Published in: IBA Section on Business Law - Committee D Newsletter - October 2002 - p. 44 - 45

of single-party or tri-partite tribunals (section 13).

(3) **Enhanced role of the Singapore International Arbitration Centre (SIAC) in appointment of arbitrators**: in a tri-partite tribunal, section 13(8) gives the Chairman of the SIAC the power to appoint a third arbitrator should the parties fail to agree upon such an appointment.

(4) **Finality of the award**: an arbitration award by the tribunal is final and binding upon the parties unless they request a correction or interpretation of an award or the arbitrator decides to make an additional award on the claims presented in the arbitral proceedings (sections 43 and 44).

(5) **Appeal to the Court**: the parties may appeal to the court on a question of law arising out of the arbitration award. They may do so by agreement or leave of court (section 49). The court may then confirm, vary, remit or set aside the award in whole or in part.

The other provisions of the AA 2001 to take note of include:

(1) the arbitration agreement must be 'in writing' (section 4);
(2) commencement of the arbitration proceedings (sections 9-11);
(3) challenge of arbitrators (sections 14 and 15);
(4) removal and liability of arbitrators (sections 16, 17 and 20);
(5) the arbitration proceedings (sections 23, 24 and 25);
(6) setting aside of award (section 48).

International Arbitration (Amendment) Act 2001

One of the most significant changes to the International Arbitration Act is in relation to the law of arbitration other than the Model Law (section 15). Section 15 of the IAA, before its amendment, allows parties to an international arbitration to opt out of the provisions of Part II of the IAA or the Model Law. However, the wordings of that section led to interpretation difficulties, ie whether an agreement to use another institutional rules of arbitration meant that Part II of the IAA or the Model Law were 'impliedly' able to be opted out by the parties.

As such, to avoid further confusion, section 15 was amended to make it clear that the parties may expressly opt out of the Model Law or Part II of the IAA and that reference to the adoption of any arbitral institutional rules shall not be sufficient to exclude the application of the Model Law or Part II of the IAA to the arbitration concerned.

Switzerland

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Lis pendens between arbitration in Switzerland and litigation abroad

Procedural background

A recent Swiss Federal Tribunal case[1] deals with the challenge of an arbitral award on jurisdiction in a dispute arising out of a construction contract.

Colon Container Terminal SA 'CCT' (Republic of Panama) had (by contract including an arbitration clause) entrusted Fomento de Construcciones y Contratas SA 'FCC' (Spain) with civil engineering works for the construction of a harbour terminal in Coco Solo North (Republic of Panama). The construction contract was terminated by both parties.

FCC lodged its claim with the Court of First Instance in Panama, at the place where the work was carried out. CCT objected to the Court of First Instance jurisdiction on the basis of the arbitration clause included in the construction contract, but its arbitration defence was rejected by the Court of First Instance as untimely.

CCT appealed the Court of First Instance ruling and simultaneously commenced International Chamber of Commerce arbitration in Geneva, Switzerland. Its appeal was successful and hence the decision of the Panamanian Court of First Instance was overruled.

FCC then appealed the Appelate Court decision before the Supreme Court of Panama.

Thereafter, the Arbitral Tribunal sitting in Geneva, without waiting for the outcome of the Panamanian proceedings pending before the Supreme Court of Panama, found that it had jurisdiction over the dispute and rendered the award on jurisdiction accordingly.

Soon after the award was rendered, however, the Panamanian Appellate Court's decision was reversed by the Supreme Court of Panama, which found CCT's arbitration defence to be untimely.

In light of this judgment, FCC then challenged the arbitral award before the Swiss Federal Tribunal, asserting jurisdiction over the dispute.

Decision

The Tribunal restated *lis pendens* and *res judicata* principles applicable to judges and went on to apply such principles by analogy to arbitral tribunals. The Tribunal rationale was that arbitral awards are enforceable in the same way court judgments are, and therefore there is the same interest to avoid contradictory decisions (equally and simultaneously enforceable) in the same case.

The Tribunal denied any priority of the arbitrators to decide on their own jurisdiction because of the pending lawsuit. The Tribunal

referred to Article 9 of the Swiss Private International Law Act (Swiss Conflicts of Law Statute) which gives priority to the court first seized.[2]

The Tribunal reasoned that the foreign state courts should be allowed to be first to decide a plea already pending before them that the arbitration clause was void or had been waived by the parties, in accordance with the principle of *lis pendens*.

According to the Federal Tribunal, the foreign state courts were also in a better position than the Arbitral Tribunal to decide, under their own law, whether an objection to their jurisdiction was timely or not.

The decision also elaborates on the conditions for a waiver to be recognised in the context of a state court action (see comments below).

The Swiss Federal Tribunal set aside the award on jurisdiction. The Tribunal held that the Arbitral Tribunal should have stayed its proceedings pending a final decision by the Panamanian Courts. The Arbitral Tribunal could have resumed its proceedings had this final decision been unlikely to be rendered within a reasonable time or had it no chance to be recognised in Switzerland.

Comments

A too quick reading of the Federal Tribunal decision might lead practitioners to think that an Arbitral Tribunal sitting in Switzerland must systematically stay arbitral proceedings because a foreign action was commenced before the arbitration.

Not every prior judicial proceeding is relevant according to Article 9 of the Swiss Private International Law Act. In addition to having been filed before the Swiss proceeding, (1) both proceedings must deal with the same subject-matter and involve the same parties; (2) it can be expected that the foreign court will render a decision within a reasonable time; and (3) that the foreign decision must be capable of being enforced in Switzerland.[3]

In the case at stake, what probably lead the Federal Tribunal to quash the award was the fact that the parties had waived their right to arbitrate, FCC had offered CCT to waive such right by lodging its claim before the Court of First Instance in Panama, and CCT accepted that offer by untimely mention that it did not accept proceeding on the merits before the Court of First Instance.

It should be noted that Article 1414 of the Panamanian Civil Procedure Code provides for the presumption of a waiver of the right to arbitrate if the respondent does not avail itself of the arbitration agreement within a short deadline after the claim has been lodged: it is too late for the respondent to invoke the arbitration clause at the time the brief (answer) on the merits is lodged, even if done *in limine litis*.[4]

Had there been no such waiver (by CCT's untimely motion equivalent to a lack of action) of the right to arbitrate, and hence, had there been a valid arbitration clause (according to Swiss law) in existence at the time the Arbitral Tribunal rendered its award, the Swiss Federal Tribunal would not have it set aside, because the Arbitral Tribunal would have been right in asserting jurisdiction over the case pursuant to a combined application of Article 9 Swiss Private International Law Act with Article II paragraph 3 New York Convention and Article 7 lit b Swiss Private International Law Act.[5]

Therefore, as long as there is a valid arbitration clause pursuant to Swiss law (that has not been duly waived by application of the *lex fori*), there is no foreign court decision capable of being enforced in Switzerland, and thus no *lis pendens*, regardless of whether a court proceeding is commenced prior to or after arbitration being initiated.

Notes

1 Swiss Federal Tribunal, 1st Civil Court, 14 May 2001, *Fomento de Construcciones y Contratas SA (Spain) v Colon Container Terminal SA* (Republic of Panama). The decision can be found on the website of the Swiss Federal Tribunal at www.bger.ch, then click on 'Rechtsprechung', then on 'Leitentscheide ab 1954', then on 'Volltextsuche', and type 'BGE 127 III 279, finally click on 'Finden' and on the green reference that will become visible and the full original French text of the decision will appear. Both the French original version and an English translation of the decision can be found in ASA Bulletin 2001 respectively at 544 and 555.

2 Article 9 of the Swiss Private International Law Act reads: 'If an action concerning the same object is already pending abroad between the same parties, the Swiss Court shall stay the proceeding if it may be expected that the foreign Court will, within a reasonable time, render a decision that will be recognisable in Switzerland.' (Free translation.)

3 A good analysis (in English) of when an Arbitral Tribunal (sitting in Switzerland) confronted with parallel litigation abroad should stay the arbitration has been published as an Editor's note in the *ASA Bulletin* 2001 at 451 *et seq.*

4 A fine analysis (in French) of *lis pendens* issues, along with a detailed sequence of procedural steps in the *Fomento* case, can be found in Dr Jean-Marie Vulliemin's article: 'Litispendance et compétence internationale indirecte du juge étranger' in *ASA Bulletin* 2001 at 439 *et seq.*

5 Article 7 lit b Swiss Private International Law Act reads: 'If the parties have concluded an arbitration agreement with respect to an arbitrable dispute, the Swiss Court before which the action is brought shall decline jurisdiction unless: the Court finds that the arbitration agreement is null and void, inoperative or incapable of being performed' (free translation), thereby strictly recalling the wording of New York Convention, Article II, para 3.

United Arab Emirates

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Enforcement of foreign arbitration awards

With arbitration increasingly becoming the preferred forum for dispute resolution in the UAE, interest in the requirements for the enforcement of foreign arbitration

INTERNATIONAL BAR ASSOCIATION
COMMITTEE D NEWS
NEWSLETTER OF THE ARBITRATION AND ADR COMMITTEE OF THE SECTION ON BUSINESS LAW

the global voice of the legal profession

Vol 7 No 2 **OCTOBER 2002**

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The rapid pace of change and developments in international arbitration which we mentioned in the last edition of the Newsletter has continued unabated. The nature and scale of these changes are reflected in Committee D's recent and forthcoming activities and in the articles contained in this latest edition of the Newsletter.

In March 2002, Committee D held the latest in its very successful series of International Arbitration Days. This year's Conference, which was held in Brussels and drew record attendance, was chaired by Bernard Hanotiau and dealt with the very current and expanding area of the arbitration of corporate disputes. This edition of the Newsletter contains a number of reports on some of the interesting topics presented in Brussels.

You will also find on page 9 of the Newsletter a copy of our programme for next year's International Arbitration Day in Sydney, Australia on 13 February 2003 on the topic of International Arbitration and Globalisation. You will see that we have been able to assemble a list of excellent speakers on current issues. As in past years, the International Arbitration Day will be followed by an LCIA Symposium on Friday, 14 February 2003. In addition, the LCIA and the Arbitration and Mediation Institute of New Zealand will hold a Conference in Auckland on Thursday, 20 February 2003. All these events have been conveniently scheduled to coincide with the America's Cup races which commence in Auckland on Saturday, 15 February 2003.

This edition of the Newsletter also contains three reports on recent developments in the field of ADR. Klaus Reichert has contributed an article on the European Commission's recent paper on the future of ADR. Robert M Smith has contributed an interesting article on mediating international intellectual property disputes and Fabian Ajogwu reports on recent developments in ADR in Nigeria.

Continued overleaf

Contributions to this Newsletter are always welcome and should be sent to the Editor, Audley Sheppard, at the address below:

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