INTERNATIONAL COMMERCIAL ARBITRATION

Working Group 3

Case study on court control

Company A in country A and Company B in country B have entered into a merger agreement (the "Merger Agreement"), whereby the respective subsidiaries in country X are going to merge into one single company ("Newco").

Among the other terms and conditions of the Merger Agreement is a clause related to the employees of A's and B's subsidiaries in country X. This clause provides that Newco is to have no more than 1000 employees from the day of its constitution. Furthermore, this clause provides that Newco's technical department is going to employ people coming from A's subsidiary, Newco's marketing department is going to employ people from B's subsidiary, and Newco's administrative staff is going to consist of employees coming from both subsidiaries.

The cap of 1000 employees for Newco implies that the total number of employees in A's and B's subsidiaries has to be reduced prior to the merger. Each company is counting on reallocating some of these employees within other affiliate companies, whereas others will have to terminate their employment relationship.

The Merger Agreement contains an arbitration clause, according to which disputes between the parties arising out of the contract are to be solved by arbitration in country Y, in accordance with the UNCITRAL Arbitration Rules. The law governing the Merger Agreement is the law of country Y. Country Y has adopted the UNCITRAL Model Law on International Commercial Arbitration.

A's and B's subsidiaries initiate the process of reduction of personnel necessary to comply with the Merger Agreement.

The employees of A's subsidiary refuse to be reallocated or laid off. They invoke labour law of country X, which provides that, in case a company is planning a reorganisation that might imply reallocation of termination of employment relationships, negotiations with the employees have to be started in the initial phase of such planning. Any commitment taken by the employer, which might imply reallocation or termination, is invalid, unless it has been preceded by a serious negotiation with the representatives of the employees. In this case, negotiations with the employees were started after the Merger Agreement had been signed.

On the basis of the foregoing, Company A invokes the invalidity of the Merger Agreement and desires to renegotiate the contract modifying the clauses concerning the employees, or, alternatively, that the contract is ceases to have any effect.

Company B does not accept to renegotiate or terminate the Merger Agreement, and initiates arbitral proceedings against Company A, requesting that Company A is ordered to reimburse damages connected with its failure to perform its contractual obligations relating to the reduction of the employees, and for having unduly terminated the contract.

The arbitral tribunal decides in favour of Company B, reasoning that the law chosen by the parties to govern the contract was the law of Y, and that any invalidity under the law of X could not affect the enforceability of the obligations contained in the contract.

Oral assignment for WG 3, to be presented on **10 October 2014:**

1. Company A challenges the validity of the award before the court of country Y.
   - Describe the grounds of invalidity invoked by A
   - Describe the defence made by B

2. Company B seeks enforcement of the award by the court of X.
   - Describe the grounds invoked by A to avoid enforcement
   - Describe the objections made by B