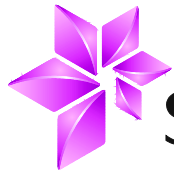




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Arbitration and the not unlimited party autonomy:

Competition law and company law

Friday, 13 November 2009



Arbitration

- Private settlement of disputes
- Alternative to courts
- Based on will of the parties

- Are the parties completely free?



Judicial control on arbitral awards

- Challenge of validity before the courts of place of arbitration
- Enforcement proceedings before the courts of the place of enforcement



Challenge of validity

UNCITRAL Model Law art. 34

An arbitral award may be set aside by the court...only if:

- (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement ...was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
- (b) the court finds that:
 - ...
 - (ii) the award is in conflict with the public policy of this State.

Voldgiftsloven § 43

En voldgiftsdom kan bare settes til side av domstolene dersom

- a) en av partene i voldgiftsavtalen manglet rettslig handleevne; eller voldgiftsavtalen er ugyldig etter de rettsregler som partene har avtalt skal anvendes på avtalen, eller i mangel av slik avtale, etter norsk rett, eller ...
- Når spørsmålet om gyldigheten av en voldgiftsdom er brakt inn for domstolene skal domstolen av eget tiltak sette dommen til side dersom
- ... b) voldgiftsdommen virker støtende på rettsordenen (ordre public).

Grounds for refusing enforcement

New York Convention art. V

1. Recognition and enforcement of the award may be refused, ... only if t
(a) The parties to the agreement ... were, under the law applicable to them, under some incapacity, or the said agreement is not valid ...

2. Recognition and enforcement of an arbitral award may also be refused if

...

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Voldgiftsloven § 46

Anerkjennelse eller fullbyrding av en voldgiftsdom kan bare nektes dersom:

- a) en av partene i voldgiftsavtalen manglet rettslig handleevne; eller voldgiftsavtalen er ugyldig etter de rettsregler som partene har avtalt skal anvendes på avtalen, eller i mangel av slik avtale, etter det lands rett hvor voldgiftsdommen ble avsagt, ...

Domstolene skal av eget tiltak nekte anerkjennelse og fullbyrding av en voldgiftsdom når:

- ... b) anerkjennelse eller fullbyrding av voldgiftsdommen virker støtende på rettsordenen (ordre public).



Legal capacity, Invalidity of arbitration agreement

(see seminar of 26 May 2009)

- State of Ukraine v Norsk Hydro ASA, Svea Hovrätt, 17 December 2007, T 3108-06
- Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan, [2009] EWCA Civ 755



Function of ordre public

- No review of the merits
- No verification of tribunal's application of law
- Prevent to give effect to an award if the result would violate fundamental principles of the forum
 - Not any mandatory rules
 - Not any overriding mandatory rules
 - The policy underlying some overriding mandatory rules



Typical examples where ordre public clause is applicable

- Bribery
- Drugs Traffic
- Discrimination
- Confiscation without Indemnity



Typical examples where ordre public clause is applicable - II

- Measures essential to the accomplishment of the tasks entrusted to the European Community:
 - Competition law (Eco Swiss, C-126/97)
 - Protection of the agent (Ingmar, C-381/98 (?))
 - Consumer protection (Claro, C-168/05)



Typical examples where ordre public clause is applicable - III

- Insolvency (Salen Dry Cargo AB v. Victrix Steamship Co, C.A., 2nd Circ., August 5, 1987)
 - Encumbrances
 - Company law