

INVESTIGATIONS OR CRIMINAL PROCEEDINGS PRIOR TO THE ARBITRATION: IMPACT ON THE ARBITRATION AGREEMENT AND ON THE ARBITRATION PROCEEDINGS

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29 October 2010



LALIVE

Where criminal law meets arbitration

- Arbitration: consensual, flexible
- Criminal law: mandatory, repressive, rigid

Where do they meet?

Fraud through the arbitration (Amir Ghaffari)

Fraud during the arbitration (Anna von Mühlendahl)

Fraud as the object of the dispute

Impact on the arbitration agreement and the tribunal's jurisdiction

Swiss courts:

- Prior to an award, Swiss courts are limited to *prima facie* control if seat is in Switzerland. Impact of criminal proceedings? Likely to be limited.
- If seat is outside Switzerland: there is *de novo* control. Impact of criminal proceedings? No obligation to stay.

Arbitral tribunal with a seat in Switzerland:

- Arbitrability – an arbitral tribunal may examine as a preliminary issue points which are not arbitrable.
- Considerations in the light of parallel criminal proceedings: (i) suspension? (ii) The threat of revision on new facts which may surface.

Impact on the arbitration agreement and the arbitral proceedings

Suspension?

Resolution of the ILA Association (1996):

“RESOLVES that the fact that a pending or forthcoming court case, whether civil or criminal, is related to an arbitral proceeding should not, in itself, cause the discontinuation or suspension of the arbitral proceeding.”

Article 209 of the UAE Code of Civil Procedure:

“If during arbitration a primary matter is submitted being beyond the arbitrator’s jurisdiction or an objection is filed against a forged paper or penal proceedings are taken[,] the arbitrator shall cease his job until a final judgment has been rendered therein.”

Impact on the arbitration agreement and the arbitral proceedings

Suspension?

Finicantieri Cantieri Navali Italiana v. Oto Melara Spa v. M. (7 September 1993)

“ Le droit d’exiger la suspension d’une procédure ne doit être admis qu’exceptionnellement, en particulier lorsqu’il s’agit d’attendre le jugement principal d’une autorité compétente permettant de trancher une question préjudicielle; même en de pareils cas, la jurisprudence affiche une grande retenue (ATF 112 IV 115 consid. 4, ATF 106 Ib 395, consid. 2 p. 399) ...

En droit de l’arbitrage, ... une partie peut en principe obtenir une suspension de procédure uniquement lorsque des points, déterminants pour l’issue du litige en hors de la compétence du tribunal arbitral, doivent être clarifiés (SCHWAB/WALTER, Schiedsgerichtsbarkeit, 4^e éd., p. 146, no 42). ”

Impact on the arbitration agreement and the arbitral proceedings

Suspension?

- Cases cited by the Federal Tribunal further confirm the very restrictive view as to a requirement to suspend.
- Obligation to suspend ? *Pacific Star Corporation v. Metal Transport Corporation of New York – the Nalo Express* (CA Yearbook, XII, 1987)
 - Death of winch operator
 - Voyage sub-charterer
 - Voyage charterer
 - Time charterer
 - Owner
- Conclusions on suspension

Impact on the arbitration agreement and the arbitral proceedings

The threat of revision

Article 123(2)(b) *Loi sur le Tribunal Fédéral*:

“the petitioner discovers, after the decision is rendered, relevant facts or conclusive evidence which could not be relied up during the previous proceedings.”

Impact on the arbitration agreement and the arbitral proceedings

Access to evidence in the criminal file

Right of access to third parties during the proceeding. “Interêt digne de protection” and if there is no public or private interest that is more worthy of protection (Art. 101.3 CPP)

The parties to the criminal proceedings:

- Charged
- Indicted
- Complaining party / *Partie civile* (the danger of a waiver of the arbitration clause – Paris Court of Appeal decision of 29 June 2006)

Impact on the arbitration agreement and the arbitral proceedings

Production of evidence found in the criminal proceedings

The position in Switzerland: liberal

The position in France: restrictive

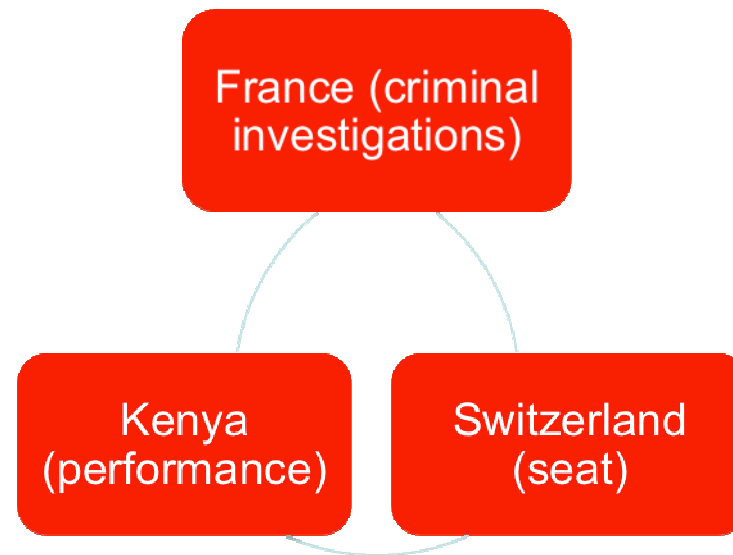
There are two impediments:

1. The party receiving a copy of the file gives an undertaking not to provide any of the documents in the file to third parties (under criminal sanction - Art. 114-1 CPP)
2. The lawyer is subject to *secret professionnelle* (under criminal sanction - Art. 226-13 CP)

Some jurisprudence allows an exception in order to exercise “le droit de la défense” (*Cour d’appel de Paris* 7 September 1999, *Cour d’Appel de Paris* 26 January 2001, *Cour de Cassation* 14 October 2008). Still unsettled and risky.

Impact on the arbitration agreement and the arbitral proceedings

The arbitrators as accomplices of crime



Q&A