ARBITRATION & ADR - SWITZERLAND

Failure to comply with mandatory pre-arbitration requirement

July 14 2016 | Contributed by Tavernier Tschanz

In a recent decision, the Supreme Court annulled an arbitral award for failure to comply with a mandatory pre-arbitration requirement.(1) It held for the first time that failure to comply with such a requirement leads to the suspension of the arbitration proceedings until the requirement has been complied with.

Facts

The dispute arose between X and Y out of two association agreements and two agreements to constitute an operational organisation in relation to oil exploitation and exploration. The association agreements contained an arbitration clause – according to which any dispute had to be resolved by an arbitral tribunal seated in Geneva in accordance with the United Nations Commission on International Trade Law Arbitration Rules – preceded by a conciliation attempt pursuant to the 2001 Alternative Dispute Resolution (ADR) Rules of the International Chamber of Commerce (ICC). After a dispute arose, Y filed a request for conciliation, following which a number of written exchanges regarding the conduct of the proceedings took place between the parties and the conciliator appointed by the ICC. In view of the difficulty scheduling a conference call to discuss these procedural issues further, Y withdrew its request for conciliation and started arbitration proceedings against X. X objected that the request for arbitration was unfounded, since the conciliation was still pending. It informed Y that it would object to the arbitral tribunal's jurisdiction to decide the dispute. The first stage of proceedings before the arbitral tribunal was thus limited to jurisdiction and, in a partial award, the arbitral tribunal declared that it had jurisdiction to decide the dispute.

X challenged the partial award for lack of jurisdiction *ratione temporis* based on Article 190(2)(b) of the Private International Law Act.

Decision

According to the arbitrator, the pre-arbitration requirement was mandatory and did not seem bound to fail. The exchange of written communications sufficed to conclude that the parties had carried out a real conciliation attempt, in good faith and in accordance with the ADR Rules.(2)

The Supreme Court set forth the features of the ADR Rules, pointing out that pursuant to Article 5(1) of the rules at least a discussion between the parties and the conciliator must take place for parties to be entitled to withdraw form the conciliation procedure.(3)

Regarding the ADR method chosen by the parties, the Supreme Court rejected Y's argument (based on the words "attempt of conciliation" in the clause) that a good-faith attempt was sufficient, irrespective of the outcome thereof and of the procedure applied. Based on an objective interpretation of the clause containing the pre-arbitration requirement, the Supreme Court found that the parties had agreed to attempt conciliation pursuant to the ADR Rules before validly starting

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arbitration and that the clause established clearly that "the parties' will to [...] confine the attempt of conciliation in a structured institutional framework and a procedure that covers all the steps of the process".(4)

Based on this finding, the Supreme Court found that the parties had not complied with Article 5(1), because they had not discussed the manner in which the conciliation would be carried out with the conciliator, the written exchanges of correspondence being insufficient for this purpose because they mainly pertained to researching a date for holding a conference call. Therefore, the Supreme Court found that there had not been a valid conciliation attempt.(5)

The Supreme Court then determined that X had not committed an abuse of rights by arguing that the arbitral tribunal had wrongly admitted compliance with the pre-arbitration requirement. In this respect, referring to an earlier decision, the Supreme Court recalled that the interdiction of abuse of rights also applies to procedure and that:

> *"a party that invokes the non-exhaustion of the pre-arbitration requirement of conciliation in its challenge against the award, while it had not proposed it to the other party during arbitration, acts abusively."*(6)

However, according to the Supreme Court, there was no reason to assimilate the facts underlying the earlier decision to the facts of the case at hand, in which there was a mandatory pre-arbitration requirement, where X had complained actively from the first stage of the conciliation and subsequently before the arbitral tribunal.(7)

Finally, noting that its previous decisions on the matter (ie, 4A_18/2007, 4A_46/2011 and 4A_124/2014) had left open the question of the penalties for failure to comply with a mandatory pre-arbitration requirement, the Supreme Court for the first time provided an answer. Referring to the unsatisfactory consequences of damages and of declaring the request inadmissible, but maintaining its statement that it could be doubted whether there is a generally applicable answer, the Supreme Court found, in accordance with the majority of scholars in Switzerland, that the preferable solution is the suspension of the arbitration together with the fixing of a time period to allow the parties to start or pursue the conciliation attempt.(8) Considering that in the present case the arbitration proceedings had begun while the conciliation attempt was still pending, and that the plaintiff had participated in the constitution of the arbitral tribunal, it made sense to suspend the arbitration proceeding until the conciliation proceeding was terminated. The Supreme Court left it up to the arbitral tribunal to decide the modalities of such suspension.(9)

Comment

This is one of the rare cases in which the Supreme Court has annulled an arbitral award. Despite holding that there may not be a solution applicable to all cases, the decision provides some legal certainty regarding the consequence of failure to comply with a mandatory pre-arbitration requirement, while the previous cases on such requirements had left the question open.

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Endnotes

(1) Supreme Court, 4A_628/2015, March 16 2016 (in French).

(2) Ground 2.2.1.

(3) Ground 2.3.

(4) Ground 2.4.1.

(5) Ground 2.4.2.

(6) Ground 2.4.3.1, referring to Supreme Court, 4A_18/2007 and to the criticisms to this finding expressed by Berger/Kellerhals, International and Domestic Arbitration in Switzerland, 3rd ed, 2015, N. 583.

(7) Ground 2.4.3.2.

(8) Ground 2.4.4.1.

(9) Ground 2.4.4.2.
