Supreme Court rules on *res judicata*

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In a recent decision the Supreme Court confirmed an arbitral award which had denied the *res judicata* effect of a foreign court decision on the ground that the foreign court had not analysed (and could not analyse) the question submitted to the arbitrators.(1)

Facts

The dispute arose out of a contract for work entered into between a state company for railway transport and a construction company for the construction of a bridge located in V. The contract contained an arbitration clause. Subsequently, the parties entered into Amendment 1 with the intention of increasing the contract price.

In the context of court proceedings started by the state prosecutor for transport (acting on behalf of V), for the purpose of invalidating Amendment 1 on the ground that the person representing the state company had no powers to bind the company, the High Commercial Court of V declared that Amendment 1 was void.

In parallel to these court proceedings, the construction company had started arbitration proceedings against the state company in order to obtain, among other things, a declaration that Amendment 1 was valid and binding. In its final award the arbitral tribunal declared that Amendment 1 was valid and binding on the parties.

The state company challenged this decision before the Supreme Court on the ground that the arbitral award violated procedural public policy because it ignored the *res judicata* effect of the decision of the High Commercial Court of V.

Decision

The Supreme Court provided a detailed summary of its practice in respect of *res judicata*.

First, the Supreme Court stated that if an arbitral tribunal seated in Switzerland is seized of a claim which is identical to a claim between the same parties that has been finally resolved by a foreign court decision, the tribunal must declare this claim inadmissible to the extent that the foreign decision may be recognised in Switzerland. Failure to do so would qualify as a violation of public policy.(2)

The Supreme Court then stated that a foreign decision is recognised in Switzerland to the extent that it complies with Article 25 of the Private International Law Act. This provision includes, among other things, the requirement that the foreign authority or court had jurisdiction.(3) Referring to a precedent, the Supreme Court held that this requirement is not met if a foreign court issues a decision notwithstanding an arbitration objection duly raised by the respondent.(4) In that case, the Supreme Court had held that the assessment of the foreign court's indirect jurisdiction must be made by reference to Article II(3) of the New York Convention. This finding was criticised by scholars in Switzerland, who held that this question should be resolved by reference to Swiss law – namely, Article 7 and Chapter 12 of the Private International Law Act.(5) However, the Supreme Court did not have to examine these criticisms in detail, since it rejected the *res judicata* objection for reasons other than the lack of indirect jurisdiction.(6)

As to the requirement that the claims be identical, it must be applied in accordance with the *lex fori*, thus in Switzerland with the principles developed by the Supreme Court.(7) According to the Supreme Court, the scope of *res judicata* (subjective, objective and temporal) varies from one legal system to another. However, on the one hand, a foreign decision has no broader effect in Switzerland than it would have if it had been issued by a Swiss court. Consequently, if the *res judicata* effect extends to the reasoning of the judgment according to the law of the state where the judgment was issued, the *res judicata* effect shall be limited to the sole dispositive part in Switzerland. On the other hand, a foreign decision has no broader effect in Switzerland than it has under the legal system from which it

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originates.(8)

As to the objective scope of *res judicata*, the Supreme Court reiterated that *res judicata* applies to a claim that is identical to one brought in earlier proceedings which led to an enforceable decision.(9) When ascertaining the objective identity, Swiss courts must not be formalistic. Both the prayer for relief and the factual background must be contemplated. For instance, there would be *res judicata* if a claim were contrary to a claim decided in a previous proceeding, or if a claim qualified as a preliminary question in a proceeding but had been decided as the principal claim in a previous proceeding. The *res judicata* effect extends to all facts that existed at the time of the first judgment (whether known or unknown by the parties), to the exclusion of facts that occurred after the last date on which, in the previous proceeding, the parties were authorised to make allegations.(10)

As to the subjective scope of *res judicata*, the Supreme Court reiterated that *res judicata* applies only if the parties are the same as those in earlier proceedings, irrespective of their role in the two proceedings or the presence of additional parties in the earlier proceedings (provided that the parties to the second proceeding participated in the earlier proceedings).(11)

Based on these principles, the Supreme Court found that, from a formalistic viewpoint, it was difficult to deny the identity of the parties to the proceedings before the state courts of V and the arbitration proceedings, as the arbitrators had done. However, the Supreme Court considered whether in such specific circumstances a less formalistic approach, based on a thorough analysis of the situation and the parties' role in the previous proceedings, would have been advisable.(12) Such an analysis may be warranted in specific circumstances where a mere formalistic approach would allow manoeuvres intending to torpedo the second proceeding. In this case the parties to the arbitration proceeding were different from the parties to the previous court proceedings, because the state prosecutor was a party in the latter but not in the former.(13)

The Supreme Court did not have to draw a conclusion from the absence of the state prosecutor in the arbitration proceedings. It rejected the challenge on the ground that the authority of the High Commercial Court of V was limited to the question of whether the person representing the state company had the powers to enter into Amendment 1. More precisely, the court had not considered whether the state company's behaviour following the conclusion of Amendment 1 could be construed as a ratification of this amendment, as the arbitral tribunal found. Therefore, according to the Supreme Court, there was no identity between the claims submitted in the state proceedings and those submitted in the arbitration proceedings.(14)

Comment

The decision provides detailed guidance on the principle of *res judicata* and does not close the door to an assessment of the party-identity requirement that is not strictly formalistic.

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Endnotes

(1) Supreme Court, 4A_508/2013, May 27 2014 (in French).

(2) Ground 3.1.

(3) *Ibid*.

(4) *Ibid*, referring to ATF 124 III 83 Ground 5b.

(5) Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 2nd edition, 2010, N 1512b and Footnote 35.

(6) *Ibid*.

(7) Ground 3.2.

(8) *Ibid*.

(9) Ground 3.3.

(10) *Ibid*.

(11) Ground 3.4.2. In this respect, the Supreme Court also held that the parties to two proceedings are not different just because they did not benefit from the same procedural guarantees in both the proceedings, or because a third party involved in the first proceedings with these parties was not bound by the arbitration agreement entered into by them (i*bid*).

(12) Ground 4.2.1.

(13) *Ibid*.

(14) Ground 4.2.2.1 and 4.3.

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