ARBITRAL AWARDS IN INTERNATIONAL COMMERCIAL LAW

Oxxolova Marhabo Norbobo qizi
Tashkent State Law University
(A/3 group)

Introduction

It is not unusual to find essays on international commercial arbitration, especially by Swiss writers and from a Swiss perspective. Somewhat more unusual (and this is the reason why it was done) is the publication of such writings in Lugano, by three authors who are active - either as lawyers or as a commercial judge - in the juridical reality of Lugano. In Switzerland there are, traditionally, two outstanding places for commercial arbitration: Zurich and Geneva. It is not surprising that these cities are respectively the first and second cities in Switzerland for finance and commerce and have developed over the years as being efficient and friendly places for arbitration, both in terms of the competence of the arbitrators, the high standards of the *juges d'appui* and the arbitration institutions (respectively the Zurich and Geneva Chambers of commerce).

Lugano, however, does not have this same tradition, although it is undeniable that this city plays an important role in commerce and finance in Switzerland: being the third financial centre in Switzerland after Zurich and Geneva. Furthermore, its unique proximity to Northern Italy, which is one of the most economically productive regions in all of Europe, gives Lugano a distinctively international commercial character.

Arbitration and Corporate Law

Arbitration in general and in particular with regard to corporations is assuming ever greater importance at both national and international levels. Not only are organisations and private law companies increasingly turning to arbitration[17], but communities and international institutions[18] as well. Internal relations within companies are characterised by a highly complex and extremely cohesive long-term legal association[19]which, in the event of a dispute, involves a continuous learning process concerning an adaptation to the company's unique requirements rather than the identification of who is right or wrong in any given case. In this sense substantive law alone cannot provide the tools to deal with the daily challenges confronting companies.

As a result, a need has developed for a higher jurisdiction to hear cases of “mediation”, which can assist in resolving disputes quickly, without necessarily being subject to the pressure of the illusion of a supposedly objective application of substantive law regulations.

Within the corporate sector, therefore, there are frequently cases in which corporate disputes relating to competing interests of shareholders and the company, respectively its structures and its shareholders, are settled by an arbitration tribunal rather than ordinary courts.

[17] GE 118 IB 562, in re Groupement d'Entreprises Fougerolle v. CERN.
[18] See art. IX of the articles of agreement of the IBRD and recent judgments of the European Court of Justice, including the judgment T-206/99 dated March 21, 2002 in re Métropole Télévision / Commission concerning competition.
[19] ROTH GÜNTER, Beiträge zum internationalen Verfahrensrecht und zur Schiedsgerichtbarkeit, Festschrift für Heinrich Nagel zum 75. Geburtstag, S. 319 und ff.

Some authors are even anticipating that corporate disputes will be dealt with exclusively by such tribunals.[20]

`Intercantonal Arbitration Convention "Concordat"

The Concordat on arbitration accepted by the Conference of the directors of the cantonal ministries of justice March 27, 1969 and approved by the Federal Council on August 27, 1969 (hereinafter: the "Concordat" or "CA"), applies to every proceeding before an arbitration tribunal with its seat in a Canton that is party to the Concordat (art. 1 CA). Arbitration regulations relating to private and public agencies and organisations, and arbitration clauses apply as long as they do not derogate from the compulsory provisions of the Concordat. All Swiss Cantons have accepted the Concordat.

In accordance with art. 4 CA, the agreement to arbitrate [also commonly referred to, in a general way, as an arbitration agreement] may be concluded by means of an arbitration agreement [in the proper sense of term] or an arbitration clause. In an arbitration agreement, the parties submit an existing dispute to an arbitration tribunal, while an arbitration clause can only refer to future disputes arising from a specific legal relationship. The arbitration may rule on any claim that either party is permitted to freely dispose of, as long as the agreement comes under the exclusive competence of the judicial authority pursuant to a mandatory provision of the law.

The arbitration agreement must be in writing (Art. 6 CA). It may be included in a written document by which a party becomes associated with a legal entity, if this document expressly refers to the arbitration clause contained in the statutes, or in a regulation derived from it (Art. 6 Abs. 2 CA). The parties must therefore submit themselves, in writing, to the arbitration agreement and the latter cannot be the subject matter of a judgement by reference[21].

The requirement that the agreement be in writing is intended to ensure that the parties are aware of their obligations relative to the arbitration agreement, thereby excluding any tacit or documentary agreement, with reference to the specific circumstances provided for in Art. 8 CA. With respect to arbitration involving corporations, Art. 6 Abs. 2 CA contains a fundamental and in some ways very restrictive approach concerning the application of arbitration to corporate issues, at least as far as companies governed by Swiss law are concerned.

Nowadays, however, the mere existence of a contractual undertaking to arbitration is no longer sufficient to preclude the concurrent exercise of jurisdiction by public authorities. It may happen that a particular dispute involving the same parties could appear simultaneously before a national court and an arbitration tribunal. This may result a conflict of judgements. The effect of this reciprocal interference may be, on the one hand, concurrent or parallel proceedings and, on the other, conflicting decisions that arise when both the arbitrator and the court judge decide the dispute in contradictory ways. Among the decisions of a national court that may affect international commercial arbitration are decisions taken by a State court concerning the validity of an arbitration agreement; decisions on provisional measures or in support of arbitration; and decisions concerning the setting aside or the enforcement of an award in a

[20] KOHLER, Die moderne Praxis des Schiedsgerichtswesens, Diss., 1966, S. 25

particular county. Neither international conventions on arbitration, nor those on civil and commercial matters, offer a clear solutions to these questions, so that conflicts often have to be solved by national laws, which may be in favour of or against arbitration. In such a context it necessary that parties and their representatives evaluate their choice of procedure carefully, so as to avoid chaotic or negative results.

Somewhat similar problems arise in the context of arbitration in corporate law, although from another point of view. In fact, this kind of arbitration has now become a very topical issue. Companies, directors and shareholders of company are becoming more and more interested in the swift and confidential settlement of disputes that arbitration can offer in this field.

Such people cannot allow either themselves or their companies the usually quite lengthy periods of waiting than can attend state court rulings. Companies and their shareholders need to settle all disputes as rapidly as possible, so as to avoid these having an unpredictable impact on the future of the company and its profitability.

Thus, within the corporate sector, one can now quite frequently encounter cases in which corporate disputes, relating to competing interests either of companies and their shareholders, or of company structures and shareholders, are settled by arbitration tribunals rather than through the state courts.

Thus, on the one hand, there is a clear need to settle disputes through arbitration tribunals rather than through state courts. On the other hand, however, the many individual differences between the various national approaches to legislation concerning arbitration and certain particular features of such legislation may, in fact, be having exactly the opposite result: in effect, actually limiting the use of arbitration in corporate law. This is because the development of the individual national arbitration acts has not, historically, been uniform.

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REFERENCES:

[1.] Auf die Frage ob der Schiedsrichter auch Massnahmen anordnen kann, die der schweizerischen Rechtsordnung unbekannt sind, wird im Rahmen dieser Arbeit nicht eingetreten. Das staatliche Gericht wird aber zweifellos nur jene Massnahmen vollstrecken, die nach seinem Recht zugelassen sind.

[2.] MERKT, Nr. 469 f., S. 191 f., welcher aber nicht ausschliesst, dass aufgrund Art. 182 Abs. 2 IPRG die schweizerischen Gerichte verpflichtet sind, auch Schiedsgerichten mit Sitz im Ausland bei der Vollstreckung vorsorglicher Massnahme Hilfe zu leisten (vgl. Nr. 472, S. 193).

[3.] MERKT, Nr. 471, S. 192, mit Bezug auf die herrschende Lehre.

[4.] VAN DEN BERG, S. 139 ff.

[5.] BERTI, Ausschluss, S. 346.