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Hybrid Arbitration Clauses Tested Again: Can the SCC Administer Proceedings under the ICC Rules?

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Party autonomy is a well-established cornerstone of arbitration, which treats the parties as the true creators of the arbitral procedure. Hybrid arbitration clauses are built on this cornerstone. In a certain type of hybrid arbitration clause, the parties place the administration of arbitration in the hands of one arbitration institution by using the rules of another institution.

It is, however, often forgotten that arbitration rules are a product of the effort made by the institutions to provide the best service. They are in constant pursuit of the most efficient procedural solutions, and they work on their arbitration rules, trying to adapt them to the needs of the industry and to reflect new developments in the field. It does not come as a surprise then that the arbitration rules, which are developed with such great effort, are considered, as I have heard many times from the institutional officials, to be *goodwill* of arbitration institutions. Taking such point of view into account together with the funds which are invested in the development of such rules as well as the fees which are received for administrating the cases, one can say that the arbitration institutions have a strong incentive to reserve the application of its rules only for itself. The question is whether there are any means for this to be done in practice?

Arbitral institutions that have decided to administer cases in accordance with the rules of another institution, and the courts that have enforced the awards made under such administration, suggest that the answer is “no”. The recent decision of the Svea Court of Appeal (“the Svea Court”) in a case between the Government of the Russian Federation (“the Claimant”) and I.M. Badprim, S.R.L. (“the Respondent”) rendered on 23 January 2015 confirmed this conclusion (“the Decision”). The Svea Court rejected the Claimant’s motion to set aside the award. One of the bases for the challenge was that the hybrid arbitration clause, agreed by the Parties, was invalid since it provided for the proceedings to be administered by the Arbitration Institute of the Stockholm Chamber of Commerce (“the SCC”) under the Arbitration Rules of the International Court of Arbitration (“the ICC Rules”).

This decision does not stand alone in the field of the courts’ decisions on usage of the hybrid arbitration clauses in international arbitration. The Singaporean court was confronted with such clause in a similar case between Insigma Technology Co Ltd v Alstom Technology Ltd [2009] SGCA 24. In this case, the court upheld the hybrid arbitration clauses which provided for the arbitration to be administered by the Singapore International Arbitration Centre (“the SIAC”) under the ICC Rules.

Similarly, the Claimant and the Respondent in the case before the Svea Court contracted for the SCC to administer the arbitration between the Parties under the ICC Rules. The dispute arose in November 2010 and it was resolved with the final award in October 2013 ("the Award"), which ordered the Claimant (respondent in the arbitration) to pay an amount in excess of 1.8 million euros plus compensation for certain expenses and interest. The Claimant sought the award to be set aside before the Svea court, and one of the grounds for this request was that such a hybrid arbitration clause was non-enforceable and thus invalid.

The parties' submissions

The Claimant submitted that a hybrid arbitration clause is not enforceable since "*the SCC lacks both the required organizational structure as well as experience to carry out the most vital tasks under the arbitration rules of the ICC*". The Claimant stated that some of these tasks are: the appointment of the arbitrators based on the ICC's national committees, the confirmation of arbitrators based on the experience of their performance in other ICC arbitrations, the confirmation of "Terms of Reference", and the scrutiny of arbitral awards. According to the Claimant, the adaptation of the ICC Rules was not possible since the SCC's notification "*that its Board of Directors had concluded that it was not obvious that the institute lacked jurisdiction to resolve the dispute*" was conditioned upon the Parties' authorization to the SCC to adapt the ICC Rules. According to the Claimant, no such authorization was given.

The Respondent replied by stating that "[it] *always had the intention of avoiding the risk of having to litigate against the [Claimant] before Russian courts", and that "the parties have clearly agreed that disputes should be solved by arbitration before the SCC*". It heavily relied on the fact that the SCC has carried out some of the measures that are particular to the ICC Rules and that it was the Claimant who provided the final agreement.

The Svea Court's judgement

The Svea Court rejected the motion for setting aside. It relied on the general principle "*that the agreement should, to the extent possible, be interpreted in line with the parties' basic intentions […], i.e. that disputes between the parties should be settled by arbitration.*" Based on this principle, the court is allowed to disregard the contradicting provisions within an arbitration agreement.

In the case at hand, the Svea Court decided that the basic intention of the parties "*was that possible disputes between the parties would be resolved by arbitration and that the purpose was that the arbitration should take place in Stockholm before the SCC*". Since "[i]*t is undisputed that the SCC agreed to and also did administer the arbitration. Thus, it is clear that the arbitration agreement was enforceable,*" the Svea Court disregarded the contradictory parts of the arbitration agreement, i.e. the SCC as the arbitration institution and the ICC Rules as the applicable rules.

Concluding remarks

At first, the conclusion seems to be a simple one: "*The hybrid arbitration clause once again has successfully passed the enforceability test.*" The efforts of the tribunal, the SCC, and the Svea Court to find a "cure" for the pathological arbitration clause in this case and to enforce the parties' initial will to arbitrate are in accordance with the pro-arbitration point of view. However, this conclusion is not to be made without several caveats.

Firstly, given the fact that the Decision was rendered *post facto*, i.e. after the SCC accepted and administered the arbitration, the question arises whether the same conclusion would be reached in a case where the chosen institution refuses to administer under the rules which are not its own and a party seeks the enforcement of the arbitration agreement. The answer would probably be "no" and the clause would be deemed non-enforceable. It was similarly concluded in the Dissenting Opinion attached to the Decision.

Secondly, the Claimant stated that the SCC Board of Directors "had concluded that it was not obvious that *the institute* lacked *jurisdiction* to resolve the dispute" [emphasis added]. The Board's decision not only disregards the fact that it is the tribunal who has the jurisdiction not the institute, but also openly coincides with the *Kompetenz-Kompetenz* principle, under which the tribunal decides on its own jurisdiction. When it comes to hybrid arbitration clauses, it seems that the will of the arbitration institution to administer the case is the decisive factor for establishing the tribunal's jurisdiction. Such a conclusion should not be easily accepted.

Moreover, one cannot easily disregard the fact that the ICC, after the first court cases were decided in this matter, tried to prevent this type of clause by inserting in its 2012 ICC Rules: "[t]*he Court is the only body authorized to administer arbitrations under the [ICC] Rules*" (art. 1(2) of the ICC Rules). It is reasonable to conclude that a general reference to the ICC Rules as the applicable rules also incorporates this provision into the parties' arbitration agreement. Although the possible argumentation in this case is an *implicit* exclusion of this provision by choosing another body to administer the arbitration, the issue of whether such exclusion can be allowed and/or can be *implicit* has gone unnoticed by the Parties and the Svea Court.

Lastly, enforcement of such clauses, as well as, the recognition of the controversy, will influence the efficiency of future enforcement proceedings. Without clear-cut regulation in this matter, future arbitral awards based on this type of clause will inevitably suffer from strategic challenges. Such challenges will entail additional costs in any case and they might result in setting aside the award. It is, therefore, only a matter of time until these consequences will outweigh the advantages of enforcement of the parties' initial will to arbitrate and either deter the parties from agreeing on such clauses or force the regulators to adequately address these issues.

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