Unofficial translation

Heading

127 III 279

48. Excerpt of the decision of the First Civil Chamber of 14 May 2001 in the case of Fomento de Construcciones y Contratas S.A. against Colon Container Terminal S.A. (pubic law appeal)

Summary

International arbitration; jurisdiction of arbitral tribunal; parallel proceedings (Art. 9 para. 1 and Art. 190 para. 2 let. PILS).
Conditions for the admissibility of a public law appeal against an interim award on the jurisdiction of arbitral tribunals in international arbitration (recital 1). Arbitral tribunals seated in Switzerland must apply Art. 9 PILS if examining a case already pending before a domestic court, whether foreign or Swiss; Breach of this rule may be raised in the context of Art. 190 para. 2 letter b PILS (recital 2).

Facts from page 280

BGE 127 III 279 S. 280

A.- By agreement of 26 April 1996, the Panamanian company Colon Container Terminal S.A. (hereafter: CCT) mandated the Spanish company Fomento de Construcciones y Contratas S.A. (hereafter FCC) to carry out civil engineering works for a port terminal in Panama. The rules which the contract referred to provided for arbitration by one or more arbitrators in the event of a dispute between the parties. During the course of performance, a dispute arose between the parties. The contract had been terminated by each party. CCT hired a different contractor to finish the works. On 12 March 1998, FCC filed a substantive action against CCT, in particular, before the Panamanian Courts. CCT objected on the basis of the arbitration agreement. On 26 June 1998, the First Instance Court held that the objection was not raised within the allotted time.

B.- Without waiting for national remedies to be exhausted, CCT filed for arbitration on 30 September 1998. The seat of the arbitral tribunal, composed of 3 arbitrators, was to be Geneva. The parties had provided for application of the ICC Arbitration Rules, and in the alternative, Federal procedural law (PCF; RS 273).

BGE 127 III 279 S. 281

FCC challenged the arbitral tribunal's jurisdiction. It primarily argued that it proposed to waive arbitration by going before Panamanian courts and that the opposite party accepted that in a conclusive act, by not raising its objection in time.
During the course of the arbitration, a higher Panamanian court, ruling on the action, held—contrary to the first instance court—that the objection had been raised in time. Referring to this decision, and without waiting for national proceedings to be exhausted, the arbitral tribunal, in an award dated 30 November 2000, reached the same decision and held that it had jurisdiction over the matter. Following this award, on 22 January 2001, the Supreme Court of Panama held that the objection had been raised too late and ordered that the proceedings continue before Panamanian courts.

C.- FCC filed a public law appeal before the Federal Tribunal. Arguing that the arbitral tribunal had wrongly upheld its jurisdiction, in disregarding rules for parallel proceedings, it requested that the challenged award be set aside and that the Arbitral Tribunal be held not to have jurisdiction.
The respondent in the appeal requested that the appellant's submissions be dismissed and that the arbitral tribunal's jurisdiction be recognized.
The arbitral tribunal refers to its decision.
The Federal Tribunal accepted the action and set aside the challenged award.

Recitals

Excerpt from recitals:

Unofficial translation

1. a) A public law appeal may be filed with the Federal Tribunal against an arbitral award, pursuant to the conditions of Art. 190 *et seq.* PILS (RS 291; Art. 85 letter c OJ).
As the seat of the arbitral tribunal was in Switzerland and neither of the parties, at the time the agreement was entered into, were domiciled or resident in Switzerland (Art. 176 para. 1 PILS), Art. 190 *et seq.* PILS are applicable, given that the parties did not exclude their application in writing and did not agree on the exclusive application of the cantonal procedural rules for arbitration (Art. 176 para. 2 PILS). Recourse to the Federal tribunal against arbitral awards is possible (Art. 191 para. 1 PILS), where parties have not excluded

BGE 127 III 279 S. 282

the possibility in an agreement (Art. 192 para. 1 PILS), nor provided for recourse before a cantonal authority instead (Art. 191 para. 2 PILS).
The appeal may be only brought on the basis of the exhaustive list of grounds contained in Art. 190 para. 2 PILS (**ATF 119 II 380** recital 3c p. 383). Procedure in the Federal Tribunal is governed by the provisions of the law on Judicial Organisation (OJ) regarding public law appeals (Art. 191 para. 1, 2nd sentence, PILS).

b) In terms of jurisdiction, interim awards may be appealed immediately (Art. 190 para. 3 PILS).
The appellant is personally affected by the challenged award which obliges it to continue proceedings before the arbitral tribunal, such that it has a current, personal and legally-protected interest in the decision not having been rendered in breach of the guarantees stemming from Art. 190 para. 2 PILS; consequently, it has standing to appeal (Art. 88 OJ).
In principle appeals are admissible when filed in time, (Art. 89 para. 1 and Art. 34 para. 1 letter c OJ), and in the manner provided for by law (Art. 90 para. 1 OJ).
Save for certain exceptions, the effect of an appeal is merely to quash the decision (**ATF 127 II 1** recital 2c; **ATF 126 III 534** recital 1c; **ATF 124 I 327** recital 4a and references). When the dispute concerns the arbitral tribunal's jurisdiction, it has exceptionally been admitted that the Federal Tribunal itself rules whether the tribunal has jurisdiction or not (**ATF 117 II 94** recital 4).
c) When the rules are those pertaining to public law appeals, the appellant must raise its claims in compliance with Art. 90 para. 1 let. b OJ (**ATF 117 II 604** recital 3 p. 606). When examining a public law appeal, the Federal Tribunal will only examine admissible claims raised and sufficiently reasoned in the appeal (see **ATF 126 III 524** recital 1c, 534 recital 1b; **ATF 125 I 492** recital 1b p. 495). The appellant thus had to state which of the cases put forward in Art. 190 para. 2 PILS were applicable and, using the challenged award, explain in which way the alleged breach occurred (see, **ATF 110 Ia 1** recital 2a); only in such conditions is it possible to really examine an action.

2. a) The appellant's main argument is to contend that the arbitral tribunal did not have jurisdiction to render the challenged award, because it should have stayed its decision pursuant to the principle *lis pendens*.

BGE 127 III 279 S. 283

It thus raises the ground set forth in Art. 190 para. 2 let. b PILS.
Staying proceedings in the event of *lis pendes* is a jurisdictional rule (**ATF 123 III 414** recital 2b), and not—as the arbitral tribunal seems to think—a simple procedural rule. Breach of this rule may be raised in the context of Art. 190 para. 2 letter b PILS (recital 2).
b) It is contrary to public policy for there to be two contradictory legal decisions on the same action involving the same parties which are enforceable at the same time (see, **ATF 116 Il 625** recital 4a).
Two fundamental principles exist to prevent that from occurring: *lis pendens* and *res judicata* (**ATF 114 II 114** recital 2a and cited references). When a matter already pending before one court is brought before another, the principle of *lis pendens* prevents the second court from ruling before a final decision is rendered by the first; this mechanism thus freezes the second court's jurisdiction. *Res judicata* prevents courts from examining a matter for which a final decision has already been rendered; this mechanism definitively excludes the second court's jurisdiction.
These mechanisms are not only applicable to domestic situations. According to the Swiss legal order, they also apply internationally, as long as the foreign decision could be recognized in Switzerland (**ATF 114 II 183** recital 2b p. 186 and cited references). Subject to international agreements, applicable rules in international matters are contained in Art. 9 PILS (*lis pendens*) and 27 para. 2 let. c PILS (*res judicata*).

Thus, Swiss public policy provides that, in international matters, the court second seized must stay proceedings pursuant to Art. 9 PILS (for a global view of the parallel proceedings problem, see KNOEPFLER/SCHWEIZER, Droit international privé suisse, 2nd edition, p. 303 and 304. n. 700 *et seq*.).
As it is not contested that the Panamanian courts were first seized of an action involving the two parties and which seems to regard the same dispute, there is no doubt that a Swiss domestic court, had it been in the same situation as the arbitral tribunal seated in Geneva, would have stayed proceedings in accordance with Art. 9 PILS (for an example of application, see **ATF 127 III 118** recital 3).

c) It remains to be seen whether the conclusion must be different because the authority in question is not a domestic Swiss court but an arbitral tribunal seated in Geneva.
aa) Naturally, because of the private nature or arbitration, arbitral tribunals should not be summarily equated with domestic courts. Regarding this issue, it must be said that arbitral awards are enforceable in the same way as judgments. Therefore there is the same incentive to prevent contradictory decisions on the same dispute which are both enforceable at the same time, within one legal order.
This first assertion is very much in favour of a similar application of the principle of parallel proceedings.
bb) Moreover, it would seem that today an arbitral tribunal could not escape the principle of *res judicata*, by relying on its particular nature. If a foreign court has declared that it has jurisdiction in a judgment which must be recognised in Switzerland, arbitrators seated in Switzerland are bound by that decision (**ATF 120 II 155** recital 3b/bb p. 164; LALIVE/POUDRET/REYMOND droit de l'arbitrage interne et international en Suisse, n. 17 ad Art. 186 PILS).
As *res judicata* and *lis pendens* are closely related principles serving the same purpose, it seems logical to treat parallel proceedings in the same manner and consider that the arbitrators, seized second, should stay their proceedings pending the decision of the domestic court, seized first, if that decision can be recognised at the seat of arbitration.
cc) The prevailing view in the doctrine equally holds that an arbitral tribunal seated in Switzerland must apply Art. 9 PILS if it examines a case already pending before a domestic court—whether foreign of Swiss (WENGER, Commentaire bâlois, InternationalesPrivatrecht, n. 9 ad Art. 186 PILS p. 1572; RÜEDE/HADENFELDT, Schweizerisches Schiedsgerichtsrecht, 2nd edition, p. 231).
Case law has already adopted that stance and considers that disputes which give rise to competition between jurisdictions must be solved by the application of rules governing *lis pendens*, *res judicata* or the recognition and enforcement of foreign decisions (**ATF 121 III 495** recital 6c p. 502). It is true that a recent decision left the question unanswered, but only because it did not have to be decided in that case (see, **ATF 124 III 83** recital 5a p. 85). Thus the jurisdictional rule contained in Art. 9 PILS, based on public policy considerations must also be applied by an arbitral tribunal seated in Switzerland.
dd) The arguments that can be opposed to this solution do not sustain scrutiny. There is no need here to envisage the risk of a foreign court refusing to consider an arbitration agreement, out of hostility to arbitration. Such a decision would not be enforceable in Switzerland (**ATF 124 III 83** recital 5b p. 87). However, the principles of *res judicata* and *lis pendens* only apply to foreign decisions that can be recognised in Switzerland (**ATF 114 II 183** recital 2b p. 186).
The arbitral tribunal's argument whereby a stay of proceedings due to *lis pendens* is not set forth in the arbitration rules or the procedural law chosen cannot be followed. In this case, as it can be seen, the issue is that of jurisdiction and not merely a procedural matter. Also, it is not accurate to say that the Federal law on civil procedure—chosen by the parties—does not allow a stay due to parallel proceedings pursuant to Art. 9 PILS (see, Art. 6 para. 2 and 22 PCF).
The arbitral tribunal's argument that its mandate gave it priority over Panamanian courts to decide the dispute is not based on any objective statement. The arbitral tribunal's findings do not show that, at the time the mandate was signed, the parties had agreed to mandate the arbitral tribunal to decide the dispute instead of the Panamanian courts, before which the matter was already pending. The fact that there were also other parties in the Panamanian proceedings in no way prevents the dispute between appellant and respondents from being completely settled before the Panamanian courts which were already seized. The respondent's arguments regarding the 10 June 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (RS 0.277.12) are not relevant, as this international agreement does not solve the issue in question.
ee) Lastly, one must wonder whether, due to the particular nature of arbitration, arbitral tribunals should not have priority to decide on their own jurisdiction. The idea that an arbitral tribunal has priority over domestic courts in jurisdiction does exist in the doctrine

(see, BUCHER, Le nouvel arbitrage international en Suisse, p. 55 n. 139).
It is true that Art. 186 para. 1 PILS grants arbitral tribunals the power to rule on their own jurisdiction. However, this does not mean that a domestic court examining the same request will lose the right to rule on its own jurisdiction; neither can we then assume that a domestic court will have to stay prior proceedings, in order to give the arbitral tribunal priority.
Case law nevertheless took this view into account and confirmed that Swiss domestic courts would only carry out summary assessments of jurisdiction when the seat of an arbitral tribunal is in Switzerland (**ATF 124 III 139** recital 2b). However, this decision does not regard which courts have priority to rule, but only the scope of a domestic court's power of review. Moreover, it only concerns the case of a Swiss domestic court bound to follow the case law of the Federal Tribunal.
There is also no serious legal basis for granting priority to arbitral tribunals (see, WENGER, ibid.). A domestic case examining a substantive issue—we thus exclude situations regarding actions on arbitral jurisdiction (see, decision of 26 January 1987 published in SJ 1987 p. 230 recital 2a)—must rule on jurisdiction even if that means ruling on the validity of the arbitration clause (unpublished decision of 16 July 1997, in case no. 4C.206/1996 recital 7b/bb). According to Art. II para. 3 of the New York Convention or Art. 7 let. b PILS (see, **ATF 122 III 139** recital 2a p. 141), domestic courts may assess whether the arbitration clause is void, inoperative or unlikely to be applied (**ATF 121 III 495** recital 6c). This could be the case if parties have waived the arbitration clause (LALIVE/POUDRET/REYMOND, *op. cit.*, n. 5 ad Art. 7 PILS).
When one of the parties relies on an arbitration agreement and the other claims that there was a subsequent agreement in favour of domestic courts, it would seem that both courts in question (arbitral tribunal and domestic court) have equal jurisdiction to decide the dispute. Therefore there is no reason to grant priority, for which there is no legal basis and no justification, to the arbitral tribunal. The rule on *lis pendens*, contained in Art. 9 PILS, which grants priority to the court first seized must thus apply.

If we were to further examine the issue in the case at hand, we could even say that Panamanian courts are better placed to decide the issue than the arbitral tribunal. Naturally, arbitral awards may be replaced by subsequent awards (see, **ATF III 495** recital 5). Such agreement may be the result of conclusive acts (ATF 121 III 495 recital 5a). The parties' behaviour will be interpreted based on the principle of trust (**ATF 121 III 495** recital 5). Thus it is possible to attribute objective meaning to a party's behaviour, even if it does not correspond to its wishes (WIEGAND Commentaire bâlois, n. 8 ad Art. 18 CO; KRAMER, Commentaire bernois, n. 101 s. ad Art. 1 CO; ENGEL, Traité des obligations en droit suisse, 2nd ed., p. 216 s.).
In this case, in seizing the Panamanian courts, the respondent expressed its desire to waive the arbitration agreement. The problem is determining whether the appellant accepted that offer. One could expect that a large company, represented by a local lawyer, would follow the correct procedure for challenging the jurisdiction of a domestic court and availing itself of an arbitration agreement. Whether the arbitration objective was raised in time is not governed by either the New York Convention or the PILS, but the *lex fori* (**ATF 111 II 62** recital 2 p. 66). The question is thus subject to Panamanian law, which the authorities of that country know better and are better placed to correctly apply.
Moreover, the arbitral tribunal expressly admitted that fact when it underscored the importance of the higher court's decision. Therefore we do not understand why it did not wait for the Supreme Court decision. This position is untenable. It would seem that the arbitral tribunal, taking advantage of its single-tier proceedings, wanted to overtake the Panamanian proceedings. There is no legal basis for such behaviour. The priority criterion set by Art. 9 PILS is the date on which the action was filed, and not the date of the final proceedings.
d) From the preceding considerations, it seems that an arbitral tribunal seated in Switzerland should have applied Art. 9 PILS.
It could thus only continue with the arbitration proceedings if it found that it was not examining the same request or that the foreign court could not, within a suitable time frame, hand down a decision which could be recognised in Switzerland (Art. 9 para. 1 PILS). The challenged award is not based on any such finding, such that it breaches Art. 9 para. 1 PILS.

Unofficial translation

In principle, as soon as it realised that the Panamanian courts had been seized first with a substantive issue between the parties regarding the same dispute, the arbitral tribunal should have stayed its proceedings. It could only have continued had it demonstrated that the conditions of Art. 9 para. 1 PILS were not met, which it did not do. In ruling on its jurisdiction instead of staying proceedings, the arbitral tribunal breached the jurisdictional rule at Art. 9 para. 1 PILS and its award must be set aside (Art. 190 para. 2 let. b PILS).
There is no need to rule on jurisdiction now, as the arbitral proceedings must, in principle, be stayed (Art. 9 para. 1 PILS).
As the action is still pending before Panamanian courts (on the basis of a final decision on jurisdiction), the arbitral tribunal could only resume proceedings if it finds that it is not called upon to examine the same action or that the foreign court cannot, within a suitable time frame, hand down a decision which could be recognized in Switzerland. Such decision by an arbitral tribunal could once again be appealed through a public law appeal.
In these conditions, there is no need to examine the other claims.