Kluwer Arbitration Blog

Arbitration Agreement the New Zealand Way

Petra Butler (Victoria University of Wellington, Faculty of Law) · Monday, February 23rd, 2015

It is nearly a trite truism that New Zealanders are, in proportion to New Zealand's size, over represented in international arbitration. A truism confirmed by John Beechy during an address at the AMINZ International Arbitration Day in Auckland on 18 February. The theme of the Day was how New Zealand could play a more prominent role in the international arbitration world other than sending its daughters and sons off- shore. With this aim in mind, AMINZ has suggested some changes to the New Zealand Arbitration Act 1996 (see John Walton here). One of the sought changes is a reversal of the Supreme Court decision in *Carr v Galloway*. The Court had set aside the arbitration agreement, expressed to be subject to rights of recourse including a non-existent appeal on "questions of fact". Readers might remember that the case was at the heart of the Willem C Vis Moot problem last year. It is not the aim of this contribution to reiterate the Vis Moot problem (readers will find an apt treatment in the winning memoranda here) but instead the focus is on an aspect of the Supreme Court decision which has recently been the centre of two German Supreme Court decisions.

The issue in *Carr v Galloway* arose in regard to the following provision in the agreement between the parties:

> The parties agree as follows:
>
> 1. Arbitral tribunal and remedies
>
> 1.1 The dispute is submitted to the award and decision of the […] as Arbitrator whose award shall be final and binding on the parties (subject to clause 1.2).
>
> 1.2 The parties undertake to carry out any award without delay subject only to such rights as they may possess under Articles 33 and 34 of the First Schedule to the Arbitration Act 1996 (judicial review), and clause 5 of the Second Schedule (appeals subject to leave) but amended so as to apply to "questions of law and fact" (emphasis added). [Italics and brackets in the original contract]

In regard to clause 1 the Supreme Court was asked to decide what constituted an arbitration agreement in light of the purpose and the statutory context of the Arbitration Act 1996. The Court found that in the context of the Arbitration Act "arbitration agreement" had a broad meaning going beyond the formal submission of disputes to the arbitral tribunal. The Court took note especially of

sections 12 and 14 of the Act (at [39]). Section 12 contemplated that the parties may, in their arbitration agreement, modify the powers of an arbitral tribunal. The Court concluded that s 14's mandate that the parties may agree "in the arbitration agreement or otherwise" to terms governing the privacy and confidentiality of the arbitral proceedings was further evidence that an arbitration agreement under the 1996 Act encompassed more than just the formal submission of the dispute to an arbitral tribunal. Furthermore, several procedural rules in Schedule 1 of the Act supported, in the Court's view, the finding that "arbitration agreement" had a broad meaning (at [40]-[41]). Overall the Court concluded: "if parties' contractual assent to arbitration is made conditional, in the specific clause submitting the dispute to arbitration, upon certain procedural matters or other terms, it must follow that those conditions are part of the arbitration agreement." (at [46])

Recently, the German Supreme Court (BGH) in BGH, NJW 2014, 3652 (24 July 2014) was confronted with the following arbitration clause (translation from German)

> 16. Arbitral tribunal.
>
> 16.1. All disputes which arise from or in relation with this contract or attachments to this contract, including disputes in regard to the validity or the existence of this contract, excluding those disputes, which are not arbitrable under [German] law will be finally decided in accordance with the arbitration rules of the German Institution of Arbitration (DIS) without the possibility to appeal to the ordinary courts. The arbitral tribunal has the competence to decide upon the validity of the arbitration agreement.

The Court held that an exclusion of the ordinary courts to decide ultimately on the jurisdiction of the tribunal (cl 16.1. 2nd sentence) was not in line with § 1040 (3) No 2 ZPO and § 1059(2) No 1(a) ZPO and therefore invalid. Like in Carr the question arose whether the invalid 2nd sentence of clause 16 rendered the entire arbitration clause invalid. The Court held, lacking any evidence to the contrary, that parties who intentionally submitted their disputes to an arbitral tribunal, instead of to the ordinary courts, would also have done so if they would have known that the ultimate competence on the arbitral tribunal's jurisdiction remained with the ordinary courts (at [11]). Like in Carr the issue arose as to what constituted an arbitration agreement since the contract which contained cl 16 had to be notarised under German law. And even though the clause had been notarised the DIS arbitration rules referred to in cl 16.1. had not been notarised. The Court was asked to find, therefore, the entire cl 16 invalid. The BGH relied on § 1029(1) ZPO for what constituted an arbitration agreement. § 1029(1) ZPO, like s 2 of the Arbitration Act 1996, implements Art 7(1) of the Model Law by stating that an arbitration agreement is "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not." The Court clearly and unequivocally stated that the agreement had to be distinguished from the possible regulation of the procedure the parties wanted to adopt in regard to the arbitration (at [15]; see also Trittmann/Hahnefeld in Boeckstiegel, Kroell, Nascimiento, *Arbitration in Germany: The Model Law in Practice*, 2nd ed, Kluwer, 2015, § 1031 para 7). The BGH in its decision had built on its earlier decision of 18 June 2014 (NJW 2014, 3655). In the latter decision the Court had made clear that a distinction had to be drawn between the agreement to arbitrate and the agreement of the parties as to the formation of the arbitral tribunal (at [10]). Therefore, an invalid agreement as to the formation of the arbitral tribunal (in the particular case it was questionable whether the

agreement to appoint a sitting judge as an arbitrator was in accordance with German law) would not render the agreement to arbitrate invalid too.

The divergent approaches can be justified by the particular statutory context and purpose of the New Zealand Arbitration Act. Section 5 (b) of the 1996 Act however states that one of the purposes of the Act is "to promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration." In its reasoning the Supreme Court has failed to address the latter purpose of the Act. A comparative analysis and discussion of the international treatment of the meaning of "arbitration agreement" of which the German approach reflects international opinion would have been desirable.

Counsel and the courts should in the future make a particular effort to engage with the jurisprudence on the Model Law of other Model Law states. The engagement should not be curtailed to the jurisprudence of Model Law countries with a common law background. To fully appreciate the nuances in interpretation of the Model Law recourse should also be had to the jurisprudence of civil law Model Law countries.

Extensive and in depth commentary in English is available in regard to some of the jurisdictions, e.g. Boeckstiegel, Kroell, Nascimiento, *Arbitration in Germany: The Model Law in Practice*, 2nd ed, Kluwer, 2015).

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