The Arbitral Tribunal's Power to Amend Contracts

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Facts

A 20-year charterparty provided that the shipowner and the charterer could negotiate an extension of its term, and that if they failed to agree on the terms of an extension, the charterer had an option to purchase the ship at scrap value. The parties reached an agreement on the terms of the extension to the charterparty, with the exception of a new purchase option which the charterer wanted to include in the agreement. The charterer exercised the purchase option of the original charterparty, asserting that the parties had failed to agree on all the terms of the extension.

The arbitral tribunal, sitting in Geneva, held that the principle of good faith under Belgian law required that the purchase option of the original charter party be incorporated in the agreement regarding the extension of the charter party. Consequently, it held that the shipowner was not entitled to exercise the original purchase option. The shipowner challenged the award before the Swiss Supreme Court, on the grounds that the arbitral tribunal:

- exceeded its jurisdiction;
- decided *ultra petita* (ie, its decision went beyond what the parties had asked it to decide upon); and
- violated the right to be heard.

The shipowner further alleged that the award violated public policy.

Decision

The arbitral tribunal did not exceed its jurisdiction as determined by the arbitration agreement and the terms of reference.(1) Swiss law on international arbitration does not bar an arbitral tribunal from filling a gap in a contract without having the parties' express permission to do so.

Nor did the tribunal decide *ultra petita*. Having denied the declaratory relief that the shipowner had validly exercised its original purchase option, the tribunal could also make a finding that a new contract had been agreed, especially since the charterer's request for relief included a claim for any other remedy which the tribunal considered equitable and appropriate according to law. If the shipowner wanted to object to this claim on the grounds that it was not specific enough, it should have done so in the arbitration.

No violation of the right to be heard ensued, as both parties submitted pleadings and evidence on the terms of the purchase option which the shipowner wanted to insert in the extension agreement, as well as on the rules of good faith under Belgian law, which the tribunal could apply on its own motion anyway.

Finally, the alleged violation of public policy was insufficiently pleaded, as it was based merely on the argument that the principle of *pacta sunt servanda* (ie, agreements are binding) prohibits, as a corollary, the imposition of a contract which the parties did not intend to make. Even if the challenge had met the pleading requirements, this argument would still fail, as this was not a case where the tribunal had first concluded that the parties were not bound by a contractual clause and then nevertheless held

them liable to respect that clause.

For further information on this topic please contact Pierre-Yves Tschanz at Tavernier Tschanz by telephone (+41 22 347 77 07) or by fax (+41 22 347 9789) or by email (tschanz@ttv.ch).

Endnotes

(1) Decision of the Swiss Supreme Court of December 19 2001 in *NV Belgische Scheepvaartmaatschappij-Compagnie Maritime Belge v NV Distrigas*, award of March 23 2001, 4P.114/2001; available on the website of the Swiss Supreme Court at www.bger.ch (using the French-language version, select "*jurisprudence*", then "*arrêts dès 2000*").