Kluwer Arbitration Blog

The Effects of Insolvency on International Arbitration

Maxi Scherer (WilmerHale & Queen Mary University of London) · Friday, May 29th, 2009

The Swiss Supreme Court recently rendered a decision (4_A428/2008, dated 31 March 2009) regarding the effects of insolvency proceedings on international arbitrations seated in Switzerland.

This case concerns a multi-party arbitration conducted under the ICC Rules with its seat in Geneva. One of the co-respondents in the arbitration, a Polish company, informed the tribunal that insolvency proceedings had been opened against it in Poland and that Polish law provided for the invalidity of arbitration agreements to which the insolvent company was party. The Polish company relied on Article 142 of the Polish Insolvency Law (the "PIL"), which provides "any arbitration clause concluded by the bankrupt shall lose its legal effect as of the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued."

The insolvent Polish company filed a request to the arbitral tribunal seeking a ruling that the arbitration against it be discontinued. The tribunal, after hearing the parties on this matter, rendered an interim award granting the Polish company's request. The arbitral tribunal held that Article 142 PIL dealt with the issue of a party's "continued capacity" to participate in an arbitration. Applying Swiss conflicts of law rules, the tribunal further held that a company's capacity must be determined on the basis of its law of incorporation pursuant to Article 154 et seq. of the Swiss Private International Law Act (the "SPILA"). The tribunal therefore discontinued the proceedings vis-à-vis the insolvent co-respondent.

The Claimant in the arbitration then initiated proceedings before the Swiss Supreme Court seeking to set aside the tribunal's interim award. The Claimant argued that the effects of a foreign insolvency proceedings on an international arbitration seated in Switzerland should be governed by Swiss law.

In its decision dated 31 March 2009, the Swiss Supreme Court rejected the request to set aside the interim award and held that the arbitral tribunal was correct in discontinuing the proceedings against the insolvent party. According to the Supreme Court, "Swiss law is silent on the subjective capacity to arbitrate of non-state parties… . Therefore, the general procedural principle applies, according to which the capacity to be a party (*Parteifähigkeit*) depends on the preliminary substantive law question of legal capacity (*Rechtsfähigkeit*) … ." The Supreme Court thus applied Articles 154 and 155 SPILA which govern the legal capacity of corporations and held that "the assessment of the legal capacity and thus the capacity to be party to international arbitration proceedings [of a Polish incorporated company] is determined … in accordance with Polish law."

The Swiss Supreme Court decision is interesting in many respects. In particular, it addresses

important choice of law questions concerning the capacity of parties to international arbitration agreements. The Court's decision also raises, but does not address, important questions regarding the effects of national legislation which arguably discriminates against arbitration agreements under the New York Convention.

The Swiss Supreme Court decision also contrasts with a ruling of the English High Court earlier this year ([2008] EWHC 2155 (Comm)), which upheld an award which came to a different conclusion in another arbitration seated in England against the same insolvent Polish company. In that case, the arbitral tribunal had decided not to discontinue the arbitral proceedings vis-à-vis the insolvent Polish party notwithstanding Article 142 PIL. The Polish company applied to the English High Court challenging the tribunal's award on that issue.

The English Court rejected the request holding that English law rather than Polish law governs the question of the effects of the insolvency proceedings on the arbitration. The Court based its decision on Article 15 of the EU Insolvency Regulation (inapplicable in Switzerland) which provides that "[t]he effects of insolvency proceedings on a lawsuit pending … shall be governed solely by the law of the Member State in which that lawsuit is pending." In doing so, the Court came to the conclusion that the term "lawsuit" in the sense of Article 15 applied not only to national court proceedings but also to arbitration proceedings.

Dr. Maxi Scherer

This entry was posted on Friday, May 29th, 2009 at 9:41 am and is filed under Commercial Arbitration, Domestic Courts
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.