



Arbitration Newsletter Switzerland

Two new Decisions confirming previous Positions taken by the Supreme Court as to Waiver of Annulment, *res judicata*, *pacta sunt servanda* and Revision of Awards

Introduction

Just before year end 2005, the Swiss Federal Supreme Court ("Supreme Court") made available two decisions arising out of the same arbitration (4P. 98/2005 and 4P. 154/2005), both rendered on November 10, 2005 and published on the website of the Supreme Court (www.bgr.ch) subsequently. Both decisions were issued in French. As in most of the cases, the presentation of facts by the Supreme Court occurred on an anonymous basis and is, therefore, difficult to read. Based on information available in newsletters and the internet, a short summary of facts, in particular identifying the parties involved, is therefore introduced below as a "starter".

Facts

In 1994, the Republic of Lebanon entered into two contracts identified as "Build, Operating and Transfer Undertaking for Implementing Cellular GSM Services in ["Lebanon"] ("BOT contracts") with France Telecom Mobile International (FTMI) and Libancell, the latter being a subsidiary of Finnish Sonera. Under these contracts, the foreign investors should implement a GSM network and provide GSM services for 10 years and three months, a duration which could be extended to 12 years on investors' demand. In return, the Republic of Lebanon was entitled to a share of the generated revenues. The BOT contracts provided for dispute resolution under the ICC Rules of Arbitration, with the seat of the arbitral tribunal being in Lebanon.

FTMI established the subsidiary FTML in Lebanon and started commercial GSM operation in early 1995 under the brand name Cellis. The commercial operation enjoyed a success beyond expectations,

which led to both technical and contractual problems. On June 21, 1999, the Lebanese Audit Court published a report on the management of the BOT contracts, inviting the government to terminate or renegotiate the contracts. On April 19, 2000, the government decided to issue a collection order for USD 300'000'000.-- against both GSM operators based on a first estimate of the alleged damages suffered by the Republic of Lebanon as established by the report of its Audit Court.

Apart from requiring the competent judge to suspend such collection order, FTML filed on May 19, 2000, a request for arbitration to the ICC. The Republic of Lebanon challenged the jurisdiction of such arbitral tribunal, invoking the administrative nature of the BOT contracts. On June 15, 2001, the Republic of Lebanon terminated the BOT contracts, effective per December 31, 2001, as provided for by Art. 22.1 lit. e thereof.

By request of the Ministry of Justice, the Lebanese Conseil d'Etat (supreme administrative court) declared on July 17, 2001, the ICC arbitration clause in the BOT contracts as null and void and held that the dispute should be settled by UNCITRAL arbitration - if applicable - as provided for by the French - Lebanese investment treaty of November 28, 1996. According to the Conseil d'Etat, disputes arising out of concession contracts were under the exclusive jurisdiction of the Lebanese courts.

By mutual consent FTML continued GSM operation in 2001 and 2002. In January 2002, the parties agreed to suspend the ICC arbitration. On June 20, 2002, FTMI and FTML served the Republic of Lebanon a



request for arbitration in accordance with the UNCITRAL rules.

On December 14, 2002, the parties signed a contract identified as "Master Transfer Deed" ("MTD") along with an addendum, dated March 7, 2003. The MTD consolidated both arbitration proceedings under the UNCITRAL rules, thereby terminating the ICC arbitration. In Art. 14.2 MTD the parties agreed

"that they will not pursue or raise any contractual disputes before any court or tribunal other than the UNCITRAL Tribunal."

Furthermore, the parties signed in Art. 14.4 MTD a waiver to challenge the jurisdiction of the arbitral tribunal as follows:

"The Parties undertake that they will not challenge the jurisdiction of the UNCITRAL Tribunal whether before the UNCITRAL Tribunal itself or before any national courts. For the avoidance of doubt, the Parties and [FTMI] do not hereby waive their right to challenge any award in the UNCITRAL Arbitration in the place where the award is made or to resist enforcement thereof in country or countries where enforcement is sought on the grounds contained in the applicable arbitration laws of those countries, save that the Parties will not do so on the ground that the UNCITRAL Tribunal lacked jurisdiction to consider one or more of the issues before it."

As to the collection order the parties stipulated in Art. 14.5 the following:

"Without prejudice of its right, the Republic of [Lebanon] agrees to suspend the enforcement of the Collection order until the Final Award is rendered. The amount of the Collection order shall be adjusted or the Collection order withdrawn on the basis of the final Award."

FTMI and FTML claimed at the arbitral tribunal the amount of USD 951'724'375.--, based on expropriation and other alleged violations of duties against foreign investors, as well as violations of the BOT contracts. Furthermore, the collection order was challenged. The Republic of Lebanon motioned for dismissal of such claims and requested that FTMI and FTML's challenge of the collection order of USD

300'000'000.-- be dismissed. The Republic of Lebanon filed also counter-claims.

By award dated January 31, 2005, the arbitral tribunal validated FTMI and FTML's challenge against the collection order of USD 300'000'000.-- and was, at least partly, approving the principal claim as well as the counter-claim. The arbitral tribunal then awarded FTML the amount of USD 266'349'600.-- to be paid by the Republic of Lebanon.

On April 8, 2005, the Republic of Lebanon filed an action for annulment of this award at the Supreme Court. In addition, it filed also a request for revision of the award at the arbitral tribunal. By revised award rendered on April 7, 2005, the arbitral tribunal notified the parties that the operative part of the award of January 31, 2005, remained unchanged. The Republic of Lebanon then challenged this revised award at the Supreme Court as well.

Action for annulment of the Award

In its challenge of the award, the Republic of Lebanon did in particular argue that the arbitral tribunal did not have jurisdiction to render such award. As to the merits, the Republic of Lebanon maintained that in rendering such award the arbitral tribunal did violate the fundamental principles of *res judicata* and *pacta sunt servanda*. As to the proceedings at the Supreme Court, the Republic of Lebanon requested a second exchange of briefs.

These arguments gave the Supreme Court the opportunity to reconfirm some earlier decisions as to the above issues and it seems appropriate to briefly summarize those positions of the Supreme Court. The analysis of the arguments brought forward by the Republic of Lebanon is not particularly helpful for this purpose since the Supreme Court did qualify at least some of those arguments as being at the edge of frivolous. ("... la critique de la recourante confine même à la témérité ...")

A second exchange of briefs at the Supreme Court is the exception to the rule. Such exception is granted by the Supreme Court only if a second exchange is, in its view, absolutely indispensable for deciding the case (BGE 130 III 755, c.f. our posting on the website of July 5, 2005).



As to the plea for lack of jurisdiction the Supreme Court confirmed its previous decision (BGE 131 III 173, c.f. our posting on the website of September 14, 2005, "Waiver of annulment under Art. 192 PILA" or "How final is final?"). The Supreme Court restated that in order to be considered as valid waiver of annulment under Art. 192 PILA, the parties must not explicitly refer to this particular provision. It is necessary, but also sufficient, that the wording chosen by the parties leaves no ambiguity as to this waiver. The Supreme Court did then qualify, not much as a surprise, the wording of Art. 14.4 MTD as clear waiver to challenge the jurisdiction of the arbitral tribunal. In doing so, the Supreme Court did also reject the argument of the Republic of Lebanon that, while signing such provision, it could not reasonably anticipate that such waiver would also encompass the jurisdiction of the arbitral tribunal to decide on the collection order. In view of the Supreme Court the consolidation of the arbitration proceedings, as stipulated by the MTD, did also include all issues arising out of the collection order.

The Supreme Court did then confirm that that the principle of *res judicata* is part of the procedural Swiss public policy thus restating its previous decisions as to that issue (BGE 128 III 91, 125 III 8, 123 III 16 und 116 II 738). In doing so, the Supreme Court left open whether a collection order issued by an administrative authority could, under the prevailing circumstances, be considered as *res judicata* at all. The Supreme Court rejected the argument of the Republic of Lebanon primarily based on the wording of Art. 14.5 MTD, cited above, where the Republic of Lebanon had explicitly agreed to suspend the enforcement of the collection order and was, therefore, precluded from raising the argument that such collection order has become final.

The Supreme Court confirmed also that the principle of *pacta sunt servanda* is one of the main cornerstones of Swiss public policy (BGE 128 III 394, 120 II 155). In order to violate such fundamental principle, an arbitral tribunal has either to apply or the refuse to apply a contractual term in contradiction to its own interpretation of the contract. The interpretation itself and the conclusions drawn from this interpretation are, by itself, not exposed to a violation of public policy (unpublished decision of the Supreme Court 4P.12/2000). The Supreme Court then confirms the conclusion already taken in this

earlier decision namely that the very large maturity of all disputes arising out of a violation of a contract can, under the very narrow perspective of public policy as referred to in Art. 190 (2) (e) PILA, not be challenged by invoking the principle of *pacta sunt servanda*.

Revision of the Award

In its second action for annulment, the Republic of Lebanon was first asking the arbitral tribunal for a revision of its award. In its revised award the arbitral tribunal conceded that there was actually a calculation error but such error occurred in the reasoning of the award only, whereas the amount stated in the operative part of the award was not affected by such error. Therefore, the award itself remained unchanged also in the revised award. In its action for annulment, the Republic of Lebanon argued that in rendering the revised award the arbitral tribunal violated Art. 190 (2) (a) PILA since the revised award was not signed by the chairman of the arbitral tribunal but only by one of the co-arbitrators, whereas the other co-arbitrator attached a dissenting opinion. Furthermore, the Republic of Lebanon maintained that the arbitral tribunal exceeded its competence by modifying the content of the award in an inadmissible way. Finally, the Republic of Lebanon stated that the arbitral tribunal rendered its revised award *ultra petita* and did also violate further fundamental procedural rights.

Before going into the brief arguments of the Supreme Court, it should be noted that the provisions of the PILA do not contain any express provisions covering the revision of arbitral awards. The pertaining guidelines as to how and when a revision of an arbitral award rendered under Chapter 12 PILA could occur had to be established first by the Supreme Court in a decision rendered shortly after the PILA came into force (published under BGE 118 II 199; in detail Geisinger/Frossard, Challenge and Revision of the Award, in *International Arbitration in Switzerland*, edited by Gabrielle Kaufmann-Kohler & Blaise Stucki, 2004, p. 154 et seq).

It seems that the Republic of Lebanon, in arguing its action for annulment, did again go relatively far as the Supreme Court concluded:

"Le grief issu de l'Art. 190 al. 2 let. a LDIP est donc manifestement dépourvu de tout fondement."



The Supreme Court concluded:

In rectifying certain figures in its reasoning but in not changing the award it-self, the arbitral tribunal did, in essence, reject the request of the Republic of Lebanon for a revision of the award. Therefore, the Republic of Lebanon had to be heard whether such refusal of the arbitral tribunal was justified or not. However, such procedure at the Supreme Court could not lead to an interpretation of the award itself.

The revision of the award is to be dealt with independently from the challenge of the award itself i.e. the fact that the action of annulment of the award (cf. 3 above) was rejected by the Supreme Court, does not automatically make the action for annulment against the revised award to become obsolete.

The fact that the revised award (which actually confirmed the award itself) was signed by one co-arbitrator only, does not per se lead to the application of Art. 190 (2) (a) PILA. Whilst it was uncontested that the revised award served upon the Republic of Lebanon was not covered by the chairmans signature, the Supreme Court accepted that the chairman did actively participate in this decision on the revised award. As a matter of fact, the copy served upon defendants beared the signature of the chairman and even the dissenting opinion of the second co-arbitrator was making reference to an active participation of the chairman in stating that "the revision of the award proposed by the chairman is not correct". Based on this, the Supreme Court concluded that there was no ground for annulment of the revised award based on Art. 190 (2) (a) PILA.

In not changing the award, the arbitral tribunal could, by definition, not have acted ultra petita and, consequently, the pertaining argument by the Republic of Lebanon based on Art. 190 (2) (c) PILA was dismissed.

The fact that the chairman of the arbitral tribunal did inform the parties, by way of a letter, in advance of the decision of the arbitral tribunal not to revise the award did not, as alleged by the Republic of Lebanon, violate the duty to keep the deliberations of the arbitral tribunal confidential. This letter was sent to the parties after the arbitral tribunal rendered its decision and contained the result only but not the deliberations itself.

Consequently, the Supreme Court dismissed also this second action for annulment.

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Hansjörg Stutzer

For further information please contact:

Dr. Hansjörg Stutzer (h.stutzer@thouvenin.com)