

European Court of Arbitration
Cour Européenne d'Arbitrage

Corte Arbitrale Europea
Corte Europea de Arbitraje
Europäischer Schiedsgerichtshof

Le / The
BULLETIN

**THE ELECTRONIC BULLETIN
OF THE
EUROPEAN COURT OF ARBITRATION**

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THE INTERNATIONAL REPORTS

> ITALY

ADVANCED COURSE ON MEDIATION

An advanced course on mediation was held in Milan, in the Law Courts on March 4, 11 and 24, 2010. The course was granted 11 credits.

On March 4, 2010 the need that the parties change their approach to the dispute and the ways to contribute to the resolution mechanism were presented by Mauro Rubino-Sammartano.

He was followed by neurobiology and mental processes by Mr. Jeremy Lack, Counsel at Law at Altenburger in Geneva.

On March 11, 2010 Mr. Federico Antich, Chairman of the Italian Chapter of the Mediation Centre for Europe, the Mediterranean and the Middle East dealt with the need to understand the iceberg (i.e. the effective needs of each party) and the need that the mediator makes each party separately aware of its weak points was handled by Mauro Rubino-Sammartano.

On March 24, 2010 a mock mediation proceedings were conducted by the Course Faculty and were followed by mediation moots handled by the participants, divided into groups.

THE ROME CONFERENCE AT THE SENATE OF THE REPUBLIC

The Conference held in Rome on May 21, 2010 at the Senate of the Republic, which involved 5 credits, has had the level of such prestigious venue.

The works, which were presided by the President of the European Court of Arbitration, were opened by Senator Caruso, formerly President of the Justice Committee of the Upper House, who has surveyed the parliamentary works of the last years in this area and has confirmed the intention of Parliament to make the alternatives to court proceedings even more efficient.

The first topic of the Session on Mediation was opened by Mrs. Maria José Santa Cruz, Vice Dean of the Valencia Bar, who described its potential.

She was followed by Prof. Giovanni Cabras, Holder of the Chair of Commercial Law at the Rome no. 3 University, Chairman of the Lazio Branch of the European Court of Arbitration, on the developments of conciliation up to now.

He was followed by Federico Antich, Chairman of the Italian Chapter of the Mediation Centre for Europe, the Mediterranean and the Middle East, who focused on the core of mediation, consisting in the need to sever the parties to a dispute from the problems and to help them to identify alternative and long effective solutions.

He was followed by Mauro Rubino-Sammartano, President of the Mediation Centre, on the psychological aspects of mediation and by Prof. Francisco Ramos Mendez, Chair of Civil Procedure at the University of Barcelona, who has very efficiently outlined the basic features of mediation and the not always adequate responses which have been provided to them.

After a visit to the main hall of the Senate, the Second Session, on Arbitration, was opened by a wide report by Prof. Carmine Punzi, Professor Emeritus of Civil Procedure at the University La Sapienza of Rome, on the role of arbitration within alternative dispute resolution mechanisms.

He was followed by a report by Mr. Habib Malouche, Chairman of the Tunisian Chapter of the European Court of Arbitration, on the choice of arbitrators.

The following report was made by Mr. Mauro Gigante, Head of the Law Department of Finmeccanica, on the cautions to be followed by corporations when referring disputes to arbitration. He was followed by Mr. Mauro Ferrante, Secretary general of the Italian Arbitration Association and Chief Executive Officer of the Italian National Committee of the ICC, who referred to experiences of his body.

The last report was made by the President of the European Court of Arbitration on arbitration and mediation in the Mediterranean.

The meeting was followed by the General Assembly of the Centre Européen d'Arbitrage.

> BAHRAIN

Court of Cassation – Recourse No. 305 of 2004 – May 9, 2005 – *President of the Court* Sheikh Khalifa Bin Rashed Bin Abdullah Al-Khalifa

« Since the time limit for rendering the award starts to run from the date the arbitrators accept their appointment, it is inadmissible to postpone the commencement of the time limit until the parties submit applications that form part of the arbitral proceedings ».

> EGYPT

Court of Cassation – Commercial Division – Case No. 9736/65 – 11 March 2008

« It is an established rule that arbitration is an exceptional means for resolving disputes which requires departure from the normal means of litigation and that arbitral awards, like judgments, are granted res judicata ».

Court of Cassation – Commercial Division – Case No. 2010/64 – 22 January 2008

« Domestic courts must recognize the arbitration agreement of the parties (Clause 13 of the Contract) and the arbitral award since Egypt ratified the New York Convention of 1958 regarding the Recognition and Enforcement of Foreign Arbitral Awards by Presidential Decree No. 171 of 1959. As the Convention was transformed into domestic law on 8 June 1959, it has a binding effect even if it contradicts other domestic and arbitration legislation».

Court of Cassation – Commercial and Civil Division – Case No. 810/71 – 25 January 2008



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« *The Court of Appeal quashed the arbitral award in its entirety because it considered that it breached mandatory rules of public policy. Article 53(2) of the Act No. 27 of 1994 recommends that “the court seized with the action for annulment shall rule sua sponte for the annulment of the arbitral award if its contents violate the public policy in the Arab Republic of Egypt” (in this case, the Court of Appeal found that the interest rate to be paid on the award exceeded the maximum interest rate allowed by Article 227 of the Civil Code : LIBOR rate plus 3% per year from 7 April 1998 until full payment of the award) ».*

...

« *The Supreme Court found that the Court of Appeal should have not quashed the arbitral award in its entirety because the part of the award which contravenes to public policy (or is not subject to the arbitration agreement) can be separated from the rest of the award. The appeal respondent was ordered to pay the costs in addition to two hundred Egyptian Pounds for attorney’s fees. The Supreme Court also asked another division of the Cairo Court of Appeal to hear the case again in accordance with its legal ruling ».*

> EMIRATES

Dubai Court of Cassation – Recourse No. 222 of 2005 – Civil recourse – January 22, 2006 – President Mohammad Mahmoud Rasem

« *The ruling of this court is that the contested judgment is not vitiated by insufficiency of its legal grounds since the Court of Cassation has the right to rectify a wrong legal decision on the basis of valid grounds without reversing the judgment. When the findings of the contested judgment refusing the aforementioned plea are legally correct, then the challenge thereto regarding the grounds of rejection of this plea is rejected ».*

Dubai Court of Cassation – Recourse No. 227 of 2006 – Commercial recourse – January 18, 2006 – President Ali Ibrahim Al-Imam

« *Amendment to the provisions of the arbitration clause may not be presumed but must be made with the approval of both parties ».*

> KUWAIT

Court of Appeals – Request for Arbitration No. 16/2001 – May 8, 2006 – Justices : Abdul Latif Thunyan Al-Thunyan, Mashari Yusuf Al-Kassar, Jamal Hamad Al Shamiri

« *The imperative provisions regarding the trading of stocks are part of the public policy and are closely linked to the national economy which is one of the State pillars ; therefore, they should not be violated or consensually agreed to be violated. The consequence of*



such violation is the annulment, which the court may rule on its own motion, i.e. even without being requested to do so ».

> LEBANON

Court of Appeal – Civil Division – First Chamber – Ruling No. 781/2009 dated June 3, 2009 – *President Jean Fahad*

« ... the arbitral tribunal which issued the disputed award and which based its award only on the testimony of a witness designated by the claimant and on the testimony of another witness designated by the respondent as well as on pieces of evidence included in the file in order to strengthen its conviction, did not violate the rights of defense because the arbitral tribunal has a discretionary power to take into account what strengthens its conviction to issue its final award without any of the litigants imposing pieces of evidence [...]. The arbitrator is not obliged to automatically hear the witnesses only because one of the litigants requested it ».

> LYBIA

Supreme Court – Civil recourse No. 41/54 – June 18, 2007 – *President Dr. Hamid Mohammad Al-Koumati*

« An award issued in a foreign country cannot be enforced if the case law of that country does not permit the enforcement of Libyan arbitral awards. The enforcement of foreign arbitral awards is possible so long as they are final and enforceable in the country where they were issued and provided that the rules set forth in the previous articles are complied with ; Article 407 lists conditions that must be met prior to granting leave for enforcement to the awards, including the requirement (paragraph 3 thereof) that the award must not conflict with a judgment or order previously issued by a Libyan court ».

> YEMEN

Supreme Court – Yemen (Commercial) – Case No. 1424/143 – May 25, 2004 – *President Mohammad Ali Al-Badri*

« The Court must re-examine the request for annulment and allow the claimant to submit his claims ».

> ICSID

International Centre for Settlement of Investments Disputes – Washington D.C. – ICSID Case No. ARB/07112, September 11, 2009

« Where the fundamental basis of the claim is a Treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or its subdivisions cannot operate as a bar to the application of the Treaty standard. When the State acts in the context of the performance of the contract as a “puissance publique”, a violation of the Contract would also constitute a violation of the Treaty, and the Tribunal will have jurisdiction for disputes arising from such violations. Whereas the umbrella clause can be used as a basis for claims based on the Treaty, it does not transform contractual claims into claims based on the Treaty ».

(All the judgments published herein are published in the Journal of Arab Arbitration, Issue n. 4 2009, edited by Jalal El Ahdab and are printed herein by their kind concession).

> TUNISIA

Tunis Court of Appeal – Case No. 56 – March 13, 2001

« The absence of authorization to the arbitrator, even if he is a public servant, does not cause the annulment of the decision since the requirement of the administrative authorization falls within the scope of the relation between the public servant and his administration along with the disciplinary responsibility that might result therefrom and does not affect in any manner the validity or annulment of the arbitral award. The arbitral tribunal is not requested to transcribe exactly everything stated in the parties' documents ».

Tunis Court of Appeal – Case n°98036 – Decision De cember 22, 2009

« The Court of Appeal of Tunis (which is the only Court in Tunisia which has jurisdiction on international matters) has dismissed the challenge of an arbitrator based on the fact that he and the lawyer of his appointor were from the same town. However the Court has accepted the challenge on the ground that the arbitrator's grandfather was the brother of the grandmother of a member of the nominating party. The Court has stated that the existence of any family relationship of any kind or degree allows the other party to doubt on the impartiality of the arbitrator ».

(Report provided by the Tunisian Chapter of the European Court of Arbitration).

> AUSTRIA

The Austrian Supreme Court, by a ruling dated July 22, 2009 (file number 3 Ob 144/09m), has held: that a respondent forfeits its right to invoke the invalidity of an arbitration agreement if it fails to raise the objection before the arbitral tribunal; and that a business-to-consumer arbitration agreement does not per se violate Austrian public policy.

In the case at issue, a Danish company (claimant) and an Austrian limited liability company (respondent) had concluded a franchise agreement including an arbitration agreement. The arbitration was held under the Rules of the Danish Institute of Arbitration. The claimant sought its enforcement in Austria under the New York Convention of 1958. Since the respondent had not objected to the jurisdiction of the arbitral tribunal before the tribunal itself, the subsequent objection during the enforcement proceedings was precluded. Further, a violation of the Austrian consumer protection law may in principle give rise to a violation of Austrian public policy. However, an agreement between a Danish company and an Austrian consumer to settle their dispute before an arbitral tribunal does not violate Austrian public policy per se. According to Sec 617 (6) no. 1 Austrian Civil Procedure Code, an arbitral award in proceedings involving a consumer shall be set aside, if a mandatory provision that may not be excluded by the parties' choice, is violated, even in disputes within an international context. However, this regulation would be redundant if each breach of mandatory consumer protection law were to violate Austrian public policy.

(* judgment 3 Ob 144/09m published in German language in *JusGuide* 2009/40/6938 (OGH))

(**For further details see review of 3 Ob 144/09m by Christian Koller on <http://www.cm.arbitration-austria.at/index.php?main=5&sub=4&lang=DE>)

(report provided by the Austrian Chapter of the European Court of Arbitration).

> ROMANIA

Abstract

Competence - third party non – signatory of the commercial contract – consequence - implicit consent

In a recent Romanian arbitral dispute, it was provided that an arbitral agreement may require a non – signatory party to arbitrate if consent to the agreement is proved by circumstances such as negotiating or/and performing the contract that was the subject matter of the dispute. The parties involved in the arbitration were a Dutch company(the Claimant), a Romanian company(the first Respondent) and a company having its headquarters in Marshall Islands(the second Respondent). The non / signatory party was the Romanian company. The transaction at issue was a sale of goods, the seller being the Dutch company and the buyer being the Marshall Islands - based company. Owing to the fact that the latter did not pay the purchase price, the Dutch company commenced arbitration against the Marshall Islands – based company(signatory - party) as well as against the Romanian company(non – signatory party).

The Arbitral Tribunal held that the consent of the Romanian company to the arbitral agreement was implicitly expressed. This holding was based on the following reasons: first, the Romanian company received the goods and promised the partial payment of the price; second, the Romanian company was aware of the existence of the contract that was the subject matter of the dispute. In this respect, the Arbitral Tribunal considered that the arbitral agreement was binding on the Romanian company because the latter was involved in the performance of the contract.

(Interlocutory award, August 3, 2006: *Romanian Arbitration Journal*, 2, 2007, at 52 – 54).

Report provided by the Romanian Chapter of the European Court of Arbitration and due to Mr. Radu Bogdan Bobei * Ph.D. in private international law, attorney – at – law, arbitrator, Romanian Court of International Commercial Arbitration, Slovenian Court of International Commercial Arbitration, lecturer, Faculty of Law, University of Bucharest.

> IRELAND

The new Irish Arbitration Act

The new Irish Arbitration Act, the Arbitration Act 2010 will enter force on 8 June, 2010. The Act repeals the existing arbitration legislation of the Republic of Ireland - the Arbitration Acts 1954 to 1998 - in their entirety, and replaces them with the UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006), to govern both international and domestic arbitration in Ireland. The implementation is faithful to the Model Law, which is presented as a schedule to the Act, with only minor changes which are stated in the body of the Act.

The Act consists of three Parts, and five Schedules comprising the text of the various international instruments which Ireland has adopted in relation to arbitration.²

Part 1 of the Act deals with commencement, definitions and repeals. Notably, in this Part the Act adopts the Article 7, Option 1 definition of “arbitration agreement” as provided in the Model Law.³

¹ See <http://www.oireachtas.ie/documents/bills28/acts/2010/a0110.pdf>.

² The UNCITRAL Model Law on International Commercial Arbitration, 1985, as amended in 2006; The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958; The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965; The Geneva Convention on the Execution of Foreign Arbitral Awards, 1927; and the Geneva Protocol on Arbitration Clauses, 1923.

³ Certain arbitrations (mainly in the Employment and Industrial Relations areas) are excluded from the scope of the Act by section 30.

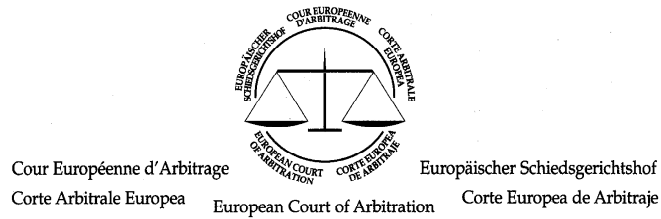
Part 2 applies the UNCITRAL Model Law to domestic as well as international arbitration taking place in Ireland. There is little here that one would not expect. Section 8 requires the Irish courts to take judicial notice of the travaux préparatoires in the interpretation of the Model Law. Sections 9 to 11 provide that the Irish High Court (which has traditionally held the jurisdiction in relation to arbitration matters) is to be the specified court for all applications in connection with the Model Law, and that there is to be no appeal from the Court, so finality is guaranteed. Section 9 provides that any court functions are to be exercised only by the President of the High Court or a specially nominated judge. This envisages the establishment of a corps of specialist judges to handle arbitration matters. Notably, section 13 of the Act limits the default number of arbitrators in any arbitration (international or domestic) to one, as opposed to the default of three as provided in the Model Law. The parties can, of course, agree otherwise. Arbitral immunity from suit (notably, without the bad faith exception) is provided in section 23, and this is extended to appointing institutions and employees, agents, advisors and experts.

Sections 14 and 15 concern the examination of witnesses and administration of the oath, and the taking of evidence in the State under Article 27 of the Model Law in support of arbitrations taking place in other states. Section 16 retains a fairly standard prohibition against consolidation of arbitrations without the consent of all concerned.

Costs and interest are dealt with in sections 18, 19 and 21. Section 21 of the Act gives the arbitral tribunal the discretion to award costs “as it sees fit” in the absence of contrary agreement by the parties. Otherwise, parties are free to agree on costs, including that each side shall in any event bear its own costs. This provision may prove attractive in particular to American parties where such agreements are common.

Many of the remaining provisions of Part 2 are relatively mundane – dealing with matters such as specific performance (section 20); survival of arbitration agreements upon death or bankruptcy (sections 26 and 27); application of the Act to Irish State Parties (there is no “Crown Immunity” in Ireland, so to speak); and arbitration under other Acts (section 29). Of special note, however, are the provisions in section 31 to protect consumers. Under that section, “consumers” (natural persons acting outside their trade or business) are no longer to be bound by arbitration clauses appearing in standard form contracts where the amount in dispute is less than €5,000, unless they agree again to arbitrate after the dispute has arisen.

Part 3 of the Act gives the Irish High and Circuit Courts a new power to adjourn any civil cases, on consent of the parties, to enable the parties to consider whether the disputes should be arbitrated. This, it is expected, will make arbitration an integral possibility in all civil litigation, and it places arbitration in the mainstream of Irish litigation procedure. The Act does not, however, make any express provision concerning costs penalties for parties who refuse to contemplate arbitration – time will tell whether the Courts will adopt such an approach.



Conclusion

The new Irish Arbitration Act, and its extension of the Model Law to domestic arbitration, will mean that in time Ireland will have a pool of arbitrators well versed in the UNCITRAL Model Law and capable of switching between domestic and international arbitrations with ease. It will also mean that Ireland, a common law jurisdiction, will generate a body of case-law on the Model Law which can be expected to be of interest the world over. Whether that will be enough to encourage greater use of Ireland as a venue for international dispute resolution remains to be seen. The faithful implementation of the Model Law by the legislation will mean, however, that the arbitral process in Ireland will remain as hermetically sealed from scrutiny by the courts as the framers of the Model Law had intended. This, coupled with the traditional support of the Irish Courts for the arbitral process, can only improve Ireland's attractiveness as a venue for arbitration.

(Report provided by the Irish Chapter of the European Court of Arbitration)

> MED-MID IV

The European Court of Arbitration is organising his

Med-Mid Forum The 4th Mediterranean-Middle East Counsel Forum

which will take place in **Tunis**, on **5-6 November 2010**.

The Programme and further information will follow.