

Arbitration - Switzerland

Bankruptcy no restriction to arbitration unless it excludes bankrupt's legal capacity

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In a recent decision the Supreme Court revisited the question of the impact of the party's bankruptcy on the continuation of arbitration.⁽¹⁾

Facts

A Chinese company started an International Chamber of Commerce arbitration - with the seat in Geneva - against a Portuguese company in relation to a sales and purchase agreement.

The respondent had gone bankrupt before arbitration began. Based on this bankruptcy, the respondent objected to the arbitral tribunal's jurisdiction. More particularly, it invoked a provision in Portuguese law, according to which:

"Without prejudice to provisions contained in applicable international treaties, the efficacy of arbitral agreements relating to disputes that may potentially affect the value of the insolvency estate and to which the insolvent is party shall be suspended. Procedures that are pending at the moment of the declaration of insolvency shall continue, without prejudice to the provisions set forth in Article 85(3) and of the Article 128(3) if applicable."

The arbitral tribunal dismissed the objection by way of an interim award. The respondent challenged the award before the Supreme Court.

Decision

The Supreme Court dismissed the challenge. It upheld the arbitral tribunal's finding that the provision did not apply to the subject of the dispute.

Referring to its decision in *Vivendi*,⁽²⁾ the Supreme Court confirmed that the parties' subjective capacity to arbitrate relates to the legal capacity of the parties.⁽³⁾ Therefore, the capacity to arbitrate is governed by the law which is designated by the general conflict of law provisions pertaining to legal capacity (ie, Articles 154 and 155c of the Private International Law Act).⁽⁴⁾ The Supreme Court further considered that the provision which defines the law applicable to the merits of the dispute (ie, Article 187(1) of the act), is not tailored to the determination of the parties' legal capacity.⁽⁵⁾

Pursuant to Articles 154 and 155c, the legal capacity of an entity should be determined in application of the law to the place of incorporation of this entity. Thus, in the case at hand, the respondent's legal capacity had to be determined in application of Portuguese law.⁽⁶⁾ However, according to the Supreme Court, Articles 154 and 155c designate the legal provisions which govern the parties' legal capacity only. Any "incapacity to arbitrate", which would result from other provisions of Portuguese law, is irrelevant for the Swiss law governing the arbitration.⁽⁷⁾ More particularly, should such law provide for limitations to the capacity to arbitrate without affecting the legal capacity of this party, this limitation would not apply in a Swiss arbitration.⁽⁸⁾ In this case, the Supreme Court found that bankruptcy was such a limitation since, according to Portuguese law, a company has a legal personality until its liquidation is complete.⁽⁹⁾

The Supreme Court denied the respondent's reference to *Vivendi*. The *Vivendi* case did not intend to set a general principle according to which a foreign legal provision which would paralyse the effects of an arbitration agreement on bankruptcy would result in the bankrupt party being deprived of its capacity to arbitrate.⁽¹⁰⁾ According to the Supreme Court, *Vivendi* must be read "in the specific context of Polish law and of the literature developed thereto".⁽¹¹⁾

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Comment

A possible reading of *Vivendi* might have been that a party in bankruptcy is prevented from arbitrating if the relevant bankruptcy law provides for such effect. This is not the case.

The Supreme Court refined its reasoning in *Vivendi*. Restrictions to arbitration contained in foreign law provisions which do not affect the parties' legal capacity are irrelevant to an arbitration in Switzerland.⁽¹²⁾ In this case, the Supreme Court considered that the Portuguese legal provision at stake did not relate to the parties' legal capacity, but merely to the material validity of the arbitration clause.⁽¹³⁾ Under Swiss law, such validity is governed by the more favourable law designated by Article 178(2).

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Endnotes

(1) Supreme Court, October 16 2012, 4A_50/2012. The full text of the decision is available in German at www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm.

(2) Supreme Court March 31 2009, 4A_428/2008. For further details please see "The uneasy relationship between arbitration and bankruptcy".

(3) Ground 3.3.1.

(4) Ground 3.3.2.

(5) Ground 3.3.2.

(6) Ground 3.3.5.

(7) Ground 3.4.2.

(8) Ground 3.3.4.

(9) Ground 3.4.2.

(10) Ground 3.5.3.

(11) Ground 3.5.3 (author's translation).

(12) Tschanz in *Commentaire Romand, Loi sur le droit international privé (LDIP) – Convention de Lugano 2011*, Article 178 of the LDIP (62-63).

(13) Ground 3.6.

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