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French Courts firmly reject anti-arbitration injunctions

Alexis Mourre (Castaldi Mourre & Partners) · Thursday, May 6th, 2010

In recent years, there has been increasing concern about court orders aimed at preventing a party from initiating, continuing or participating in arbitration proceedings (see notably, IAI Series on International Arbitration, no 2, Anti-Suit Injunction in International Arbitration, E. Gaillard ed., 2005; ICCA Congress Series, No 13 International Arbitration 2006, Back to Basics?, A. J. Van Den Berg, Kluwer Law Int 2007).

The Paris court of first instance (*Tribunal de Grande Instance*) has in recent months rendered two interesting decisions in this respect. These two decisions address the issue whether and to what extent French courts can interfere with the arbitral proceedings, in particular when relief is sought in summary proceedings on the basis of an alleged risk of imminent or irreparable harm. In both sets of proceedings, the arbitrators were directly sued.

The first of these two cases led to an order of the Paris court of 6 January 2010 (*S.A. Elf Aquitaine and Total v. Mattei, Lai. Kamara and Reiner*). The claim amounted to an aggressive attempt to derail an ongoing arbitration by requesting the court to enjoin the arbitrators from pursuing the proceedings. The underlying dispute in the arbitration was concerned with a cooperation contract concluded between Elf Neftgaz, a subsidiary of Elf Aquitaine, and certain Russian parties. The basis for the request was that a shareholders' assembly of Elf Neftgaz had decided the liquidation of said company. The Russian parties subsequently made an application to the president of the Paris tribunal of commerce to appoint an ad hoc representative for Elf Neftgaz to the effects of the arbitration they were about to commence against such company. The court accepted such request and appointed an ad hoc representative for Elf Neftgaz. The arbitration commenced with its seat in Paris, and the court appointed representative nominated an arbitrator on behalf of Elf Neftgaz. However, the judgment having designated the ad hoc representative was thereafter retracted upon request of Elf Aquitaine. Although such decision was appealed by the Russian parties, Elf Aquitaine and Total seized the court in summary proceedings (*référé*) against the three arbitrators (who were the only named defendants) to obtain an injunction to interrupt the arbitration. The request was based on the contention that Elf Neftgaz's arbitrator had been appointed by a representative deprived of powers and that the continuance of the arbitration in spite of the withdrawal of the court decision having nominated Elf Neftgaz's representative would be such as to cause irreparable harm.

The case leading to the Paris First Instance Tribunal decision of 29 March 2010 (*Republic of Equatorial Guinea v Fitzpatrick Equatorial Guinea, de Ly, Owen and Leboulanger*) was concerned with a contract for the construction of a highway. A dispute arose between the parties, and

Fitzpatrick initiated ICC arbitration. Like in the *Elf* case, the seat of the arbitration was in Paris. The Republic challenged the Arbitral Tribunal's jurisdiction on the basis that the arbitral agreement and the laws of Equatorial Guinea imposed to exhaust local judicial remedies before arbitration could be initiated. The Republic also submitted that Fitzpatrick had been placed in insolvency proceedings in Equatorial Guinea and that only the receiver appointed by the local court had powers to represent it. The arbitral tribunal rendered a partial award upholding its jurisdiction, and proceeded to instruct the merits in the second phase of the arbitration. Meanwhile, the partial award was challenged before the Paris Court of Appeal. Based upon such challenge, the Republic made an application before the Arbitral Tribunal to stay the arbitration. The Arbitral Tribunal rejected such application and the Republic started summary proceedings to enjoin the arbitrators from continuing the arbitration until the Court of appeal decision in the setting aside proceedings.

Both sets of proceedings were initiated pursuant to article 809 of the Code of Civil Procedure, which provides that "*The president [of the Tribunal of First Instance] may always, even if the request is subject to serious objections, order in summary proceedings such conservatory or protective measures that may be necessary to prevent imminent harm or to put an end to a manifestly illegal trouble*".

In the *Elf* case, the claimants alleged that the arbitration should not proceed for the judgment having designated the representative of a party had been retracted. As a consequence, the nomination of an arbitrator by such party was invalid, thus jeopardizing the entire constitution of the arbitral tribunal. The respondents objected that French law does not permit courts to deliver injunctions to an arbitral tribunal, and that based upon the negative aspect of *Kompetenz-Kompetenz*, arbitrators have exclusive jurisdiction to rule upon their own jurisdiction, the courts' assessment being postponed until a possible challenge against the award, with the consequence that courts are deprived of any power to assess the arbitrators' jurisdiction once the arbitral tribunal is constituted.

The court endorsed such arguments and decided that, once the arbitral tribunal is constituted, it is only for it to decide on its own jurisdiction, and that it is as a consequence for the arbitral tribunal to decide the consequences of the withdrawal of the court nomination of a party representative on the regularity of its own constitution: "*notwithstanding the effect of the withdrawal of the order having designating the* [party representative] *and the irregular designation of two or three of the arbitrators, the question of the existence of this arbitral tribunal or of the regularity of its constitution falls exclusively within the jurisdiction of the arbitral tribunal, which excludes that the court be seized in summary proceedings*".

The court adopted the same principles in the *Republic of Equatorial Guinea* case.

The Republic argued that the arbitral tribunal manifestly lacked jurisdiction because the arbitral agreement and the local law requested exhaustion of local remedies. Based on such contention, it developed several arguments. First, it argued that it would suffer an imminent and irreparable harm if the arbitration were to proceed for the award on the merits would be rendered before the Court of Appeal has a chance to rule on the challenge against the interim award on jurisdiction. Although the claimant conceded that the award on the merits could not be enforced in France until such challenge is decided (in particular because the challenge stays the enforcement of the award under French law), it would nevertheless be faced with the risk of enforcement abroad. In addition, the ICC Court of Arbitration had requested the Republic to pay an additional advance on costs, which the Republic might not be able to recoup would the award be ultimately quashed. Finally, the

Republic had lodged a criminal complaint on the ground of an alleged forgery, and it submitted that all proceedings should be stayed pending the criminal proceedings. The respondent raised a number of objections. First, the claim supposed that the court would express a view on the arbitral tribunal's alleged lack of jurisdiction which had already been decided in the partial award, thus violating the *res judicata* of said award (awards have in France *res judicata* since they are rendered – Article 1476 of the Code of Civil Proceedings). Second, like in the *Elf* case, it submitted that the arbitral tribunal enjoys an absolute priority to decide issues relating to its jurisdiction. In addition, French courts are deprived of any jurisdiction to interfere with the arbitral proceedings and cannot give injunctions to an arbitral tribunal, even though it sits in France. Third, French law clearly sets the principle that a challenge against a partial award on jurisdiction does not stay the arbitral proceedings and the arbitral tribunal can therefore proceed to instruct the merits even though setting aside proceedings are pending (notably, Cass. 19 March 2002). Finally, the criminal proceedings that the Republic had instrumentally started do not have the effect of staying the arbitral proceedings (Cass. 25 October 2005).

The court rejected the application. It admitted that: "*Article 809 of the Code of Civil Proceedings may be the basis for an order in summary proceedings* [to prevent imminent harm or to put an end to a manifestly illegal trouble] *even if the arbitral tribunal is already constituted and courts are deprived of jurisdiction to decide the dispute*". But such an order can only be taken "*to secure the enforcement of the arbitral award" and the court can therefore not "order the arbitrators to stay the proceedings*" as "*to order such a measure would constitute an interference with the arbitral proceedings which does not fall within the jurisdiction of national courts, even in summary proceedings*".

These two decisions confirm in very clearly terms that in no circumstance is the court authorized to interfere in any manner with arbitral proceedings (in an earlier order dated 24 June 2004, the Court of Paris had already decided that "*in no circumstance*", and "*whatever the legal grounds invoked", has the court any power to order an arbitral tribunal to stay its proceedings* – TGI Paris, 24 June 2004, LV Finance Group, Rev. Arb. 2005, p. 1037).

In sum, French courts may only intervene in support of the arbitration and in the limited cases provided by the law. In no circumstance can they entertain instrumental claims aimed at staying or disrupting the arbitration.

A bon entendeur…

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