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What lies ahead for Europe?

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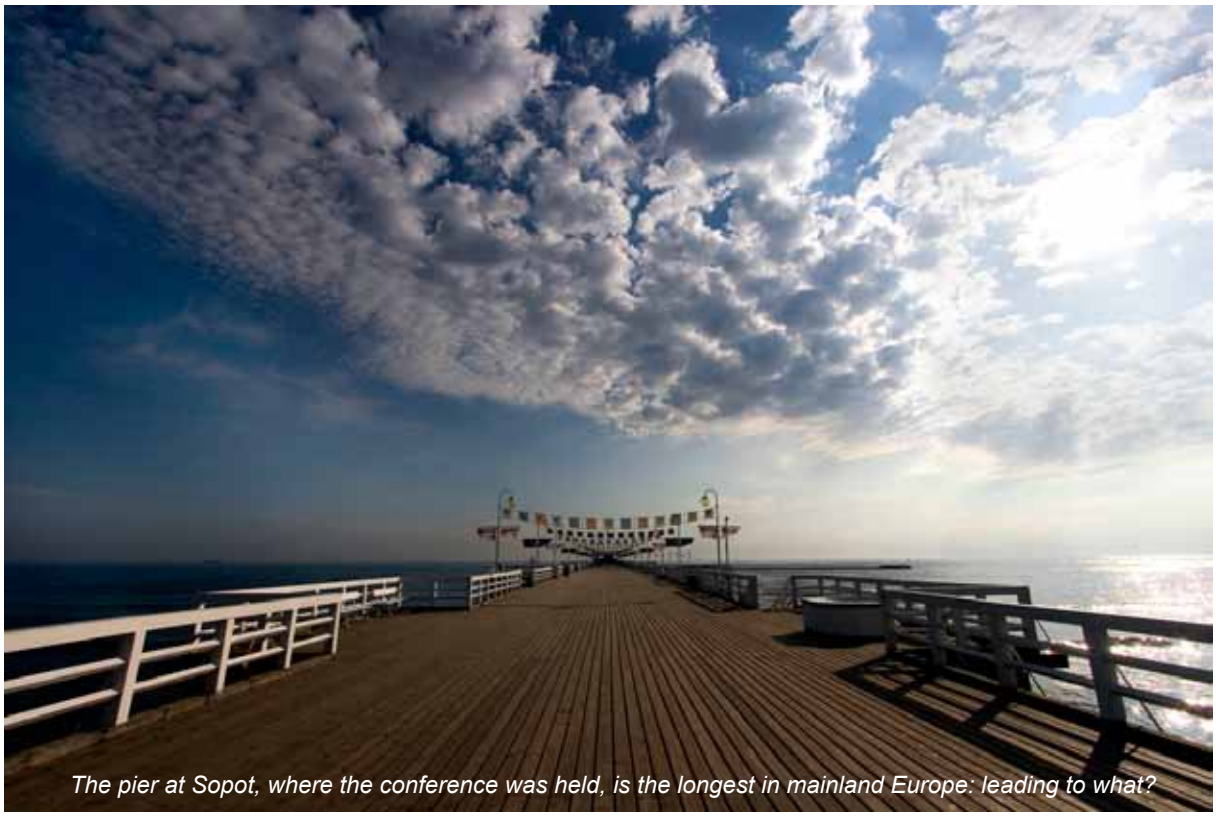
A panel at the European Forum for New Ideas in Poland considered the future of international arbitration in Europe, including such questions as whether Europe should have its own ICSID and whether tribunals should have the power to submit questions of law to the European Court of Justice.



The pier at Sopot, where the conference was held, is the longest in mainland Europe: leading to what?

GAR was unable to attend the closed panel, which included representatives of major European arbitration institutions and associations as well as private practitioners and EU officials. However, ICC secretary general Jason Fry and LCIA director general Adrian Winstanley later presented summaries of the panellists' findings to a wider body of delegates. In those summaries and the discussion that followed, one message came across strongly: the need for more dialogue between the arbitration community and the EU on such issues.

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Investment arbitration

Fry reported on the panel's discussions regarding the "landscape of investment arbitration in the wake of the Lisbon Treaty".

"As you know, the Lisbon Treaty gave the EU exclusive competence to deal with foreign direct investment as part of its competence in respect of the Common Commercial Policy," Fry said. He noted that foreign direct investment is not defined in the treaty. "However, that intriguing issue aside, it can be assumed that the EU would have exclusive competence to enter into international investment and trade agreements in relation to foreign direct investment."

"The horse has left the stable in the sense that the treaty is already in place – but quite how unruly it is and in what direction it will run is still unknown," Fry said. "The Lisbon Treaty leaves us with a number of quite complex issues to be resolved and regrettably there is a degree of uncertainty as to the way forward".

Fry said the panel considered firstly "what type of trade or investment agreement will be entered by the EU in future", whether they will be exclusive bilateral or multilateral arrangements between the EU and third party non-EU states or mixed agreements entered into jointly by the EU and a member state in respect of foreign direct investment and indirect investments. The EU's policy in this regard remains unresolved, he said.

Assuming that the EU intends to enter into new agreements of one type or the other, he said "the question is begged as to what transitional arrangement will be put in place to deal with the existing framework of BITs between EU member states and other states, or indeed intra-EU BITs, which currently exist between certain member states". On that point too, the mechanisms are unclear, he said.

And looking further into the future, Fry said the panel considered what kind of dispute resolution mechanisms the EU investment treaties - mixed agreements or otherwise - will contain. "The EU is not a state and therefore, as matters presently stand, does not have the capacity to become a signatory to the Washington Convention and be part of the ICSID system for the settlement of investment disputes," he explained. "So unless some sort of arrangement is reached whereby the convention could be amended, which seems implausible, or another mechanism is agreed whereby the EU can become a member of ICSID, the centre doesn't seem to be an option for resolving disputes arising from EU investment agreements in future".

"So what shall we put in place as an alternative?" Fry asked. He said there was discussion within the group about the possibility of establishing "a European ICSID", but the consensus was against it. Instead, he said the panellists had taken the view that there are European institutions that could fulfil this role (the ICC Court of Arbitration and the Permanent Court of Arbitration among them) "albeit that their rules and procedures may require some adaptation".

But Fry said this idea presented several additional challenges that would need to be

addressed, including how to ensure transparency with respect to disputes that may involve issues of European public policy, consistency between the awards of different tribunals tasked with interpreting the new EU investment agreements and the correct interplay between European law, European public policy and public international law.

“The elephant in the room is the question of enforcement,” Fry said. “If award creditors can’t invoke the ICSID Convention, which provides a specific mechanism for awards to be recognised and enforced in the same way as judgments of the host state, then what equivalent mechanism for enforcement might be envisaged for the EU?”

If there is no alternative, he said that creditors would have to seek enforcement under the New York Convention and would be subject to the jurisdiction of the enforcing court and - potentially – the control of the European Court of Justice. For foreign investors, that may not be an attractive prospect.

“In any event, we’re on a road that we must go down – that’s been established by the Lisbon Treaty – but quite what pathways we should take along the way remains unclear,” Fry concluded. He said the panellists agreed that “real progress” is required on these questions and that “a dialogue between the arbitration community, the arbitration institutions and the EU Commission and parliament would be a worthwhile venture”.

Commercial arbitration

Winstanley said that, in its discussion of commercial arbitration, the panel had acknowleged that “the EU, for all its present difficulties – and they are many and serious – is a hugely important global economic power”.

“As such, European law, including regulations and directives and the judgments of the European Court of Justice, impact upon a very significant volume and value of cross-border business and upon the preferred method of resolving disputes that may arise from this business – that is, arbitration.”

Consequently, Winstanley said the EU and the arbitration community “must engage in effective dialogue to ensure that European law which impacts upon arbitration – whether judge-made or made by the legislature – does so in a positive and supportive way for the benefit of all those concerned inside or outside the EU, and for the economic wellbeing of the EU”.

He said that the panellists first considered Brussels I – the European regulation directing member states to recognise and enforce civil and commercial judgments from elsewhere in the EU – and the controversial decision of the European Court of Justice in West Tankers. In that case the ECJ held that, while an anti-suit injunction concerning arbitration would normally fall outside the scope of Brussels I, if such an injunction presumed to oust the jurisdiction of another member state, the regulation gave exclusive jurisdiction to the court first seized. “Differing views were expressed on whether the case was a welcome catalyst for necessary clarification of Brussels I or a bad ECJ decision that led to the belief that something in the regulation was broken and needed to be fixed, when it was not and it did not.”

Whatever your view on this, Winstanley said, “we are now on track to do something with Brussels I”. He said that the differing approaches of the EU Commission and the European Parliament to amending this regulation have created “ongoing uncertainties,” but it now seems clear that the arbitration exception in Brussels I is to be “retained and clarified”.

“But is that this really the end of the story?” Winstanley asked. Crucial matters remain to be looked into such as the interaction between Brussels I and the New York Convention and any impact the regulation has on article 2(3) of the convention (by which the courts of a convention state, when seized of an action in respect of which there is an arbitration agreement, shall, at the request of a party, refer the parties to arbitration).

Winstanley said the panel also considered the influence of EU law on arbitration – taking as examples the West Tankers ruling and the council directive at the heart of the Jivraj v Hashwani case. “The consensus was that EU law does have a significant influence and the question was raised whether it is therefore necessary and desirable for arbitral tribunals to be able to refer questions on the interpretation of EU law direct to the ECJ,” he said. At present, only national courts can make such referrals.

Another talking point was the proposed harmonisation of European contract law for business and consumers – the subject of a recently published feasibility study by the EU that is expected to yield formal proposals soon. “While we are all keen to see more interaction between European law, business and arbitration, we need to consider what the nature of this harmonised law will be,” Winstanley said. “At the moment it is anticipated that the legislation will be ‘optional’. Are parties then likely to adopt it in preference to more certain state laws? And what enforceability issues would arise from the application of a non-national law?”

Winstanley said the most difficult topic tackled by the panel was whether, as a matter of EU public policy, European courts would be inclined to annul awards that breach European law. While observing that “public policy can be all things to all men” he said that “it appears awards may be subject to attack on public policy grounds, despite there currently being no reliable guidance on which EU rules may be deemed to constitute public policy.”

Going forward: it’s good to talk

Responding to the summaries, several delegates spoke of their fears that the EU’s reforms would have unintended consequences for arbitration in Europe. **Diana Droulers**, president of the International Federation of Commercial Arbitration Institutions and executive director of the Arbitration Centre of the Caracas Chamber of Commerce, pointed to the movement to constitutionalise arbitration in Latin America as an example of an improving effort that had not yielded good results. “Look deep” into the possible effects of any changes, she advised.

Catherine Kassedjian, a professor at University Pantheon-Assas (Paris II) and a member of the expert group advising the European Commission on whether to retain the arbitration exception, voiced her concern that by acting too hastily to amend Brussels I – without thinking through the full implications – the Commission would, in the long-term, drive arbitration away from European fora. She said there are inherent difficulties in getting

arbitration mixed up with Brussels I, an instrument that was never intended to deal with it, and that harmonising European contract law would result in an unnecessary addition to the plethora of existing rules and regulations and would only be of benefit to small business.

The EU should avoid falling into the trap of pushing reforms simply to justify its existence, she suggested - and it would be good to "pause and take stock" before charging ahead on these issues .

Arbitrator **Sophie Nappert**, who practices from 3 Verulam Buildings in London and moderates the OGEMID arbitration listserv, took the opposite view, pointing out that discussions about amending Brussels I have already lasted almost 10 years and that if more thought is given to the consequences we might never come up with a workable instrument.

Offering a viewpoint from Brussels, the director general of Business Europe, **Philippe de Buck**, said it had not been anticipated that the issue would take so long to resolve and that the intention of the EU in its reforms had always been to bolster the single market, create a level playing fields for investors and make life easier for citizens. "Changes in the EU take forever", he admitted.

The Polish vice president of the European Economic and Social Committee, **Jacek Krawczyk**, acknowledged that thought needs to be given to the future regime for enforcing investment and commercial awards in the wake of the Lisbon Treaty and any amendments to Brussels I. He also spoke of the difficulty of creating a harmonised law out of 37 different contract law systems: "Ideally in a single market you have a single law, but creating one is not an easy exercise when contract laws are so embedded in member states' legal systems".

The EU is currently in favour of a gradual approach, he revealed, harmonising some elements of the legislation and then "seeing where that takes us". He added that the task is not as simple as rewriting statutes because of the abundance of relevant case law in each member state, which is used to interpret the laws and to which companies look when assessing the risks of certain transactions.

As an employer, Krawczyk said he was not in favour of overregulation but said he was "a deep believer" in the need for a certain level of harmonisation between member states in order for the EU to succeed. He added that he thought Western Europeans were more sceptical about such harmonisation than those from the former communist bloc.

Noting Kassedjian's concern that arbitration might be driven away from EU fora, the chairman of the ICC Court of Arbitration, **John Beechey**, commented that he and Fry had spent a considerable amount of time over the past year seeking to ensure that the ICC Court of Arbitration stays within the EU (in the face of proposals that it should move from Paris to Geneva). He said he would be concerned if indecision over these questions forced businesses to take their arbitrations outside the EU. One of the reasons arbitration is so popular as a method of resolving disputes is because businesses hate uncertainty, he pointed out. To introduce uncertainties into a process that was seen to work would be a

"recipe for disaster".

Beechey stressed the importance of the EU having "the right interlocutors" and suggested that the ICC Court would be willing to share its experience of how arbitration works in practice with the EU Commission to help resolve these issues that are crucial to business confidence. He was sure that other EU-based arbitral institutions such as the LCIA would be happy to do the same."One can seek to avoid unintended consequences by having dialogue", he said.

Beate Gessel-Kalinowska vel Kalisz, the president of the Lewiatan Court of Arbitration in Warsaw and the organiser of the panel, added that arbitration institutions must be prepared to "get closer" to the reform process – "or other people will end up deciding these questions instead of us".

The European Forum of New Ideas was organised by Poland's confederation of private employers, Lewiatan, to celebrate Poland's presidency of the EU. Held in the spa town of Sopot on the Baltic coast, the forum covered issues such as whether capitalism is destroying democracy, the role of the media in politics and the Eurozone crisis. Above all it considered Europe's role in the globalised world and the future of the EU integration project. A special programme was devoted to arbitration at the instigation of the Lewiatan Court of Arbitration, which operates under the auspices of the confederation. The contents of that programme were conceived by Beata Gessel-Kalinowska vel Kalisz with the help of Sophie Nappert.

In their quest for "new ideas", the forum's 1,000 delegates benefitted from the inspiration of former Polish president **Lech Walesa**, who launched his Solidarity movement in nearby Gdansk in 1980. At a packed opening ceremony, Walesa said he hoped that he would be the "last revolutionary", since the collapse of communism has ended the need for confrontation, and raised questions regarding the future of European democracy, solidarity and economics.

Current Polish president **Bronislaw Komorowski** dared delegates to "be courageous" in their thinking and to retain the "competitive attitude" essential to the development of Europe.

Participants in the summit: "International Arbitration in Europe in the 21st century: Beyond Splendid Isolation"

Summit organiser and speakers

Beata Gessel-Kalinowka vel Kalisz, President of the Lewiatan Court of Arbitration in Warsaw

Sophie Nappert, barrister at 3 Verulam Buildings in London

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Panel on commercial arbitration

Adrian Winstanley, director general of the LCIA (moderator)

Judith Gill, partner at Allen & Overy (introduction)

Wolfgang Hahnkamper, chairman of the Austrian Arbitration Association (on Brussels I)

Beata Gessel-Kalinowka vel Kalisz, President of the Lewiatan Court of Arbitration in Warsaw (on Brussels I)

Wendy Miles, partner at Wilmer Cutler Pickering Hale & Dorr in London (on the influence of EU law on arbitration)

Maciej Szpunar, Poland's Deputy Minister of Foreign Affairs responsible for EU law, legal and treaty affairs (on the proposed harmonisation of contract law in the EU)

Albert Henke, professor of international investment law and disputes settlement and research fellow and lecturer on civil procedure at the Universita of Milan and a senior associate at Clifford Chance in Milan (on the annulment of awards and European public policy)

Diana Droulers, President of the International Federation of Commercial Arbitration Institutions and executive director of the Arbitration Centre of the Caracas Chamber of Commerce

Jerzy Rajski, professor of civil comparative law at Warsaw University

Panel on investment arbitration

Jason Fry, secretary general of the ICC Court of Arbitration in Paris (moderator)

Barton Legum, partner at Salans in Paris (introduction)

Alexander Belohlavek, partner at Belohlavek Law Office in Prague

Luigi Fumagalli, professor of law of State University of Milan

Sophie Nappert, barrister at 3 Verulam Buildings in London

Dirk Pulkowski, legal counsel at the Permanent Court of Arbitration in The Hague

Other participants

John Beechey, chair of the ICC Court of Arbitration in Paris

Jens Bredow, secretary general of the German Arbitration Institute (DIS) in Cologne

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Lorraine Brennan, managing director of JAMS International in London

Philippe de Buck, director general of Business Europe in Brussels

Francois Dessemontet, professor at Lausanne University and representative of the Swiss Arbitration Association (ASA)

Marcin Dziurda, president of the state treasury solicitor's office in Warsaw

Catherine Kessedjian, professor at the University Pantheon-Assas (Paris II)

Jacek Krawczyk, vice president of the European Economic and Social Committee

Bartosz Kruzewski, partner at Clifford Chance in Warsaw

Piotr Nowaczyk, partner at Salans in Warsaw

Anna Maria Pukszto, partner at Salans in Warsaw

Audley Sheppard, partner at Clifford Chance in London

Krzysztof Stefanowicz, vice president of the Lewiatan Court of Arbitration in Warsaw

Malgorzata Surdek, partner at CMS Cameron McKenna in Warsaw

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