

APA-project ("Arbitration and Party Autonomy")

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UNIVERSITY OF OSLO
FACULTY OF LAW



Arbitration and the not unlimited party autonomy:

**The impact of intellectual property rules and of the arbitrability rule
on the enforceability of arbitral awards**

Date: 22 November 2011

Place: Statoil ASA, Drammensveien 264. Vækerø 0283 Oslo

The impact of intellectual property rules and of the arbitrability rule on the enforceability of arbitral awards

- 9.00-9.45 **The framework: Arbitration law and the New York Convention as limits to party autonomy** – Professor *Giuditta Cordero-Moss*, University of Oslo
- Ongoing research on intellectual property law as a limit to party autonomy in arbitration** – Research Assistant *Hedda Bjøralt Roald*, University of Oslo
- Ongoing research on arbitrability as a limit to party autonomy in arbitration** – Research Assistant *Ulrik Tetzschner*, University of Oslo
- 9.45-10.00 **Break**
- 10.00-11.30 Panel discussion.
- 11.30-12.00 Extended discussion (questions and comments from all participants)
- 12.00-13.00 **Lunch**

Panel:

- Ivar Alvik, University of Oslo
- Are Brautaset, legal counsel, Statoil ASA
- Giuditta Cordero-Moss, Professor, University of Oslo
- David Echenberg, senior contract risk manager, General Electric Energy Services
- Michele Graziadei , professor, University of Turin
- James Hope, partner, Advoktafirman Vinge
- Kai Uwe Karl, senior counsel litigations, General Electric Oil & Gas
- Cathrine Kessedjian, professor, University of Paris II
- Alexander Komarov, Professor, Russian Academy of Foreign Trade
- Gustaf Möller, Krogerus, and former justice, Supreme Court of Finland
- Sophie Nappert, Avocat, Bar of Quebec, Canada; Solicitor of the Supreme Court of England and Wales
- Fredrik Norburg, partner, Norburg advokatbyrå
- Fausto Pocar, professor, University of Milan and judge, International Criminal Tribunal for Rwanda

- Hedda Bjøralt Roald, Research assistant, University of Oslo
- Ole-Andreas Rognstad, Univerisity of Oslo
- Aapo Sarikivi, attorney at law, Roschier
- Michael Schneider, partner, Lalive
- Jerney Sekolec, arbitrator and former secretary general, UNCITRAL
- Petri Taivalkoski, partner, Roschier
- Ulrik Tetzschner, Research assistant, University of Oslo
- Ivan Zykin, Professor, Andrey Gorodissky & Partners

Participants:

- Mads Fugelsang, Attorney at law, Selmer
- Per Helset, Attorney at law, Orkla
- Martin Jetlund, Attorney at law, Selmer
- Marie Nesvik, Research Fellow, University of Oslo
- Geir Woxholth, Professor, University of Oslo

List of topics for discussion

Intellectual Property:

Assumptions:

- Parties are free to choose the law governing their contracts;
- Contracts may have implications beyond the area of contract law. These legal effects will be subject not to the law chosen by the parties, but to the law applicable according to the relevant choice-of-law rule;
- Arbitral tribunals are bound to follow the will of the parties;
- Arbitral awards must be recognised and enforced without review of the merits or of the application of law;
- If the arbitral tribunal applies the law chosen by the parties instead of the applicable law, it is an error of law that does not affect the validity or enforceability of the award;
- Under certain circumstances, an award may be declared invalid or unenforceable (i.a., if the award is in contrast with the public policy of the court);
- Under certain circumstances, disregard of the applicable law may lead to conflict with public policy (if the award conflicts with some rules of company law, competition law) or other grounds for invalidity or unenforceability (non-compliance with rules on legal capacity).

Thesis:

Within the law of intellectual property some rules protect so important interests, that an award following the parties' choice and disregarding these applicable rules will risk being declared invalid or unenforceable.

Discussion to demonstrate the thesis:

- Examples (not necessarily involving Norwegian law) of contracts with intellectual property law implications, where the parties try to circumvent the applicable law by choosing a more liberal law/ have not taken into account the consequences of choosing another law: Patent- and trademark licenses
- Explanation of what interests are affected by applying a foreign law
- Explanation of which infringements of these interests may be considered as a violation of public policy

List of topics for discussion

Arbitrability:

Arbitration clauses and arbitrability

Assumptions:

- Courts shall not accept jurisdiction on dispute where there is a valid arbitration agreement between the parties
- If a dispute is on a matter that is not arbitrable, courts have jurisdiction
- If an arbitral award was rendered in a dispute on a matter that is not arbitrable, the award may be set aside or refused enforcement
- Arbitrability is determined by the internal law of the court that is deciding on the validity of the award (the court of the place of arbitration) and of the law of the court that is deciding on the enforcement of the award (the court of the place of enforcement)
- The purpose of the arbitrability rule is to ensure accurate application of rules by the courts in areas where states do not consider it appropriate to delegate the resolution of disputes to private mechanisms

Thesis:

- The arbitrability rule is traditionally a general rule containing abstract criteria restricting access to arbitration for certain types of claim.
- The arbitrability rule is increasingly being used at a pre-award stage to restrict access to arbitration in case it likely, in the specific case, that the arbitral tribunal will not grant an award in accordance with relevant overriding mandatory rules or public policy rules.

Discussion to demonstrate the thesis:

- Comparison of the arbitrability rule, the public policy rule and of the overriding mandatory rules.
- The Second Look doctrine's role in allowing disputes with public policy implications to be referred to arbitration.
- The impact public policy rules and overriding mandatory rules of the forum state may have on the effectiveness of arbitration agreements.

APA Project

Research Plan

	Autumn 09	Spring 10	Autumn 10	Spring 11	Autumn 11	Spring 12	Autumn 12	Spring 13
Company law	Cathrine Bjoland							
Competition Law	Nicolai Nielsen							
Property and Insolvency			Siri Hafeld					
Administrative Regulations			Tone Wetteland					
Arbitrability					Ulrik Tetzschner			
Intellectual Property					Hedda Bjøralt Roald			
Contract Law							XX	
Labour law							XX	