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LIABILITY OF ARBITRAL INSTITUTIONS: INCREASED SCRUTINY BY THE COURTS OF THE SEAT?

The role and conduct of arbitral institutions has come under scrutiny in two recent court decisions, in Sweden in relation to the Arbitration Institute of Stockholm Chamber of Commerce (SCC) and in France in relation to the Court of international arbitration of the ICC. Both decisions may be considered either as positive or negative developments for institutional arbitration, depending where one sits.

In December 2008, **the Swedish Supreme Court** held for the first time that, where the seat of the arbitration is in Sweden, **the Swedish courts may review the arbitrators' fees, even when they have been set by an institution, in this instance the SCC.**¹ Soyak, a Turkish construction company, against which a three member tribunal rendered an award in a construction dispute, brought two sets of proceedings before the Swedish courts. First, it challenged the award rendered in favour of Hochtief, a German company, on the basis that the award lacked reasons and, secondly, it sought a reduction and partial reimbursement of the arbitrators' fees, on the basis that they were unreasonable in view of the work done, including the arbitrators' failure to state their reasons in the award. The Swedish Supreme Court (the third and highest court to hear the matter) upheld Soyak's right to challenge the arbitrators' fees, and, like the lower courts, awarded costs against the three arbitrators who challenged the availability of such an action under Swedish law.

The decision is based on a **specificity of the Swedish Arbitration Act** to the effect that the arbitrator's fees, which are separately set out in the award, ought to be reasonable (Article 37) and may be contested before the local courts (Article 41). The question in this case was whether these provisions applied when, rather than the arbitrators themselves, an arbitral institution (here the SCC) had fixed the Tribunal's remuneration, in accordance with the arbitration rules agreed by the parties (the SCC Rules). In deciding that Article 41 did apply in all circumstances, the Supreme Court relied on Swedish private law rules and on the underlying rationale of Article 41, being the possibility for any party to challenge what constitutes an

¹ Decision No 4227-06 dated 3 December 2008, *Hobér, Kraus & Melis v. Soyak International Construction & Investment Inc.*, published in English in Mealey's International Arbitration Report Vol. 24 No 3 March 2009 with commentary by S Jarvin & C S Dorgan who represented the Plaintiff.

otherwise immediately enforceable portion of the award under Swedish law. **The decision of principle stands** although, in this instance, in the separate annulment proceedings, the Supreme Court later concluded that the reasoning in the award was adequate. Meanwhile the arbitrators apparently agreed to reduce their fees, so that the question of their reasonableness was never decided by the courts.

The decision will obviously create **some uncertainty and thus concern for arbitrators sitting in Sweden**, as it may encourage parties to a SCC arbitration to challenge the Tribunal's fees – and thus delay the payment of the arbitrators. The decision, however, should be of **limited impact outside Sweden** because of the unique feature of the Swedish Arbitration Act which allows the parties to contest the arbitrators' fees before the local courts. Even in Sweden it may, arguably, be of limited impact outside SCC arbitration, because of the SCC's lower degree of scrutiny of awards, by comparison to, for instance, the ICC.

However, case administration by the ICC has itself also been challenged, this time in France, and the enforceability of the complete exclusion of liability clause contained in Article 34 of the ICC Rules (regarding the ICC, the Court, the National Committees and the arbitrators) put into question. Hence, a **French Court of Appeal has recently held that, in principle, the ICC could face a claim for damages if it were to fail in the performance of its core duties when administering arbitration cases, despite the wording of Article 34 of the ICC Rules**, although in the case at hand the ICC was not found liable.²

The case arose out of the long-lasting **SNF v. Cytec** dispute. SNF SAS brought an action against the ICC after two sets of arbitral proceedings against a Dutch company, Cytec Industries B.V., resulted in awards that were set aside by the Belgian courts for public policy reasons, specifically breach of EU competition law. The awards had also given rise to court proceedings in France. This time, SNF turned against the ICC, accusing the institution of having failed in the administration of the ICC Rules, in particular in the control of the duration and costs of the arbitrations, and in the control of the award, specifically by not verifying compliance with European public policy. SNF also argued that the 1988 Rules, which contain no equivalent to Article 34 of the 1998 Rules, applied since the arbitration clause was signed in 1993.

² *SNF S.A.S. v. CCI*, Court of Appeal of Paris, 22 Jan. 2009.

It was not the first time that an action was brought against the ICC,³ and, unsurprisingly, the Court of Appeal as in the past upheld the lower court's ruling against SNF. On the merits, it concluded that the ICC had properly set the administrative fees and costs as per the agreed ICC rules and schedule, had diligently verified the time limits and had effectively reviewed the award. The court pointed out that whilst it held no judicial function, the ICC had even pointed the arbitrators to the public policy issues later raised by the Belgian courts. In brief, in its organizational function, the ICC could not be held liable for shortcomings in the arbitrators' reasoning and for their failure to consider EU competition law. Notably, the Court also decided that the parties had not agreed to the 1998 Rules in their arbitration agreement, but had done so by signing the Terms of Reference.

In a perhaps more unusual approach, the Court of Appeal went beyond the decision of the lower court.⁴ It took the opportunity to insist on the ICC's duty to properly administer its cases and to provide an adequate structure for efficient arbitration i.e. with expected velocity, complying with agreed rules and resulting in an enforceable award. It further held that the ICC could in effect be sued if it failed to comply with its essential obligation as a service provider, and that Article 34 of the ICC Rules would not be of much help in that regard:

“Considérant que pour exécuter ses obligations moyennant rémunération, la CCI doit organiser et administrer l'arbitrage et à cette fin fournir une structure propre à permettre un arbitrage efficace c'est-à-dire intervenant avec la célérité escomptée, élaborée conformément aux règles choisies et susceptible de recevoir exécution;

Considérant que selon l'article 34 du règlement d'arbitrage 1998, « ni les arbitres, ni la Cour ou ses membres ni la Chambre de commerce Internationale ou son personnel, ni les comités nationaux de la Chambre de commerce internationale, ne sont responsables envers quiconque de tout fait, acte ou omission en relation avec un arbitrage »;

Considérant que la clause élisive de responsabilité qui autorise la CCI à ne pas exécuter son obligation essentielle en tant que prestataire de services non juridictionnels doit être réputée non écrite dans les

³ See *Cubic Defense Systems, Inc. v CCI*, Court of Appeal of Paris, 15 Sept. 1998, Rev. arb., 1999, 103 and Note P. LALIVE, 113; and *Cour de Cassation (1ère)* 20 Feb. 2001, Rev. arb., 2001 and Note Th CLAY, 511.

⁴ *Tribunal de grande instance de Paris, (1ère Ch.)* 10 Oct. 2007, Recueil Dalloz – 2007 – No 41, 2916 and Note Th CLAY, 2917.

rapports entre la CCI et la société SNF dès lors que la clause contredit la portée du contrat d'arbitrage.”

To some degree, these remarks should not come as surprise. Under most legal systems, at least gross negligence in the performance of its administrative and organisational duties could give rise to the arbitral institution's liability, despite exemption clauses in the institution's arbitration rules. The incongruity of a *total* exemption of liability of arbitral institutions has indeed been highlighted in the past.⁵ On a more practical level, there is indeed some value in arbitrators and arbitral institutions being reminded from time to time that their conduct may be closely scrutinized by the courts of the seat.”

On the other hand, the French Court of Appeal decision and the Swedish Supreme Court decision bring to light what may be considered as unfortunate avenues for a disgruntled party to challenge the arbitral process. One would expect any State court in any arbitration-friendly jurisdiction to confine the application of the principles laid down in those two decisions to extreme cases. However, whatever opportunity for challenge is left open by the legislator or the courts, it will be used by some, even if not all, losing parties. For arbitrators and institutions, defending such actions raises not only issues of time and costs, but also leads to uncertainty, breach of confidentiality, and damage to reputation. Some accountability is desirable - and should be of no concern to diligent arbitrators and institutions. But in practice these recent developments may well open the way to more abuses in what appears to be an increasing trend in international arbitration of parties attacking arbitrators and institutions once they fail on the merits of their claim.⁶ As far as the ICC is concerned, it will certainly be interesting to see how the Revision Task Force seeks to address the issue, if at all, when considering the revision Article 34 of the ICC Rules.

DOMITILLE BAIZEAU

⁵ See e.g. P. LALIVE “Sur l’irresponsabilité arbitrale”, in *Etudes de procédure et d’arbitrage*, Mélanges J-F. Poudret, Faculté de droit de Lausanne, 1999, 419, and “Irresponsibility in International Commercial Arbitration”, in *Asia Pacific Law Review*, vol 7, 2/1999, 161. See also Note on the lower court decision in *SNF v Cytec* by Th CLAY, *Op. Cit.*, at 2919 and E. SILVA ROMERO “Les apports de la doctrine et de la jurisprudence françaises à l’arbitrage de la Chambre de commerce internationale (II. L’arbitrage, Troisième Séance)” *Rev. arb.*, 2005, 421, at 432-437.

⁶ As evidenced by another recent (unreported) case of two franchise owners asking for a refund of the fees paid to the American Arbitration Association (AAA) after an award against them was vacated for manifest disregard of the law (and the matter described by the court as one that should have never gone to arbitration) in *Coffee Beanery v. WW & L.L.C.*, No. 07-1830, 2008 U.S. App. (6th Cir.) 14 Nov. 2008.

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ASA Bulletin

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