4P.37/2001

SWISS FEDERAL TRIBUNAL

1st Civil Court

May 14th, 2001

composition of the Court : M. Walter, Chairman, M. Leu, M. Corboz, Mrs. Klet and M. Nyffeler, judges. Clerk : M. Carruzzo.

Deciding the public law appeal made by

Fomento de Construcciones y Contratas SA, in Madrid (Spain) represented by Mr. Laurent Levy and Mr. Elliott Geisinger, attorneys in Geneva

against

The arbitral award issued on November 30th, 2000 by an ICC Arbitral Tribunal sitting in Geneva and composed of Mr. Bruno Keppeler, Chairman, Mr. Alberto Mazzoni and Mr. José Carlos Fernandez Rozas, arbitrators, in the dispute between the Appellant and Colon Container Terminal SA in Eldorado (Republic of Panama), represented by Mr. Benoît Dayer and Mr. Howard Kooger, attorneys in Geneva

(International arbitration, *lis pendens*)

In view of the documents in the file which bring to light the following facts :

A.- By a contract of April 26th, 1996, Colon Container Terminal SA (hereafter "CCT"), a Panamanian company in Eldorado, entrusted the Spanish company Fomento de Construcciones y Contratas SA (hereafter "FCC") in Madrid with carrying out certain works of civil engineering for the construction of the harbor terminal of Coco Solo North (Republic of Panama) against a compensation of US$ 29.480.277,58.

The regulations to which the contract referred stated that should a dispute arise between the parties, a decision would be issued by the Engineer (in this case : Union-Tech Engineering Consultants Company) and that if the Engineer's decision was not accepted, a certain time would ensue to find an amiable solution, whereupon the different may be brought in front of one or several arbitrators acting according to the rules of conciliation and arbitration of the International Chamber of Commerce.

During the performance of the contract, a dispute took place between the parties. The contract was terminated by both parties. CCT entrusted the works to another contractor.

On March 12th, 1998, FCC filed a claim in the Panamanian Courts against CCT among others. CCT raised a defense based on arbitration.

On June 26th, 1998, the Panamanian Court of First Instance found that the arbitration defense had not been submitted timely.

B.- Without waiting for the national proceedings to run their course, CCT introduced arbitral proceedings on September 30th, 1998.

The venue of the Arbitral Tribunal, composed of three arbitrators, was set in Geneva. The parties anticipated that the rules of arbitration of the International Chamber of Commerce would govern the proceedings and, subsidiarily, the Federal Statute on Civil Procedure (PCF).

FCC challenged the jurisdiction of the Arbitral Tribunal. Principally, it claimed that it had proposed renouncing arbitration when it filed a claim in the Panamanian Courts and that its opponent had conclusively accepted by failing to raise the arbitration defense timely.

During the arbitral proceedings, a superior court in Panama, on appeal, found – contrary to the lower court – that the arbitration defense had been raised timely.

With reference to that decision and without waiting for the national proceedings to run their course, the Arbitral Tribunal, in an award of November 30th, 2000, decided similarly and found that it had jurisdiction in the case.

After the award, the Supreme Court of Panama, in a decision of January 22nd, 2001, found that the arbitration defense had been raised too late and ordered the proceedings to go ahead in the Panamanian Courts.

C.- FCC submits a public law appeal to the Federal Tribunal. Arguing that the Arbitral Tribunal found in favour of its jurisdiction by disregarding the rule of *lis pendens*, it submits that the award should be overturned and that the Arbitral Tribunal be found to have no jurisdiction.

The Respondent submit that the appeal should be rejected and that the Arbitral Tribunal be found to have jurisdiction.

The Arbitral Tribunal referred to its award.

Legal considerations :

1.- a) A public law appeal to the Federal Tribunal is allowed against an arbitral award pursuant to articles 190 ff LDIP (art. 85 litt. c OJ).

As the venue of the Arbitral Tribunal was set in Switzerland and at least one of the parties, at the time the arbitration agreement was executed, had neither its domicile nor its habitual residence in Switzerland (art. 166 par. 1 LDIP) articles 190 ff LDIP apply, because the parties did not rule out their application in writing and did not agree to apply exclusively the arbitration rules of the cantonal procedure (art. 176 par. 2 LDIP).

An appeal to the Federal Tribunal against an arbitral award is allowed (art. 191 par. 1 LDIP) when the parties did not opt out of the appeal (art. 192 par. 1 LDIP) and did not chose the appeal to a cantonal authority as a substitute (art. 191 par. 2 LDIP).

The appeal may only be made based on one of the grounds limitatively set forth at art. 190 par. 2 LDIP (ATF 119 II 380 consid. 3c p. 383).

The proceedings in front of the Federal Tribunal are governed by the rules of the statute organizing the Federal Courts (OJ) with regard to a public law appeal (art. 191 par. 1, second phrase, LDIP).

b) In matters of jurisdiction, a preliminary award may be appealed immediately (art. 190 par. 3 LDIP).

The Appellant is personally affected by the award which compels FCC to continue to proceed in front of the Arbitral Tribunal and FCC therefore has a personal and present interest, legally protected, to ensure that the award was not issued in violation of the guarantees contained at art. 190 par. 2 LDIP; consequently, FCC has standing to appeal (art. 88 OJ).

Timely filed (art. 89 par. 1 and art. 34 par. 1 litt. c OJ) in the legally prescribed form (art. 90 par. 1 OJ), the appeal is acceptable in principle.

But for certain exceptions, the appeal may only seek to overturn the decision (ATF 127 II 1 consid. 2c, 126 III 534 consid. lc, 124 I 327 consid. 4a and references). When the dispute relates to the jurisdiction of an Arbitral Tribunal, it has been exceptionally found that the Federal Tribunal may itself decide on jurisdiction or lack thereof (ATF 117 II 94 consid. 4).

c) Since the procedural rules are those of a public law appeal, the Appellant must formulate the ground for appeals in accordance with the rules of article 90 par. 1 litt. b OJF (ATF 117 II 604 consid. 3 p. 606). Within the framework of a public law appeal, the Federal Tribunal entertains only the arguments raised in

the appeal itself and with sufficient reasons (ATF 126 III 524 consid. 1c, 534 consid. 1b, 125 I 492 consid. 1b p. 495). The Appellant accordingly had to spell out which of the possibilities of article 190 par. 2 LDIP were met in the Appellant's view and also appropriately show why the rule relied upon had been breached by the award under appeal (ATF 110 Ia 1 consid. 2a); only under such conditions can the appeal be examined.

2.- a) The Appellant principally argues that the Arbitral Tribunal had no jurisdiction to issue the award under appeal because the Arbitral Tribunal should have stayed the proceedings in view of the principle of *lis pendens*.

Thus the Appellant relies on article 190 par. 2 litt. b LDIP.

Staying the proceedings because of *lis pendens* is a matter of jurisdiction (ATF 123 III 414 consid. 2b.) and not – as the Arbitral Tribunal seems to have thought – a simple rule of procedure. The violation of *lis pendens* may accordingly be relied upon within the framework of article 190 par. 2 litt. b LDIP.

b) It is contrary to public policy that within a specific legal order, two judicial decisions should contradict each other in the same action and between the same parties with both of them being equally and simultaneously enforceable (ATF 116 II 625 consid. 4a).

In order to avoid such a situation, there are fundamentally two principles : *lis pendens* and *res judicata* (ATF 114 II 183 consid. 2a and the references quoted). When a court is seized of a matter already pending before another court, the principle of *lis pendens* bars the second court from deciding the matter before a final decision in the first proceedings; this mechanism accordingly paralyses the jurisdiction of the second court. As to *res judicata*, it is a principle preventing a court from entertaining a case which has already been finally decided; this mechanism finally rules out the jurisdiction of the second court.

The mechanisms just described are not applicable only in internal matters. According to the Swiss legal order, they apply also internationally, provided the judgement of the foreign court may be recognized in Switzerland (ATF 114 II 183 consid. 2b p. 186 and the references quoted). Subject to international treaties, the rules applicable internationally are contained at art. 9 LDIP (*lis pendens*) and at art. 27 par. 2 litt. c LDIP (*res judicata*).

Thus, the Swiss legal order internationally recognizes the duty for the court seized after another court to stay the proceedings pursuant to the conditions of article 9 LDIP (on the entire issue of international *lis pendens*, see Knoepfler/Schweizer, International Swiss Private Law, 2nd edition, p. 303 s. n. 700 ff).

It is not disputed that the Panamanian Court were seized first of an action opposing the same parties among others and which appears to have the same dispute as its object. Thus, there is no doubt that a Swiss State Court, had it been in the same situation as the Arbitral Tribunal sitting in Geneva, would have had to stay the proceedings pursuant to article 9 LDIP (for a practical example see ATF 127 III 118 consid. 3).

c) It remains to decide if the conclusion must be different because the second court is not a Swiss State Court but an Arbitral Tribunal sitting in Switzerland.

aa) It is true that an Arbitral Tribunal, in view of its private nature, cannot be assimilated to a State Court without further study.

With regard to the problem at issue, it must be pointed out that arbitral awards are enforceable in the same way as court judgements. There is therefore the same interest to avoid, within the same legal order, contradictory decisions in the same case which would be equally and simultaneously enforceable.

This first finding strongly supports applying the principle of *lis pendens* by analogy.

bb) Furthermore, it appears generally admitted today that an Arbitral Tribunal, by invoking its particular nature, could not free itself from the principle of *res judicata*.

Indeed, if a foreign court has found that it has jurisdiction pursuant to a judgement which must be recognized in Switzerland, an arbitrator sitting in Switzerland is bound by such a decision (ATF 120 II 155 consid. 3b/bb p. 164; Lalive/Poudret/Reymond, *Le droit de l'arbitrage interne et international en Suisse*, n. 17 ad art. 186 LDIP).

As *res judicata* and *lis pendens* are closely connected principles serving the same function, it appears logical to treat *lis pendens* in the same way and to recognize that the arbitrator seized after a State Court must stay the proceedings until the State Court first seized has decided the matter, to the extent that the decision of the State Court is susceptible of enforcement at the venue of the arbitration.

cc) Legal writers in their majority consider that an Arbitral Tribunal sitting in Switzerland must apply article 9 LDIP if it is seized of a matter already pending in front of a State Court, whether Swiss or foreign (Wenger, *Commentaire bâlois, Internationales Privatrecht, n. 9 ad* art. 186 LDIP p. 1572; Rüede/Hadenfeldt*, Schweizerisches Schiedsgerichtsrecht*, 2nd edition, p. 231).

Case law already took the same view when it was stated that the conflict which may be caused by overlapping jurisdictions must be solved by applying the rules of *lis pendens*, of *res judicata* or the rules on the recognition and enforcement of foreign decisions (ATF 121 III 495 consid. 6c p. 502). Admittedly, a more recent case left the issue open, however only because it was not necessary to decide it (ATF 124 III 83 consid. 5a p. 85).

It must therefore be admitted that the jurisdiction rule at article 9 LDIP, which is based on considerations of public policy must also be applied by an Arbitral Tribunal sitting in Switzerland.

dd) The arguments against this solution are worthless.

There is no reason to consider here the risk that a foreign court, due to a kind of hostility towards arbitral justice, would refuse to take into account an arbitration agreement. Indeed such a judgement would not be susceptible of enforcement in Switzerland (ATF 124 III 83 consid. 5b p. 87). However, the principle of *res judicata* and the principle of *lis pendens* apply only to a foreign judgement susceptible of enforcement in Switzerland (ATF 114 II 183 consid. 2b p. 186).

The argument of the Arbitral Tribunal according to which neither the rules of arbitration nor the procedural law chosen by the parties provide for a stay because of *lis pendens*, cannot be followed. Indeed, as was seen before, the issue here is one of jurisdiction and not a mere organization of the proceedings. Moreover it is inaccurate to state that the Federal Law of Civil Procedure – chosen by the parties – does not allow a stay due to *lis pendens* under the conditions of art. 9 LDIP (see art. 6 par. 2 and 22 PCF).

There is no objective finding supporting the argument of the Arbitral Tribunal that the terms of reference would give priority to the arbitrators to decide the issue before the Panamanian authorities. Nothing in the findings of the Arbitral Tribunal shows that the parties would have agreed, when they signed the terms of reference, to entrust the Arbitral Tribunal with deciding the issue instead of the Panamanian Courts which had already been seized.

That there are other parties in the Panamanian proceedings in no way rules out that the dispute between the Appellant and the Respondents may be entirely dealt with in the Panamanian Courts which have already been seized.

The Respondents' developments with regard to the New York Convention of June 10th, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (RS 0.277.12) are without pertinence because the New York Convention does not deal with the issue at hand.

ee) Finally, it must be examined whether the Arbitral Tribunal, by reason of its particular nature, would not have a privileged right to decide its jurisdiction.

The idea that an Arbitral Tribunal would have a priority to decide on jurisdiction by comparison to State Courts is indeed found in some legal writing (in this direction : Bucher, *Le nouvel arbitrage international en Suisse*, p. 55 n. 139).

It is true that article 186 par. 1 LDIP gives the authority to decide its own jurisdiction to the Arbitral Tribunal. However, this does not mean that a State Court seized of the same action would be deprived of the right to decide its own jurisdiction; neither can it be deducted therefrom that the State Court would be compelled to stay its proceedings, initiated before the arbitral proceedings, to give priority to the Arbitral Tribunal.

Case law nevertheless took that view into account by stating that the Swiss State Court would have to limit itself to a summary review of its own jurisdiction when the venue of the Arbitral Tribunal is in Switzerland (ATF 124 III 139 consid. 2B). That decision, however, did not relate to a priority to decide, but exclusively dealt with the scope of the review belonging to the State Court. Moreover, it would apply only to a Swiss State Court bound to follow the jurisprudence of the Federal Tribunal.

There is no serious legal basis for a priority in favour of the Arbitral Tribunal (in this direction : Wenger, *ibid*.). The State Court seized of an action on the merits – the hypothesis of a declaratory action with regard to the jurisdiction of the arbitrators being left aside (see the decision of January 26th, 1987 *in* SJ 1987 p. 230 consid. 2a) – must rule on its own jurisdiction even if in order to do so it has to express a view on the validity of an arbitration clause (unpublished decision of July 16th, 1997, in the case 4C.206/1996, consid. 7b/bb). According to article II par. 3 of the New York Convention or to article 7 litt. b LDIP (see ATF 122 III 139 consid. 2a p. 141), the State Court may examine whether the arbitration clause has fallen through, is inoperative or cannot be applied (ATF 121 III 495 consid. 6c). Such may be the case if the parties renounced the arbitration clause.

When one of the parties relies on an arbitration agreement and the other argues that a subsequent agreement took place in favour of the State Court, it is clear from the outset that both courts in competition (the Arbitral Tribunal and the State Court) are equally empowered to deal with the issue.

There is therefore no reason to grant a priority to the Arbitral Tribunal which has no legal foundation and justification. The rule of *lis pendens* must be upheld, as stated at article 9 LDIP, which gives priority to the court first seized.

If the issue at hand is examined more closely, it may even be argued that the Panamanian Courts are in a better position than the Arbitral Tribunal to decide the issue.

It cannot be denied that an arbitration agreement may be substituted by a subsequent agreement (ATF 121 III 495 consid. 5). Such an agreement may result from action taken by the parties (ATF 121 III 495 consid. 5a). The attitude of the parties may be interpreted according to the principle of trust (ATF 121 III 495 consid. 5). It is therefore possible to attribute to a party the objective meaning of its behavior even if this does not correspond to its intimate will (Wiegand, *Commentaire bâlois*, n. 8 ad. art. 18 CO; Kramer, *Commentaire bernois*, n. 101 f. ad. art. 1er CO; Engel, *Traité des obligations en droit suisse*, 2nd edition, p. 216 f.).

In this case, the Respondents, when they applied to the Panamanian Courts, showed their intent to renounce the arbitration agreement. The issue is whether the Appellant accepted this offer. It may be expected from a large company, represented by a local lawyer, that it should act properly if it wished to challenge the jurisdiction of the State Court and avail itself of the arbitration agreement. Deciding whether the arbitration defense was raised timely falls neither within the New York Convention nor the LDIP but depends on the *lex fori* (ATF 111 II 62 consid. 2 p. 66). Ultimately, the issue is therefore governed by Panamanian law, which the authorities of that country are better placed to know and apply correctly.

Indeed, the Arbitral Tribunal specifically admitted this when it stressed the importance it gave to the decision of the Superior Court. Therefore, one cannot understand why the Arbitral Tribunal did not wait for the decision of the Supreme Court. Such a position is untenable.

It appears that the Arbitral Tribunal, taking advantage of its position in a single level of jurisdiction, tried to move more quickly than the Panamanian Courts. Such a way of proceeding is deprived of any legal foundation. The criteria for priority set forth at article 9 LDIP is the date of the action and not the date of the decision in the last instance.

d) The considerations made above show that the Arbitral Tribunal sitting in Switzerland should have applied art. 9 LDIP.

The Arbitral Tribunal could not have continued the Arbitral proceedings except by a finding that the arbitrators were not seized of the same case or that the foreign jurisdiction would not be able to issue a decision susceptible of enforcement in Switzerland within an appropriate time frame (art. 9 par. 1 LDIP).

The award under appeal is not based on such a finding and it must therefore be concluded that it was issued in violation of art. 9 par. 1 LDIP.

As it is clear that the Panamanian Courts were seized first of a case on the merits between the parties and that the case was apparently about the same facts, the Arbitral Tribunal should in principle have stayed the proceedings. Only by showing that the conditions of article 9 par. 1 LDIP were not met, something it did not do, could the Arbitral Tribunal have gone ahead. By ruling on its own jurisdiction instead of staying the proceedings, the Arbitral Tribunal violated the jurisdictional rule contained at article 9 par. 1 LDIP and its award must accordingly be overturned (art. 190 par. 2 litt. b LDIP).

There is no reason to decide jurisdiction now because the proceedings must be stayed in principle (art. 9 par. 1 LDIP).

As the case is still pending in the Panamanian Courts (based on a final decision on jurisdiction), the Arbitral Tribunal would only be able to resume its proceedings based on a finding that it is not entertaining the same action or that the foreign jurisdiction is not in a position to issue, within an appropriate time frame, a decision which may be enforced in Switzerland. Such a decision from the Arbitral Tribunal would be subject to a new public law appeal.

In view of the foregoing, there is no need to decide the other issues raised in the appeal.

3.- The costs must be born by the Respondents against whom the appeal is decided (art. 156 par. 1 and 159 par. 1 OJ).

Based on the foregoing

The Federal Tribunal :

1. Grants the appeal and overturns the award under appeal.

2. Orders the Respondents to pay the judicial costs of CHF 20.000,--.

3. Orders the Respondents to pay CHF 20.000,-- to the Appellant for the latter's costs.

4. Communicates a copy of this decision to the representatives of the parties and to the Chairman of the Arbitral Tribunal.