Kluwer Arbitration Blog

Award in commodities sector enforced despite absence of original arbitration agreement

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Switzerland is a global hub for commodity traders, and therefore also a significant jurisdiction for disputes arising in the commodities sector. A recent decision of the Swiss Federal Supreme Court (Decision 5A_441/2015 of 4 February 2016 (ASA Bull. 2/2016)) addresses important issues relating to **commodity sales contracts** and Swiss enforcement proceedings.

The case involved arbitral proceedings between two commodity trading companies under the GAFTA Rules, which provide for a two-tier procedure. Party B, which had won the arbitration before the second-tier GAFTA appeal panel, sought to enforce the award against Party A in Switzerland under the **New York Convention** ("NYC"). The competent cantonal court ordered the enforcement (*definitive Rechtsöffnung* / *mainlevée definitive*). Party A however appealed the decision to the Supreme Court, alleging that the award should not be enforced for lack of a valid arbitration agreement (Articles V(1)(a) and II(2) NYC).

The **cantonal court had found that there was no valid arbitration agreement from a formal point of view under Swiss law**. Indeed, **in the commodity trading industry**, **contracts are often not signed by the seller/buyer but by a broker**. In the case before the court, there was no document signed or confirmed by both parties, and the relationship between the broker and the parties was unclear. The court however further examined whether an arbitration agreement may exist under English law, the law governing the contract, as Article 178 of the Swiss Private International Law Act provides that an arbitration agreement is to be considered valid if it is valid under either Swiss law, the law applicable to the contract, or any law chosen by the parties. Referring to section 5(5) of the English Arbitration Act, the court found that Party A had accepted to be bound by the arbitration agreement by proceeding on the merits in the arbitration.

The cantonal court's decision was confirmed by the Supreme Court, which found that Party A's invocation of Article II(1) NYC in order to resist enforcement of the award was clearly in bad faith, and amounted to an abuse of rights, as it had failed to raise an objection in the arbitral proceedings. The Court recalled that, according to the rule of **good faith, a party's conduct can cure formal shortcomings in the arbitration agreement** under Art. II(2) NYC. In the Court's words: "In the context of international arbitration, the jurisprudence has repeatedly confirmed that, depending on the circumstances, a given behaviour can, according to the rule of good faith, compensate for the failure to comply with a rule of form." ("*En matière d'arbitrage international, la jurisprudence a constamment affirmé que, suivant les circonstances, un comportement donné peut suppléer en vertu des règles de la bonne foi à l'observation d'une prescription de forme*.")

The Supreme Court also rejected Party A's argument that Party B had **failed to produce a complete certified translation of the arbitral award, the arbitration agreement, or the contract.** According to the Court, Article IV(2) NYC is **not mandatory**, especially if the relevant documents are in English (Supreme Court Decision 138 III 520). The Court noted that in any event Party A had complied with the arbitration clause, and Party B had translated extracts of its appeal to the GAFTA second tier arbitral tribunal, which reproduced the arbitration clause. It did not matter to the Court that this translation was not certified.