Partial award in case no. 13774

Parties:
Claimant: Manufacturer (Egypt)
Respondents: (1) Buyer (Spain); (2) End buyer (Spain)

Place of arbitration:
Cairo, Egypt

Published in:
Unpublished

Subject matters:
- competence-competence
- non-signatory party not bound to arbitration clause
- place of arbitration
- forum non conveniens

I. JURISDICTION

1. Kompetenz-Kompetenz

[5] "Where a party to an arbitration procedure raises a plea concerning the ‘existence, validity or scope’ of the arbitration agreement, the Court of Arbitration -as a preliminary matter- has to determine under Art. 6(2) of the ICC Rules whether the arbitration will proceed. Under Art. 6(2):

'... the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.'

[6] "Therefore, if the Court of Arbitration is satisfied that a prima facie arbitration agreement exists, the arbitration will proceed before the Arbitral Tribunal. The Arbitral Tribunal, however, is not bound by the Court's decision and, if asked by the parties, may render a decision on its own jurisdiction in form of a partial or final award. Indeed, it is well settled in international arbitration that, under the Kompetenz-Kompetenz principle, arbitrators have the power to decide on their own jurisdiction (see e.g. the interim award in the ICC case no. 4367 [1984], in Collection of ICC Arbitral Awards 1986-1990, 18)."
II. PLACE OF ARBITRATION

1. Place of Arbitration as a Procedural Issue

[28] "The determination of the place of arbitration - also called in arbitration law the arbitral 'seat' or 'situs' - is clearly a procedural issue rather than a substantive one. This is confirmed by Art. 14(1) of the ICC Rules:

'The place of the arbitration shall be fixed by the Court unless agreed upon by the parties.'

If it were a substantive issue, the ICC Rules would have certainly provided for a decision by the Arbitral Tribunal rather than by the ICC Court. Indeed, some commentators have stated that 'the decision of the ICC Court as to the place of arbitration is administrative in nature; no reasons are given, no arguments are heard before the Court, no appeal is allowed' (WL. Craig, WW Park, J. Paulsson, International Chamber of Commerce Arbitration, Oceana Publications, ICC Publishing, 3rd ed., 2000, at 94).

[29] "It should be noted that, although international arbitration shows a trend towards 'delocalization', the choice of the place of arbitration implies important legal consequences, as it establishes a certain relationship with the legal system and the courts of that place. In particular, the place of arbitration might determine inter alia:

- the national courts which have jurisdiction to set aside the award;
- the national courts which may intervene to support the arbitral tribunal for interim or conservatory measures;
- the applicability of mandatory rules of the country where the arbitration takes place or of other countries;
- the applicability of certain conflict-of-law rules;
- the national law applicable to procedural issues;
- the national law governing the arbitrability of a given subject matter;
- the nationality of the arbitral award for the purposes of Art. I(1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[30] "It should be added that it is well established in international arbitration that the 'place of arbitration' is a legal concept, which must be dearly distinguished from the geographical location or locations where the arbitrators may actually hold hearings, consultations or other meetings. This is confirmed by the ICC Rules, under which the 'Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties' (Art. 14(2)) and it 'may deliberate at any location it considers appropriate' (Art. 14(3)). Consequently, the Sole Arbitrator's determination concerning the issue of the place of arbitration will establish the legal place of the present arbitration but it will not affect the possibility of holding hearings or meetings elsewhere."

[...]
[39] "Furthermore, the express wording contained in the Second Contract cannot be altered by the submission of First Respondent that the original intent of the parties was different and that First Respondent never truly agreed that Cairo be the place of arbitration, finding 'itself obliged to trust in Claimant, without any time for negotiation and contracts review'.

[40] "Indeed, absent any evidence to the contrary, the Arbitral Tribunal must assume that a commercial contract signed by two unrelated business entities engaged in international trade is an arm's length transaction, where neither party is subject to the other's dominant influence. The Arbitral Tribunal observes that First Respondent failed to submit any evidence of duress or that it was in any way compelled to enter into the Second Contract or to accept Cairo as the place of arbitration. As a consequence, First Respondent's argument that the clause on the place of arbitration was added without its consent and knowledge must be disregarded."

[...]

Referring Principles:

- I.2.3 - Presumption of professional competence and equality of parties
- XIII.2.4 - Principle of separability of the arbitration clause
- XIII.3.3 - Seat of arbitration