

COMMENTS TO THE RULING OF THE CAIRO COURT OF APPEALS

7TH COMMERCIAL CIRCUIT (12/B)

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The facts as resulting from the English summary of the case, can be thus synthesized.

A construction contract was entered into between Sobhy Hussein Ahmed (hereinafter the COMPANY) and a Cooperative Association of Construction and Housing for the employees of a petroleum company "Suez Gulf" (hereinafter the ASSOCIATION). Under the contract the COMPANY was to realize a construction project in a touristic village located at the North West Coast ("Merjan" village). A dispute arose among the parties centered around a number of issues concerning the proper performance of the works and the payment thereof. The parties agreed that in case of dispute a recourse should be made to arbitration under the Rules of the Cooperation Union for Central Housing. Following a number of procedural and substantive vicissitudes two awards were eventually rendered. In the course of time both awards were challenged. A ruling was rendered in the hearing of 9th June 2009 before the Cairo Court of Appeals 7th Commercial Circuit (12/B).

The summary of the facts brought before the Court of Appeals reveals that the grounds of nullity put forward by the ASSOCIATION include, if one may use an expression well-known in the arbitration circles, "all weapons available in the book of complaints". No judgment can be cast on the soundness of these grounds lacking a direct knowledge of the files of the two cases. The present comments are meant to deal with the respective ambit of the jurisdiction of the Arbitral Tribunals and of the Court of Appeals before which the

setting aside claim for nullity was finally filed, stressing the importance of the principles laid down by the Court of Appeals.

The judgment of the Court of Appeals rejecting the prayers of the ASSOCIATION to set aside the two awards is extremely interesting on both substantive and procedural grounds. In its setting aside claim, the ASSOCIATION alleged the invalidity of the arbitration agreement and of the constitution of the Arbitral Tribunal and also claimed procedural irregularities. It also alleged that the contracts between the ASSOCIATION and the COMPANY have been wrongfully annulled, and that the disputes between the parties had been previously settled under the auspices of the Cooperation Union for Central Housing, so that the claim for compensation was to be deemed premature. It further questioned the reliance of the expert in its report based on copies of documents submitted by the COMPANY in the arbitration proceedings, and, as an overall final complaint, imputed to said COMPANY a breach of its obligations under the construction contract. The Court of Appeals reviewed the case taking into consideration the minutes of the arbitration hearings, and gave to the parties the opportunity to fully participate in the proceedings by submitting their respective claims and defenses in compliance with the principle of due process and with the parties' right of defense.

The judgment rendered by the Court of Appeals fully represents and upholds the inherent nature and fundamental function of arbitration at the present and advanced stage of its development both nationally and internationally, and the principles laid down therein are going to strengthen in the Arab countries the image and attractiveness of this out-of-Court method of solving disputes. In the reasoning leading to the rejection of the ASSOCIATION setting aside claim for nullity of the two arbitral awards, the Court of Appeals punctually analyzed the inner nature and binding effects of arbitration to be treated as the foremost expression of the parties' autonomy in choosing an alternative method to settle their disputes. Each principle laid down by the Court of Appeals deserves an individual *ad hoc* approval.

In the first place, the Court of Appeals reaffirmed the intangible validity of the doctrine usually referred to through the expression "Kompetenz-Kompetenz". All claims concerning the validity of the arbitration agreement upon which the arbitrators' jurisdiction is resting, should be adjudged by the arbitrators themselves in the

performance of the function entrusted to them by the parties which signed the arbitration agreement. This is the point of arrival of a doctrine which has evolved *inter alia* with a view to avoiding that a reluctant party succeed in preventing the prompt inception of the arbitration by immediately challenging the validity of the arbitration agreement through a suit brought before a Court of Justice. By attributing to the arbitrators the competence to decide on their own competence, these delaying tactics are obviously frustrated.

In the second place, the Court rejected the claim challenging the validity of the constitution of the Arbitral Tribunal by stating that an arbitrator cannot obstruct the implementation of the proceedings by failing to appear and/or refusing to carry out the duties inherent in his mission. To remedy such misfits, the legal systems admitting the so-called truncated tribunal doctrine allow the arbitration to proceed under the guidance of the majority of the arbitrators. In any event, as a general rule, the interested party is empowered to seek from the appointing authority the designation of a new arbitrator. In the case decided by the Court of Appeals, it was held that the Cooperation Union for Central Housing in its capacity of appointing authority should have been requested to appoint a substitute arbitrator.

In the third place, the Court of Appeals punctually applied Article 8 of the Egyptian Arbitration Law, whereby a party which did not raise a defense before the Arbitral Tribunal is deemed to have waived its right to do so and cannot resurrect such defense when challenging the award. This conclusion represents a basic application of a doctrine known both in civil as well as in common law countries. In civil law countries it is referred to through the expression "*nemo venire contra factum proprium potest*". In common law countries the doctrine is identified by the word "estoppel". In essence, under this doctrine, nobody can contradict itself by taking, or omitting to take, a certain course of action and then pretend to be able to do the contrary. The holding of the Court of Appeals, therefore, is not only impeccable from a legal standpoint, but also commendable under equitable standards.

In the fourth place, the Court of Appeals rejected the ASSOCIATION's allegation that in the arbitration proceedings violations had occurred of "judicial customs and legal rules because the lawyers refused to sign the minutes of the hearings and to provide copies thereof and the parties did not receive official directions in the course of the arbitration".

The Court preliminarily held that these complaints had already been brought during the arbitration and could not be resumed in a setting aside action. Furthermore, the behaviour of the parties and the rules of conduct to be followed during the proceedings should be dictated by the arbitration agreement and in arbitration the formalities should be reduced to a minimum, as necessary to ensure that the parties' right of defense be fully complied with and that due process be punctually observed. Recourse to arbitration should be guided *inter alia* by the search of a procedure which is simpler and more flexible than a judicial procedure.

In the fifth place, the Court of Appeals disposed of the ASSOCIATION's claims dealing with the merits of the dispute by finding as follows: that the arbitrators correctly decided that the ASSOCIATION's challenges dealing with the annulment of the contract, with the settlement of the dispute, and with the award for damages, could not be accepted. The principle was thus laid down under which a Court of Justice cannot re-open the case by re-examining the merits of an arbitral award that a complainant party is seeking to nullify.

In conclusion, through its judgment rendered as above, the Court of Appeals rejected all the ASSOCIATION's claims aimed at setting aside the awards previously issued on the same disputes and ordered that the ASSOCIATION pay the costs of the judicial proceedings.

The succinct English summary of the case did not allow a more extensive perusal of the judgment of the Court of Appeals, which is commented herein in its essence with full approval of its reasoning and dispositive part. This judgment is to be regarded as a fundamental precedent to be followed unhesitatingly, as the expression of the generally accepted principles characterizing the modern law of arbitration embodied in the main international conventions, model laws and domestic laws of the major countries of the world.

Bologna, 1st July 2009



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