Is It Possible to Halt A Constitutional Claim by Means of An Anti-Suit Injunction?

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In international commercial arbitration, issues relating to the unconstitutionality of national law (or national legislation) are very rarely raised before the arbitral tribunal. Within a purely academic setting, Jan Paulsson once commented that "[t]here [was] nothing at all unorthodox about the proposition that international tribunals empowered to apply national law [are also entitled to] make plenary determinations about [its] constitutionality."[fn]J PAULSSON, *International Arbitration Is Not Arbitration*, (2008) 2 Stockholm International Arbitration Review 18.[/fn]

Five years after Jan Paulsson's lecture, I wrote an article arguing, among other things, that the task of determining whether an act of Parliament is contrary to the constitution is entrusted to national courts and not to arbitral tribunals. I further argued that, unless otherwise declared by the judiciary, acts of Parliament are generally presumed to be valid, as a result of which the tribunal's role is to apply the law, even if this produces a hypothetically "unconstitutional" outcome.[fn]*See* JC BETANCOURT, *Understanding the 'Authority' of International Tribunals: A Reply to Professor Jan Paulsson*, (2013) 4(2), Journal of International Dispute Settlement 227-244.[/fn]

To illustrate, if the tribunal is asked to render an award with respect to the validity of a commercial contract governed by a piece of legislation that has been claimed — but not proved or declared — to be unconstitutional, it is clear that the tribunal would be certainly empowered to decide the question of whether or not such a contract is valid. However, it would definitely not be empowered to consider the question of whether the relevant legislation is or is not unconstitutional, hereinafter referred to as a "constitutional claim."

At that time, there were no English cases on this point and, therefore, most of my arguments were supported by constitutional theory rather than case law. My proposition was, and continues to be, that an arbitral tribunal cannot legitimately make a decision as to the constitutionality of national law. Consequently, the only way to effectively challenge the validity of the alleged unconstitutional legislation is by way of an application to the court that has been constitutionally vested with the power to decide this type of claim.

In *Aqaba Container Terminal (Pvt) Co. v Soletanche Bachy France SAS*, *[2019] EWHC 362 (Comm)*, the Commercial Court made clear that an arbitral tribunal sitting in London is not empowered to arbitrate a constitutional claim to invalidate national legislation. The Court's stance on this issue may no doubt encourage parallel proceedings. However, the Court also held that a constitutional claim may be brought to a halt by means of a permanent anti-suit injunction. This blog post provides an analysis of the Court's judgment.

The Case: *Aqaba Container Terminal (Pvt) Co. v Soletanche Bachy France SAS*

Aqaba Container Terminal (ACT) entered into a construction contract with Soletanche Bachy France (SBF). The contract contained an ICC arbitration clause. The seat of the arbitration was London. A dispute arose as to whether such a contract had been lawfully terminated. The dispute was referred to arbitration. The arbitral tribunal decided, *inter alia*, that ACT had validly terminated the contract.

SBF sought to challenge the award under Sections 67 and 68 of the Arbitration Act 1996. The challenge was dismissed.

A few years later, SBF initiated court proceedings in Jordan to obtain a declaration of unconstitutionality of Article 17 of the Aqaba Special Economic Zone Law No. 32 of 2000. SBF alleged that the contract was "signed pursuant to [Article 17] which [was contrary to Article 117] of the Jordanian Constitution."[fn]*See Id*. at 20.[/fn]

SBF's submission was that if the court were to find that Article 17 was contrary to Article 117 of the Jordanian Constitution, it would have also concluded that the above-mentioned contract was null and void. SBF made no reference whatsoever to the arbitration agreement, the award, or the challenge to the latter in the Jordanian proceedings.

The Anti-Suit Injunction

To counteract the Jordanian proceedings, ACT applied to the Commercial Court for a permanent anti-suit injunction to impede the continuation of those proceedings. SBF contended that a constitutional claim was the only way to invalidate the contract and that the granting of that injunction would adversely affect its constitutional rights.

The Commercial Court relied on expert evidence that even if the court had determined that Article 17 was contrary to Article 117 of the Jordanian Constitution, it would not have declared the contract void. The Court also found that "a claim to invalidate the [contract fell within the scope of] the Arbitration Agreement," and that it should have been decided by the tribunal.[fn]*See Id*. at 35.[/fn]

The Court also explained that "[i]f the result of agreeing not to bring a civil claim to invalidate the contract [was] that it [was] not possible to reach the benches of a constitutional court then that [was] the result of the agreement that [SBF] made, not of the injunction."[fn]*Id*. at 42.[/fn] Consequently, the injunction was granted.

Is the Court's Reasoning Legally Sound?

The Court's judgment may raise a few eyebrows among constitutional romanticists, but no doubt, its reasoning is legally sound. By agreeing to arbitrate, the parties were bound not to initiate court proceedings in breach of the arbitration agreement. In the case in hand, it was for the arbitral tribunal to determine whether or not the main contract was valid.

Nonetheless, SBF chose to question its validity before the Jordanian courts, which constitutes a breach of the arbitration agreement, and the purpose of an anti-suit injunction is to remedy that type of breach. Thus, the Court was right in granting such an injunction. This is also fully consistent with the

New York Convention.

What Would Have Been the Arbitral Tribunal's Role?

Although the Court expressly stated that an arbitral tribunal does not have the power to invalidate national legislation, it also acknowledged that "[i]f Article 17 of Law No 32 of 2000 [was] invalid the question whether the Construction Contract [was] as a result invalid would be (or have been) for the arbitration tribunal."[fn]*Id*. at 36.[/fn]

The above reasoning should not be interpreted to mean that arbitral tribunals are authorised to carry out a non-binding judicial review in order to decide whether a contract is valid. Rather, it means that if, at some point, Article 17 had been declared unconstitutional by the Jordanian courts, the tribunal would have been entitled to make an award as to its validity.

Conclusions

As far as English Law is concerned, it is possible to halt a constitutional claim by means of a permanent anti-suit injunction. It can be said that the right to set aside a contract on any of the available grounds (including constitutional grounds) is not a constitutional — and let alone a fundamental — right, but a contractual right.

Once the parties have entered into an arbitration agreement, it can also be said that they have somewhat waved their right to challenge the validity of the respective contract before the national courts, and this appears to be the case even if the validity of the contract arises in the context of a constitutional claim.