SCHELLENBERG WITTMER

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Switzerland/France/UK/USA: Name two things that make each of them stand out

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Switzerland

1. The tradition of neutrality of Switzerland

- Traditional neutrality and non-EU membership play a role at the time of negotiating the contract and choosing a seat

2. Pro-arbitration attitude of Swiss courts:

- No court interference
- Rapid and efficient setting aside proceedings
- Very few awards set aside

France

1. Extension and transfer of arbitration agreements to non-signatories: wide-reaching approach

- **Extension**: the arbitration clause extends to any party involved in the negotiation and/or performance of a contract, irrespective of any national law.
  - *Pakistan v. Dallah* (Paris CA, 2011)

- **Subcontractors**: the arbitration clause of the main contract extends to the subcontractor who was aware of its existence and was directly involved in the performance of the main contract.
  - *Constructions Mécaniques de Normandie* (C. Cassation, 2011)

- **Chains of contracts**: the arbitration clause is automatically transferred down the distribution chain, from the manufacturer to the ultimate buyer, as an accessory of the property of the goods sold, irrespective of the ultimate buyer's ignorance of the clause.
  - *Alcatel Business Systems et al. v. Amkor Technology Inc et al.* (C. Cassation, 2007)

France (cont'd)

2. Arbitrators' duty of disclosure: extensive scope and strict sanctions

> Guarantee of an arbitrator above any suspicion or excessive severity?

- Precise disclosure of the **regularity** of the appointments
  - *Prodim* and *Somoclest* (C. Cassation, 2010): multiple appointments give rise to a "courant d'affaires".

- Precise disclosure of **past relationship** with the party or its counsel
  - *Tesco v. Neoelectra* (Paris CA, 2011): award set aside for failure to disclose a **more remote relationship** than required under the Orange list of the IBA Guidelines.

- Duty to **constantly investigate** any possible conflict of interests involving the arbitrator's **law firm**
  - *Tecnimont v. Avax* (Paris CA, 2009; C. Cassation, 2010; Reims CA, 2011): award set aside for failure of the chairman to disclose circumstances which he was not aware of and involved his law firm and subsidiaries and parent companies of one party.

UK

1. Anti-suit injunctions in support of arbitration

- The arbitration does not need to be pending or contemplated.
  - *Kamenogorsk* [2011] EWCA
- Limited to proceedings in non-EU Member States since ECJ's ruling in *West Tankers*.
- Intent to circumvent *West Tankers* by entering a judgment in terms of the award (sect. 66(2) of Arbitration Act) in order to pre-empt any subsequent irreconcilable judgment (Art. 34 of Regulation 44/2001).
  - *West Tankers v. Allianz* [2012] EWCA
  - *African Fertilizers* [2011] EWHC
- Question: can a judgment entered in terms of an award under sect. 66(2) be enforced as a judgment under the Regulation or does it fall under the arbitration exception?

UK (cont'd)

2. **Appeal on a point of law** (sect. 69 of the Arbitration Act)

- Unless otherwise agreed by the parties
  - e.g. choice of ICC or LCIA Arbitration Rules
  - but not the UNCITRAL Rules
    - *Shell Egypt West Manzala v. Dana Gas Egypt Ltd* [2009] EWHC: an arbitration agreement providing that the award shall be "*final, conclusive and binding*" does not exclude an appeal on a point of law but merely expresses the *res judicata* effect of the award.
- Need of the agreement of all the parties or leave of the court under restrictive conditions
  - some standard forms of contract contain the express consent of the parties, in order to avoid the discretionary power of the court to grant leave.

USA

1. Doctrine of “manifest disregard of the law”

- Prudential ground for setting aside awards rendered in the US, in addition to the statutory grounds of the Federal Arbitration Act.
- Conditions: the arbitrators were aware of the existence of a clearly applicable legal principle but decided to ignore it.
- Uncertainty as to its survival since *Hall Street* (US Supreme Court, 2008).
- Split among Circuit Courts; Second Circuit (appellate court for NYC) considers that “manifest disregard of the law” remains a valid ground for setting aside awards.

USA (cont'd)

2. Class arbitration

- *Green Tree Financial Corp. v. Bazzle* (US Supreme Court, 2003): class arbitration may be available even when the arbitration agreement is silent on the issue.
- 300 class arbitrations pending before the AAA.
- The worst of two worlds? Typical disadvantages of class actions (excessive procedural burden and high damages award) but with no second instance review, while loss of traditional benefits of arbitration (rapidity, confidentiality, informality).
- Class waivers held unconscionable in certain States.
- *Stolt Nielsen v. AnimalFeeds* (2010) and *AT&T v. Concepcion* (2011): new hostile approach of the Supreme Court: class arbitration changes so much the nature of arbitration that it cannot be presumed in the silence of the arbitration agreement.
- Uncertain future of class arbitration in contractual claims v. statutory claims.

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Thank you

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