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Arbitration - Switzerland

Arbitrator's ICC challenge process under New York Convention scrutiny

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Introduction

When administering an arbitrator's challenge, the International Court of Arbitration of the International Chamber of Commerce (ICC court) endeavours to ensure compliance with due process fundamentals – the parties, the affected arbitrator and the other arbitrators, as the case may be, are invited to comment in writing on the challenge. However, the reasoning of the ICC court's decisions on the merits of the challenge, usually taken at its monthly, non-public plenary session, are not communicated – and its decisions are final (ICC Rules of Arbitration 2012, Article 14(3), formerly Article 7(4)).

The Supreme Court recently confirmed, in an exequatur challenge proceeding, that in principle such process was consistent with the right to be heard minima guaranteed under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁽¹⁾

Facts

Two companies filed for debt collection proceedings in Switzerland against a third company in order to enforce a foreign ICC arbitration award.⁽²⁾ The debtor objected to the recognition and enforcement of the award in Switzerland. It argued that the award, issued following the ICC court's unmotivated dismissal of its challenge against one member of the arbitral tribunal, infringed its right to be heard. In the applicant's view, neither its continued involvement in the arbitration proceeding (notwithstanding its persistent constitution-based objection), nor its agreement to an ICC arbitration (and therefore to an unmotivated challenge decision pursuant to the ICC Rules of Arbitration) prejudiced its fundamental right to be heard. The Swiss enforcement courts dismissed the objection and declared the arbitral award enforceable in Switzerland. The Supreme Court upheld the lower courts' decisions.

Decision

The Supreme Court first set out to determine whether the challenge should be considered on the basis of the specific due process exception (New York Convention, Article 5(1)(b)), which pursuant to constant practice, includes the parties' right to be heard, or on the basis of the more general public policy reservation (Article 5(2)(b)). Referring to the general principles governing the relationship between *lex specialis* and *lex generalis*, the Supreme Court confirmed the eminently subsidiary character of the public policy reservation and declared that:

"the appreciation on the basis of the public policy reservation must be ruled out insofar as the [New York Convention] contains specific and precise dispositions on the concrete grounds of recognition or refusal of execution."⁽³⁾

According to the Supreme Court, such priority is even more justified considering that not all procedural irregularities, even those which could lead to the annulment of a Swiss international award, would preclude the recognition and enforcement of a foreign arbitral award in Switzerland – rather, only those "infringements of fundamental principles of the Swiss legal order which violate intolerably the sense of the law" would do so.⁽⁴⁾

On the merits of the applicant's arguments, the Supreme Court acknowledged that the lack of motivation of a decision on the arbitrator challenge would not ease the task of the judge of exequatur requested to verify the content of an arbitral award. However, it also found that such risk was for the party to bear, having consented freely to arbitration for other good reasons. Indeed:

"[s]hould it be allowed for that party to simply invoke the lack of motivation to resist the enforcement of an award issued in application of a freely chosen procedure, it would often lead to protect a behavior inconsistent with good faith requirements. The fact that judicial authorities' decisions need motivating does not imply that the same principles should prevail in arbitration proceedings, where the parties' autonomy plays a far more important part and which, [insofar as they are] freely chosen for other advantages, should not necessarily offer the same guarantees as ordinary judicial proceedings."⁽⁵⁾

The Supreme Court referred along the same lines to its earlier case law, stating that the right to be heard does not, in international arbitration, warrant the right to have a reasoned arbitral award.⁽⁶⁾

Comment

Little can be said about the outcome of the Supreme Court's reasoning. When consenting to arbitration parties agree to forfeit certain procedural guarantees typically associated with court litigation – they cannot in good faith negate such an agreement when confronted with the enforcement of an adverse arbitral award.

However, it would be inaccurate to conclude that when consenting to ICC arbitration, the parties could possibly implicitly waive their right to a motivated decision on an arbitrator's challenge. It is dubious that parties could even invoke their right to be heard with respect to a procedure conducted before a private *gremium*, such as the ICC court, and leading to a decision binding on the parties (and the arbitrators) by virtue of (contractual) agreement to the ICC managing the arbitration, but devoid of any jurisdictional effects (and indeed not assimilated to an award).⁽⁷⁾⁽⁸⁾

The regularity of the arbitral tribunal's constitution is subject to judicial review – regardless of and independently from the ICC court's prior decision – in the challenge proceeding against the arbitral award or, as a last resort, in the recognition and enforcement proceeding, both of which are compliant of the parties' right to be heard. The short answer could thus have been that the parties' right to be heard was respected with their right to challenge the award, including on constitution grounds, and ultimately to object to its enforcement. This was in effect emphatically stated in prior decisions from another chamber of the Supreme Court.⁽⁹⁾

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Endnotes

- (1) Supreme Court, 5A_68/2013 and 5A_69/2013, July 26 2013. See www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.html (in French).
- (2) It transpires from the narrative of the facts that the applicant had challenged the award on constitution grounds before the Paris Court of Appeal, presumably unsuccessfully.
- (3) Ground 4.2.1 (authors' translation). On the uneasy distinction between Article 5(1) (to be invoked by the parties) and Article 5(2) (applied *ex officio*). See Supreme Court, 4A_233/2010, July 28 2010, Ground 3.3.
- (4) For further details please see "International award annulled on grounds of procedural public policy infringement".
- (5) Ground 4.2.2 (authors' translation).
- (6) *Id* referring to earlier decisions published in ATF 134 III 186, Ground 6.1; 133 III 235, Ground 5.2; 130 III 125, Ground 2.2. For further details please see "Four recent Supreme Court arbitration decisions provide legal guidance".
- (7) Supreme Court, 4A_644/2009, April 13 2010, Ground 1, and 4P.226/2004, March 9 2005, Ground 3.1.
- (8) In effect, in proceedings ancillary to the arbitration which gave rise to the enforcement and to the decision commented herein, the applicant had also (unsuccessfully) assigned the ICC court before the *Tribunal de Grande Instance* in Paris to obtain the communication of the motivations of its decision on the arbitrator's challenge. *Tribunal de Grande Instance de Paris*, December 19 2012, excerpts in *Les Cahiers de l'arbitrage* 2013/2, Pages 476 to 477 and Note S Akhouad, *Les décisions de l'institution d'arbitrage sur la demande de récusation d'un arbitre sont-elles confidentielles?*, Pages 455 to 476. The *Tribunal de Grande Instance* dismissed the case, among other reasons, on the grounds that due process was guaranteed with the possibility for the parties to seek the assistance of judicial authorities in ancillary proceeding failing any resolution from the institution in charge of managing the proceeding, or as a last resort with the possibility to invoke constitution grounds in the challenge of the award.

⁽⁹⁾ Supreme Court, 4A_14/2012, May 2 2012, published in ATF 138 III 270. For further details please see "No two-tier judicial review of constitution of arbitral tribunal". Supreme Court, 4A_146/2012, January 10 2013. For further details please see "Court declines to hear constitution-based challenge against arbitral award".

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