Arbitration - Switzerland

Court declines to hear constitution-based challenge against arbitral award

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May 09 2013

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Introduction

In a recent decision, the Swiss Supreme Court confirmed that an *ad hoc* arbitral tribunal seated in Geneva was regularly constituted within the meaning of Article 190(2)(a) of the Private International Law Act where French courts had appointed the co-arbitrator of the Israeli respondent in the arbitration proceeding.(1)

The domestic court seized to appoint the co-arbitrator was located in a state (France) other than that which the parties had then chosen as the seat of the arbitration (Switzerland). The only connection with France at the time of the appointment by the French courts was the reference in the arbitration clause to the president of the International Chamber of Commerce in Paris, as the ancillary appointing authority of the presiding arbitrator. The French Court of Cassation considered such a connection sufficient for the purpose of the French courts' jurisdiction to appoint the co-arbitrator.

The Swiss Supreme Court held that it was bound by the decisions of the French courts, at least with respect to their jurisdiction to appoint the co-arbitrator.(2)

Facts

The dispute referred to arbitration pertained to a participation agreement for the construction, maintenance and exploitation of Eilat-Ashkelon Oil Pipeline. The arbitration clause contained in the participation agreement provided that each party had to nominate an arbitrator, and that:

> "*[i]f such arbitrators fail to settle the dispute by mutual agreement or to agree upon a Third Arbitrator, the President of the International Chamber of Commerce in Paris shall be requested to appoint such Third Arbitrator.*"

No reference was made in the arbitration clause to the place of arbitration.

After having started arbitration, further to the respondent's refusal to nominate its arbitrator, the claimant requested the president of the *Tribunal de grande instance* of Paris to appoint the respondent's co-arbitrator. In the face of the respondent's persistent refusal to nominate its co-arbitrator, the French courts proceeded to make the appointment. The French courts' jurisdiction was eventually upheld by the Court of Cassation on February 1 2005. The court considered that the impossibility for a party to access a court of law, even an arbitral tribunal, would be tantamount to a denial of justice inconsistent with fundamental international public policy as enshrined in the principles of international commercial arbitration and Article 6(1) of the European Convention on the Protection of Human Rights. According to the court, the protection against denial of justice conferred jurisdiction on the French courts to assist and cooperate in the constitution of the arbitral tribunal, since there was a connection, however remote, with France.(3) The appeal court appointed the respondent's co-arbitrator and the place of arbitration was agreed to be Geneva, Switzerland.

The respondent's objection of irregular composition was dismissed by the arbitral tribunal in a partial award on February 10 2012. The arbitral tribunal held that a party to an arbitration clause has the primary duty to nominate an arbitrator, and that failure to comply with this obligation allows the other party to seek assistance from the competent domestic court. The arbitral tribunal further considered that, in the specific case, the parties' right to be heard had been respected and the decision of the Court of Cassation could not be questioned legitimately.

The respondent challenged this partial award before the Supreme Court on the grounds that the arbitral tribunal as constituted had no jurisdiction to hear the case.

Decision

The Supreme Court dismissed the respondent's challenge against the partial award and confirmed the arbitral tribunal's finding.

The Supreme Court pointed out that the dispute presented two particularities:

- A foreign domestic court had appointed an arbitrator for the respondent, which unsuccessfully challenged this appointment; and
- The respondent's arbitrator had been appointed before the seat of the arbitration was agreed to be in Geneva.(4)

Regarding the second particularity, the Supreme Court held that it appeared questionable whether the respondent still had an interest in challenging the appointment of its arbitrator by the appeal court. Assuming such a challenge to be successful, the claimant could simply request the competent judge in Geneva to appoint an arbitrator pursuant to Articles 179(2) and (3) of the Private International Law Act. Thus, the respondent would be in the same position as that resulting from the challenged award.(5)

Regarding the first particularity, the Supreme Court recalled that the decision of a domestic court appointing an arbitrator is not *res judicata* (ie, final and binding). It is for the arbitral tribunal to decide on its own jurisdiction and composition in a decision that can be challenged before the Supreme Court.(6) However, the Supreme Court considered that this case should be treated differently, for various reasons. First, the appointment proceeding had been conducted before the courts of a state other than that of the place of the arbitration. Second, the appointment of the respondent's co-arbitrator by the French courts was not merely an administrative decision, but a decision taken by the highest court in France in full consideration of all relevant arguments. Third, the arbitrators had in no way expressed their intention to review the decisions of the French courts on the issue in dispute. In light of these considerations, the Supreme Court found that the respondent was prevented from indirectly challenging the French decisions before the Supreme Court.(7)

The Supreme Court considered that the only question it was required to examine, which had not been addressed by the French Court of Cassation, was whether the arbitration clause was effectively meant to exclude any domestic court from appointing the respondent's arbitrator.(8) The respondent argued that the parties had deliberately omitted to mention the place of the arbitration and the applicable law in order to exclude any judicial intervention in the process of the co-arbitrators' appointment, with the consequence that if one party failed to nominate its co-arbitrator, the arbitration would not take place.(9)

The Supreme Court, proceeding by way of interpretation of the contractual provision based on the principle of good faith, considered that it was inconceivable that the parties had consciously agreed that the failure by one of them to nominate its arbitrator would have prevented the other party from proceeding in arbitration.(10)

Comment

The judicial review of the regularity of the composition of the arbitral tribunal by Swiss courts is guaranteed by local courts when the initial determination on the constitution of the tribunal is made in ancillary proceedings (as is the case for *ad hoc* arbitration), and by the Swiss Supreme Court in the challenge against the arbitration award when the review of the regularity of the composition of the tribunal is made by a private body (as is usually the case for institutional arbitration)(11) (for further details please see "No two-tier judicial review of constitution of arbitral tribunal"). This latest decision, while short of setting forth a generally applicable rule, seems to suggest that the Supreme Court would also decline to hear constitution-based challenges when the arbitral tribunal has been appointed, in part, by a foreign judicial authority having jurisdiction to do so. If confirmed beyond the particularities of this case, it remains to be seen whether such practice would be consistent with the European Convention on the Protection of Human Rights standards.

What the Supreme Court's decision would have been had it found that the parties' intent had been to foreclose arbitration if a party failed to appoint its arbitrator remains to be seen. For instance, the parties' agreement could have been intended to exclude all interferences in their dispute by any state authority, even in assistance to the arbitration process. In particular, the Supreme Court would then have had to balance the parties' agreement against their protection against denial of justice.

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Endnotes

(1) Supreme Court 4A_146/2012. See www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.html (in French).

(2) Ground 3.3.2.

(3) *Etat d'Israël c/ société* National Iranian Oil Company, *Cour de cassation*, *Première chambre civile* 404, February 1 2005. See www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/02_15.237_635.html (in French), 3rd *Attendu*.

(4) Ground 3.3.

(5) Ground 3.3.1.

(6) Ground 3.3.2, referring to the Digest of Supreme Court Decisions, (ATF) Volume (115)(2)(294) and Volume 110, and to Tschanz in *Commentaire Romand, Loi sur le droit international privé, Convention de Lugano*, Helbing & Lichtenhahn, 2011, N 47 to Article 190.

(7) Ground 3.3.2.

(8) Ground 3.3.3.

(9) Ground 3.4.2.

(10) Ground 3.4.3.

(11) For example, ATF 138 III 270 and Supreme Court 4A_46/2011, May 16 2011.