

influence these 'big picture' issues. Discussion is ongoing about wider promotion of Scotland as a suitable place for dispute resolution generally, and arbitration specifically, including the possibility of setting up an arbitration centre. Some commentators believe that the so-called 'tartan card' can be played, pointing out that the Scottish system offers many of the advantages of familiar law and language without the perception of being locked into a London-centric system. That in turn has the potential for leading to, among other things, lower expense.

Conclusion

Where the debate on any of these issues will finally end remains to be seen. It seems likely that the Bill, broadly in its current form, will enter into law. However, the format of any other drive to increase Scottish arbitration business remains unclear. One way or another, however, it seems likely that the passing of this Bill will increase work for arbitration practitioners.

SWEDEN

Supreme Court of Sweden authorises arbitration of EC competition law disputes

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On 19 February 2008, the Supreme Court of Sweden ruled in *BornholmsTrafikken AS/ Ystad Hamn Logistik AB*, Case No T 2808-05, that the appropriate application of the Swedish Arbitration Act in light of the 1999 *Eco Swiss/Benneton* decision rendered by the European Court of Justice (ECJ) required the arbitration of disputes arising under EC competition law that are covered by an arbitration agreement under the Swedish Arbitration Act. In that case, a Danish ferry operator (BornholmsTrafikken AS) brought an action against a Swedish port (Ystad Hamn Logistik AB) for alleged excessive port charges in violation of Article 82 EC. The port, in one of several objections to the claim, argued that part of the claim was covered by a separate agreement relating to certain investments in the port. That separate agreement included an arbitration clause and was therefore required to be resolved in arbitration.

The Swedish Arbitration Act explicitly provides that courts are not competent to hear disputes that are subject to arbitration once the defendant objects to the court's jurisdiction (Article 4). The Act also

explicitly states that arbitrators are competent to hear disputes on competition law sanctions between the parties, ie damages, invalidity of infringing clauses, etc (Article 1, paragraph 3).

Nevertheless, in 2003, the District Court relied on sections 32–36 of the 1999 ECJ *Eco Swiss/Benneton* judgment, which held that national procedural law, such as the cited Swedish Arbitration Act provisions, could not validly be invoked in light of the importance of EC Competition law. The District Court therefore ruled that the dispute covered by the arbitration clause could not be arbitrated.

The Court of Appeal for Southern Sweden overruled this judgment in 2005. This court found, with reference to the principle of the autonomy of the procedural rules of the Member States and the jurisprudence of the ECJ, that the reasoning by the ECJ in the *Eco Swiss/Benneton* judgment was in line with such procedural autonomy. Consequently, the Appeal Court held that there could be no reason under the national law of the Member States not to allow EC competition law disputes covered by an arbitration agreement to be heard in arbitration. Additionally, the Appeal Court reiterated that the Arbitration Act states that an award is invalid if it violates Swedish *ordre public* (Article 33), and under the *Eco Swiss/Benneton* judgment that provision applies to all arbitral awards that violate EC Competition law.

In February 2008, the Supreme Court affirmed the Appeal Court's judgment. Referring to the *Eco Swiss/Benneton* judgment, the Supreme Court reasoned that because national courts have the authority to invalidate an arbitration award that is contrary to Article 81 EC, this authority presupposes that it is acceptable in EC law for arbitrators to hear disputes arising under competition law.

SWITZERLAND

No extension of arbitration agreement to non-signatory parent company

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A Qatari contractor and a Cypriot subcontractor entered into a subcontract whereby the Qatari party performed dredging work for the construction of an industrial complex in Qatar. The contract was subject to Swiss substantive law and contained an ICC arbitration clause providing that Geneva would be the location of arbitration. The Italian parent company of

the contractor acted as guarantor, issuing a document captioned 'Parent Company Guarantee Letter'.

A dispute arose regarding unforeseen subsoil conditions. The Cypriot subcontractor subsequently initiated arbitration in Geneva against the Qatari contractor and its Italian parent. It claimed some US\$20 million for additional costs due to the subsoil conditions, acceleration of the work, and the second Gulf war. The subcontractor also requested an order extending the deadline for completion of the work.

The parent company argued that it was not bound by the arbitration agreement in the subcontract. The ICC found that there was a prima facie valid arbitration agreement and allowed the arbitration to proceed. In January 2008, the arbitral tribunal issued a preliminary award denying its jurisdiction *ratione personae* regarding the parent company. The subcontractor applied to the Swiss Federal Supreme Court seeking to have the award set aside.

The Supreme Court confirmed the award based on several grounds (Supreme Court Decision 4A_128/2008 of 19 August 2008).¹ First, according to the privity of contract rule, an arbitration clause in a contract only binds the contracting parties. Exceptions to this principle do exist, however: the assignment of a right; the assumption of a debt either *in lieu* of the original debtor or jointly and severally; and the transfer of a contract (*cession de créance, reprise (simple ou cumulative) de dette, transfert d'une relation contractuelle*).

With the exception of an assumption of debt, an arbitration clause in a main contract is not applicable to the undertakings of a third party to guarantee the performance of a party to the main contract. In order for an arbitral tribunal constituted pursuant to the main contract to have jurisdiction over the guarantor, the guarantee agreement must contain either a specific arbitration clause to that effect or a clause referring to the arbitration clause in the main contract. Failing such language, the guarantor must have expressed, explicitly or by its conduct, the intention to be bound by the arbitration clause in the main contract.

None of those prerequisites was met in the case at hand. The conduct of the parent company could not reasonably have been construed as manifesting an intent to be bound, which might then have justified an extension of the arbitration clause. Further, the Supreme Court clearly distinguished the case from the leading precedent on extension of arbitration agreements to non-signatories (129 III 727 of 16 October 2003). In the precedential case, which involved a construction project in Lebanon, an individual constantly interfered with the performance of a contract signed by a company he controlled. The ICC Arbitral Tribunal found that through his conduct he accepted to be bound by the arbitration agreement contained in the contract entered into by his company. The Supreme Court upheld that ruling.

In the case at hand, the Supreme Court ruled that

mere affiliation to the same group of companies is not sufficient to justify the extension of an arbitration clause. Therefore, the arbitration clause in the main contract did not bind the non-signatory parent company, even if it had issued a parent guarantee.

Secondly, the Court ruled that the guarantee agreement itself could not be construed as incorporating the arbitration clause from the main contract. That could only be the case if the guarantee letter qualified as an assumption of a debt under Swiss law or as the equivalent of such an assumption under the law applicable to it (the Supreme Court found that since the guarantee agreement did not contain a choice of law clause, it was governed by Italian law, which had the closest connection to the case).

The reference in the parent guarantee agreement to the subsidiary company's obligation under the subcontract could not be construed (or in good faith be understood by the subcontractor) as incorporating by reference the subcontractor's arbitration clause. The purpose of the reference was merely to identify the obligations that the parent company undertook to guarantee.

Conclusions

The recent decision by the Swiss Federal Supreme Court is important in that it:

- (1) confirms the very restrictive conditions in which a non-signatory can be bound by an arbitration agreement under Swiss arbitration law;
- (2) rejects the group of companies doctrine; and
- (3) draws a clear distinction between guarantee undertakings, which entail the transfer of the arbitration clause contained in the contract to the performance they guarantee, and those that do not.

The key factor in determining whether an arbitration clause should extend to a third party is the parties' intentions, expressed by the terms of the contract or by a party's conduct. As is true in most cases, arguments advocating both for and against the extension of the arbitration clause were present in the case. Those arguments that were not persuasive in the opinion of the present Arbitral Tribunal, and, in its wake, of the Supreme Court (which is essentially bound by the Arbitral Tribunal's interpretation of the contract) may well be considered relevant in different circumstances arising in other proceedings. For instance, the absence of a specific dispute settlement mechanism in the guarantee agreement could just as well have been construed as evidence for the submission of the guarantor to the dispute mechanism set out in the main contract. This is particularly true when the guarantor is the guaranteed party's parent company and not an unrelated third party insurer or bank. Whether the extension of the application of an arbitration clause will be allowed in any given case

therefore remains a fact-specific analysis. This ruling confirms that the threshold is high: claimants who initiate arbitration against non-signatories have little hope to prevail unless there is clear evidence that the non-signatory meant to be bound by the arbitration clause on which the claimant relies. That is good news for parent companies dragged into arbitration proceedings based on arbitration agreements entered into by their affiliates.

Last but not least, the efficiency of the Supreme Court proceedings merits mention. Merely five months passed from the date of the application to set the award aside to the Court's ruling.

Notes

- 1 The original French opinion is available at the Supreme Court's web page www.bger.ch. It will also be published in the *ASA Bulletin*. An English translation will be published in 2009 in *Swiss 2 International Arbitration Law Reports* (2008).

UKRAINE

Arbitrability of corporate disputes in Ukraine

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This article discusses the peculiarities of corporate legislation in Ukraine and analyses the recently adopted Recommendations, issued by the High Commercial Court, which bind all lower commercial courts in Ukraine. Contrary to the Recommendations' intended purpose of facilitating corporate dispute resolution, they may damage Ukraine's reputation as an investor-friendly country.

The Recommendations

To ensure the uniform and proper application of substantive and procedural law in corporate cases arising from or in connection with corporate relations, the Presidium of the High Commercial Court of Ukraine adopted Recommendations No 04-5/14 (the Recommendations) on 28 December 2007. The Recommendations were issued to establish the primary methods of dispute resolution for typical corporate disputes, to provide legal opinions, and to give guidance to practitioners, thereby creating a unified system of dispute resolution.

In general, the Recommendations provide clarifications to the courts regarding: subject matter jurisdiction and territorial jurisdiction; exercise and

protection of corporate rights; acquisition, transfer, and termination of corporate rights; full or partial annulment of business documents of incorporation; application of injunctive measures; and contractual regulation and application of foreign law in corporate relations.

The Recommendations also provide significant clarification regarding the use of methods for securing a claim. For example, the Recommendations prohibit interim orders for the seizure of an enterprise's property, because the seizure could lead to the interruption of that enterprise's business. However, if a commercial court suspects that the actions of a corporate executive body (or a body whose election is disputed) may lead a business into a state of severe financial distress or permanent insolvency, the court may prohibit the alienation of fixed assets, immovable property, and other company property. Thus, the court may actually secure a claim by clearly determining what property may not be alienated.² These clarifications aside, as it turns out, the Recommendations, which seemed to be a means to resolve problems in Ukraine, have serious flaws.

Controversial features

Chapter 6 of the Recommendations, which is the most controversial and gives rise to the gravest concerns, states that any agreement between shareholders and a company that is governed by foreign law will be null and void as contrary to the public policy of Ukraine. Chapter 6 also specifies that shareholders of companies incorporated in Ukraine are prohibited from agreeing to resolve corporate disputes through international commercial arbitration. As a result, party autonomy is considerably restricted and foreigners are unable to apply their own corporate law to contracts executed with Ukrainian parties or resolve disputes through international arbitration.

In light of Chapter 6 of the Recommendations, the definition of 'corporate dispute' has become critical, because it is the key to determining how and where corporate disputes may be resolved. However, Ukrainian legislation does not provide a clear definition of 'corporate dispute'. In an attempt to add clarity, the Recommendations define 'corporate disputes' as those involving:

- the claims of participants (ie, shareholders or founders) in business entities, including claims against the entity or against each other, in relation to the establishment, activity, management, or termination of the entity in question;³
- the invalidation of a decision to remove a participant from a company, including a decision determining the size and debiting of the value of the share of a company's property to be paid to a participant who has left the company;

