assignee may refuse to be bound by the arbitration agreement and may even force the debtor into Latvian state courts, which has already had disastrous commercial effects upon respondents.

Earlier practice of Latvian courts in disputes governed by Latvian substantive law

As a matter of Latvian substantive and procedural law, if the underlying agreement is governed by Latvian substantive law and the original parties to it have agreed on arbitration in Latvia, a voluntary assignee would not be automatically bound by the arbitration agreement contained therein. While initially the Latvian Supreme Court had adopted this approach in consumer protection cases, it is now also followed in commercial disputes.[4] The reasoning is that only the assigned right is transferred to the assignee and not the legal relationship as such. While the applicable Latvian law provides that the assigned right is transferred on to the assignee along with all the ancillary rights to it, the right to arbitrate is not considered an ancillary right, as specifically ruled by the Latvian Supreme Court.[5] Instead, arbitration is viewed as an agreed procedure for dispute settlement between the original parties to the underlying agreement, and it has to be separated from the assignment.

As a result, an original party to the underlying agreement governed by Latvian substantive law could easily escape the agreed arbitration by simply assigning its right to a third party, even its own subsidiary, which could effectively land the dispute in overloaded Latvian courts, provided the required jurisdictional requirements in favour of Latvian courts are also satisfied.

Appeal of Hamburg [Hanseatiches Oberlandesgericht] (February 17, 1989) in *Yearbook Commercial Arbitration XV* (1990), pp.455–465. On Switzerland in particular also see: D. Girsberger, C. Hausmaninger, "Assignment of Rights and Agreement to Arbitrate" in *Arbitration International* (1992), Vol.8, p.129 and the following decisions referred to in fn.50 of the said article: Appellationshof of the Canton of Berne, May 4, 1973, 111ZbJV 200, 202 (1975); Obergericht of the Canton of Zürich, May 10, 1977, 76 Blätter für Zürcherische Rechtsprechung (ZR) 157, 158 (1977); Obergericht of the Canton of Zürich, March 2, 1981, 80 ZR 191, 192 (1981); Handelsgericht St. Gallen, November 14, 1956, 54 Schweizerische Juristenzeitung (SJZ) 310, 311 (1958). On the USA in particular also see: *Technetronics Inc v Leybold Geaeus GmbH*, Case No. 93-1254, United States District Court, Eastern District of Pennsylvania (June 9, 1993), in *Yearbook Commercial Arbitration XIX (1994)*, pp.843–849; *Sea Spray Holdings Ltd v Pali Financial Group Inc* Case No. 3 Civ. 1988 (VM), United States District Court, Southern District of New York (June 23, 2003) in *Yearbook Commercial Arbitration XXIX* (2004), pp.990–1002.

[3] See Lew, Loukas and Kröll, *Comparative International Commercial Arbitration*, 2003, p.148.

[4] Decision of the Senate of the Supreme Court of the Republic of Latvia in Case No SPC-28 (2004). *Judgments and decisions of the Civil Department of the Senate of the Supreme Court of the Republic of Latvia 2004*, Riga: Latvijas Tiesnesu macibu centrs, (2005), pp.738–740.

[5] *Judgements and decisions of the Civil Department of the Senate of the Supreme Court of the Republic of Latvia 2004*, Riga: Latvijas Tiesnesu macibu centrs, 2005, p.740.

However, recent developments in commercial disputes suggest that, under Regulation 44/2001 (Brussels I Regulation)[6] and the Latvian Civil Procedure Law,[7] it is not that difficult to seize a Latvian court. It is quite enough to bring a claim against a person domiciled in Latvia and automatically enjoin other persons domiciled abroad as co-defendants. Moreover, because Latvian courts would entertain even apparently frivolous and unconscionable claims and consider themselves seized, the claim against a Latvian respondent would not even have to survive "a serious issue to be tried" test.

Recent developments involving foreign substantive law protecting the economic value of arbitration agreements

One would think that the situation should be different if the underlying agreement were governed by, for example, Swiss law, because as a matter of Swiss law a voluntary assignee would normally be bound by the arbitration agreement if it wanted to invoke the assigned claim.

Since the 1958 New York Convention does not appear to be dealing with the issue of arbitration agreement transfers to assignees, one would expect this issue to be analysed under the applicable Swiss substantive law as the law governing the assigned right. This approach would also appear to be consistent with art.12 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations[8] ("the 1980 Rome Convention"), which provides that the law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor and the conditions under which the assignment can be invoked against the debtor. After all, if the assignee is bound by the arbitration agreement under the applicable Swiss substantive law, there would appear to be no valid reason to intervene by holding otherwise under Latvian law.

In addition, it may be argued that the exclusion of "arbitration agreements" from the scope of the 1980 Rome Convention in art.1 does not render the Convention inapplicable to the issue in question. Instead, a better interpretation would be that the Convention does not apply to determine the law governing the arbitration agreement itself concluded between the original parties to the underlying agreement. The law governing the arbitration agreement would have to be determined under the choice of law rules governing the court deciding the issue.[9] As a matter of Latvian choice of law rules, an arbitration agreement in favour of Swiss arbitration would be governed by Swiss law, as it is the law of the place for the performance of the obligation, i.e. to arbitrate in Switzerland.

However, a Latvian state court, equivalent in rank to the Court of Appeal in England, has recently ruled twice that, as long as such Swiss arbitration is not consented to by the voluntary assignee in writing and the assignee argues Latvian substantive and procedural law as opposed to Swiss law as the law

[6] Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) [2001] OJ L12/1.

[7] An unofficial English translation is available at *http://www.ttc.lv/* [Accessed April 6, 2009].

[8] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 [1980] OJ L266.

[9] *Cf.* Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, [1980] OJ C282/1.

governing the underlying agreement and the arbitration agreement contained therein, (a) the case would be heard under Latvian law as the law specified in the statement of claim in order to remain within the boundaries of the claim, (b) the assignee is not bound by the arbitration agreement and (c) can sue the debtor in Latvian state courts.[10]

Since the matter concerned only companies domiciled in Latvia, the other grounds for jurisdiction under the Brussels I Regulation and Latvian Civil Procedure Law were not in question. However, as noted above, it would also not be difficult to sue a foreign party in Latvian courts using the same logic. Moreover, if one accepts the argument that the Brussels I Regulation would not even be applicable in circumstances where the binding nature of an arbitration agreement is argued by virtue of the exclusion of "arbitration" in art.1 of the Brussels I Regulation, and such an argument may indeed appear possible according to the judgment of the European Court of Justice in the *Van Uden Maritime / Kommanditgesellschaft in Firma Deco-Line* case,[11] the enjoinment of foreign parties under Latvian Civil Procedure Law seems even less complicated.

The fact that the arbitration agreement between the debtor and the assignor was concluded properly and included in the underlying agreement and properly executed in writing, was irrelevant. As a result, the court seems to have adopted a rather formalistic approach to the written-form-requirement, when internationally the tendency appears to be that assignees need not themselves fulfill the written-form-requirement,[12] i.e. the assignee needs not to sign the arbitration agreement itself.

It is surprising how lightly the Latvian court has disregarded art.12 of the 1980 Rome Convention, declaring it inapplicable based on the exclusion of "arbitration agreements" in art.1 of the 1980 Rome Convention. Little regard was shown to the argument that the respondent, as an original party to the underlying agreement and arbitration agreement contained therein, may not be forced to accept the jurisdiction it never agreed to when assuming the obligations under the underlying agreement.

It may also be rather shocking to a foreign investor to learn that, in these circumstances, the Latvian court also had no hesitation in ordering most severe provisional measures exceeding US $20 million, effectively freezing all of the respondent's funds and nearly destroying the respondent commercially even before the case reached merit in the Court of First Instance. It may be even more puzzling that no counter undertaking in damages was ever ordered by the court, which does not happen automatically in Latvia, and the claimant was an obvious satellite of the other original party to the underlying agreement and with no assets.

While the Latvian Supreme Court has not yet pronounced itself on the issue of whether the assignee is bound by the arbitration agreement if the underlying

[10] *SIA Cesijas Darijumi v AS VENTSPILS TIRDZNIECIBAS OSTA* (2008) a decision of the Kurzeme Regional Court, case No C02064006 (not published). *SIA Cesijas Darijumi v AS KALIJA PARKS* (2008) a decision of the Kurzeme Regional Court, case No C02064106 (not published).

[11] *Van Uden Maritime BV (t/a Van Uden Africa Line) v Kommanditgesellschaft in Firma Deco-Line* (C-391/95) [1998] E.C.R. I-7091 at [32].

[12] For a debate on the issues see for example, A. Reiner, "Some Recent Austrian Court Decisions in the Field of Arbitration" [2000] 17 *Journal of International Arbitration* 4, 90.

agreement is governed by such foreign law as Swiss law and the assignee wishes to invoke the assigned claim, it has taken two years in various appeals to the Latvian Supreme Court and a number of international investment protection considerations to persuade the courts to at least release the funds of the respondent to salvage it from a commercial catastrophe before the case even reaches the merits. While it is hoped that the Latvian Supreme Court would rule otherwise, the existing practice of the Supreme Court in cases where Latvian substantive law governs the underlying agreement may voice a concern.

With all due respect, it is respectfully submitted that when it comes to the analysis of transferability of arbitration agreements as a result of a voluntary assignment, the Latvian courts appear to be on the course of derailing the Latvian civil justice system on this issue. Apparently, Latvian courts are prepared to strip arbitration agreements of all their economic value. Arbitration agreements have little economic value[13] if a party to an underlying agreement containing an arbitration agreement can avoid it by means of a simple assignment of a claim to a third party, perhaps even to its own subsidiary, thus effectively forcing the other party to the underlying agreement into litigation in state courts.

Conclusion

As disturbing as it may be, the practice of the Latvian courts is unlikely to change any time soon. In fact, the latest draft of the new Latvian Arbitration Act provides that no rights emanating from an arbitration agreement may be assigned. Perhaps even an action at the European Union level may be desirable to achieve a uniform approach to these issues because it has the potential of becoming a bitter deviation from the prevailing practice in the European Union with potentially disastrous effects on European commercial matters, and as long as Latvian judicial decisions in civil and commercial matters enjoy the free movement of judicial decisions in the European Union, the current practice must stop. It is simply wrong and unfair and is reminiscent of Soviet thinking and its approach to law.

In the meantime, foreign investors coming from countries honouring the economic value of arbitration agreements would be strongly encouraged to take the following steps, especially when dealing with Latvian partners likely to find jurisdictional grounds for bringing an action in Latvian state courts.

First, whenever possible, the underlying agreements and arbitration agreements contained therein ought to be subjected to the law protecting the economic value of arbitration agreements, such as Swiss law, or English law.

Secondly, underlying agreements ought to contain a condition precedent requiring a validation of the assignment in writing by the other party to the underlying agreement. Where this is commercially unsound or where impossible, undertakings in underlying agreements should be consented to, conditional upon them being enforced under the terms and conditions given to the original creditor and in the forum agreed with the original creditor.

It is hoped that, with these measures, investors will be better placed to maintain the agreed dispute settlement venue and avoid overburdened Latvian courts, which have already proven to be rather complicated to foreign investors.

[13] See Lew, Loukas and Kröll, *Comparative International Commercial Arbitration*, 2003, p.148.