

FOMENTO - A TALE OF “LITISPENDANCE”, ARBITRATION AND PRIVATE INTERNATIONAL LAW

by Adam Samuel¹

I: INTRODUCTION

Claude Reymond has two important qualities not always shared by his colleagues on which this paper focuses. First, he welcomes views from anyone and anywhere that might cast more light on his beloved Switzerland’s laws. Secondly, he has always refused to be straightjacketed by the ideological discussions that have often hindered the understanding of arbitration. He is interested in practical solutions to real problems. This does not mean that Claude Reymond is uninterested in theoretical issues. He just knows that their place is as a way of increasing understanding and reaching sensible results. They are not an end in themselves.

The Swiss Tribunal fédéral’s decision in the Fomento case² may be a perfect case to show up these qualities. The outcome of the case may very well have been correct. The reasoning is based on two sets of structural flaws which if applied to other cases could cause uncertainty and unnecessary litigation: the two great curses of international arbitration. One relates to private international law and the other concerns arbitral jurisdiction.

II: THE FACTS

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²Fomento de Construcciones y Contratas S.A. c/ Colon Container Terminal S.A. ATF 127 III 279. (2001); the case is discussed by J-F Poudret in Note on the case at [2001] Rev. Arb. 835.

In 1996, CCT, a Panamanian company hired a Spanish business, FCC, to help build a port in Panama. There was an ICC arbitration clause in the contract providing for arbitration in Geneva.

When a dispute arose, FCC began proceedings (on 12th March 1998) in the Panamanian courts against CCT. CCT argued that the court did not have jurisdiction as a result of the arbitration clause. On 26th June 1998, the Panamanian judge concluded that the objection to his jurisdiction had not been raised sufficiently promptly and declined to stop the case.

CCT then started an arbitration in Geneva on 30th September 1998. FCC immediately applied to the arbitral tribunal for it to dismiss the claim for want of jurisdiction on the basis that CCT's behaviour in Panama amounted to a waiver of its right to arbitrate.

The Panamanian appeal court reversed the decision of the Panamanian court and dismissed the case finding that CCT had not waived its right to arbitrate. The arbitral tribunal unsurprisingly reached the same decision on waiver in an award on jurisdiction of 30th November 2000 (2 years and two months after the start of the case). An application was made to the Tribunal fédéral to set aside the arbitrators' decision on the basis that the Panamanian proceedings constituted "litispendance" which prevented the arbitrators from ruling on their own jurisdiction..

On 22nd January 2001, the Panamanian Supreme Court restored the first instance judgement that FCC had waived its right to arbitrate the dispute.

What the Tribunal fédéral had to decide was whether the arbitrators were entitled to issue their ruling on jurisdiction while this issue was being determined by the Panamanian courts. It concluded that they were not and set aside the arbitrators' decision.

III: A POSSIBLE DECISION

If the Tribunal fédéral had been minded to set aside the arbitrator's award, there was a simple way to achieve this. It could have concluded that on the facts CCT had waived its right to arbitrate under both Swiss and Panamanian law. That would have ended the case in a simple uncontroversial way. During its judgement, the court came very close to making such a finding.³ None of the discussion that follows would have been necessary if the court had reached this simple practical result. It could have left the difficult debate on the various points raised by the parties for a case where the view taken could have significantly affected the outcome. From a judicial technique point of view, this might have prevented some unfortunate analytical lapses discussed below.

³ At p. 287.

IV: THE COURT'S ACTUAL APPROACH

The Court starts by making some fairly uncontroversial remarks about “litispendance”. It points out the chaos caused by having two enforceable judgements in circulation in the same legal system.

This echoes the French Cour de cassation decision in Hilmarton. It goes further, though, than Hilmarton in stating that both res judicata and lis alibi pendens are principles of public policy. However, the presence of a court action elsewhere does not necessarily create the evil described.

It is the next step of the court’s argument that causes the problem. It applies “litispendance” to arbitration tribunals. It gives a number of reasons. Since arbitration awards are enforceable in the same way as judgements, there is the same need to avoid having contradictory arbitration awards in circulation as there is with judgements. Caselaw has established that if a foreign court whose judgement is enforceable in Switzerland concludes that it has jurisdiction, an arbitral tribunal is bound by that view.

The relevant textbook paragraph cited, though, only refers to Swiss courts and only requires a tribunal to “examine” if the foreign judgement is capable of enforcement in Switzerland.⁴ This, though, may be too literal an approach.

Having decided that an arbitrator is bound by the “litispendance” requirements of Swiss law LDIP Art 9, the court moves onto consider whether the Panamanian judgement on the case would be enforceable in Switzerland. Since the applicant was a Panamanian company, this did not receive any discussion. Anyway, the Court rejected the argument that its approach of allowing a foreign court to delay and then bind a Swiss arbitral tribunal would enable a foreign country to deliberately ignore an arbitration agreement. Such a judgement, it pointed out, would not be enforceable in Switzerland. The case it cites for this states that enforcement of a judgement would be refused if an arbitration agreement applicable to the dispute complied with the New York Convention.⁵

The Court finishes by commenting obiter that the question of whether the applicant waived his rights to arbitrate has to be decided by Panamanian law as the relevant *lex fori*. In doing so, it relied on one of its previous decisions. That concluded that where a party was alleged to have waived its right to arbitrate before a Swiss Cantonal court, that court was right to apply its own law to determine whether such a waiver had occurred.⁶

V: ANALYSIS

⁴ATF 120 II 155 at p. 164.

⁵ATF 124 III 83 at p. 87.

⁶ATF 111 II 62.

(i) The Issues

In a relatively short judgement, the Tribunal fédéral raised a large number of major issues about arbitration, some of which have been discussed for many years. Others have barely been considered, at least outside Switzerland. The question of the applicability of “litispendance” principles to arbitrations raises questions about the nature of arbitration and the application of arguments on that subject to real cases. The court’s discussion of these points raises critical questions on the scope of the arbitrators’ and the court’s right to determine their own jurisdiction. When the court considers the applicability of “litispendance”, it then brings up issues relating to the law applicable to waiver of the right to arbitrate. Even the nature of that waiver - contractual or jurisdictional is raised indirectly.

(ii) The Nature of Arbitration - You must remember this, a lis...⁷

This author’s first reaction to the idea of “litispendance” applying to arbitration, in the late 80s⁸ was that an arbitration is not a “lis”. So, how could it be pending? This raises the time-honoured issue of whether an arbitration is more contractual than jurisdictional. Indirectly, though, it also raises the question of whether this analysis helps to resolve arbitration problems.

The Court’s analysis is brief but to the point. While uncomfortable about assimilating the notions of arbitration and national courts, it points out that arbitral awards are automatically enforceable in the same way as national judgements.⁹ The public policy objection to multiple lawsuits on the same subject relates to concerns about there being contradictory judgements capable of being simultaneously enforced. It must follow that arbitration must be regarded as a lis for this purpose.

⁷ H Hupfeld, AAs Time Goes By? perhaps the key lyric which reflects the views expressed here are ?The fundamental things apply?. This was sung but not played on the piano by Dooley Wilson in the film, ACasablanca? .

⁸ P Schweizer & O Guillod, “L’exception de “litispendance” et l’arbitrage international” in Le juriste suisse face au droit et jugements étrangers ed. F. Knoepfler, Editions universitaires, Fribourg, 1988, 71.

⁹ At p. 284.

The Court relies on a second argument. In dealing with its jurisdiction, the arbitrator is bound by the rules of *res judicata*. There is no reason, therefore, why the arbitrator should not be bound to observe its sister doctrine of “*litispendance*”.

This point would not pose any great problems in most countries where the arbitration statute does not contain any detail on the law applicable to the arbitration agreement. In England, for example, a court would simply take the view that it was bound to apply a foreign court judgement, if it was entitled to recognition, to any judicial attack on the arbitrator’s jurisdiction, notably in enforcement proceedings.¹⁰ It would, therefore, set aside any award that contravened it. The difficulty is that, under Article 178(2) LDIP, the substantive validity of the arbitration agreement may be governed whichever of a maximum of three legal systems most favours upholding the agreement. What we have here looks like the suppression of Article 178(2) LDIP on the grounds of public policy where an arbitrator finds himself in the face of a judgement entitled to enforcement emanating from another country. Others might argue (and the point will be discussed later) that waiver is not a question of the validity of the agreement to arbitrate. In that case, the general rule that the LDIP and thus presumably Swiss law applies to that question is being disapplied in a similar way.

To return to the discussion of the nature of arbitration, the court takes a fairly pragmatic approach. It sees that arbitral awards have the same legal effect as judgements in Swiss and other municipal laws. So, it assimilates the two. It then reinforces its argument by analogy. It is ironic, though, that by elevating the notion of arbitration above a mere contractual obligation, legal systems have exposed arbitration to a whole range of arguments about foreign judgements and increased the risk of awards being set aside. The original arguments in French legal literature to show that awards were contractual was designed to evade the rules there restricting the enforcement of foreign judgements.¹¹ The problem seems to have turned full circle.

In this context, it is worth recalling the opinion of Alfred Lainé¹² submitted to the French courts in the *Del Drago* case at the end of the 19th century. He argued that an arbitral award should be treated as a judgement for enforcement purposes. His destruction of the old argument which assimilated awards to contracts influenced a whole generation of

¹⁰ East India Trading Company Inc v. Carmel Importers and Exporters Inc. [1952] 2 Q.B. 439; Dicey & Morris, Conflict of Laws, 13th ed. L. Collins, Sweet & Maxwell, London 2000 at p. 621.

¹¹ The relevant references and a discussion of these points can be found in A Samuel, Jurisdictional Problems in International Commercial Arbitration – A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law, Schulthess, Zurich 1989, Cap 1, in particular at pp. 32-36.

¹² “De l’exécution des sentences arbitrales étrangères en France” 26 Journal du droit international: Clunet 641 (1899).

arbitration theorists. The only problem was that the outcome of the Del Drago case had to be reversed by the Cour de cassation in 1937 and the Geneva Convention 1927 to ensure that foreign arbitral awards received recognition without the various restrictions placed by France in the way of foreign judgements until the second half of the 20th century.

Discussions of the nature of arbitration are important for educational purposes; they also occasionally help to serve practical problems, mainly when it comes to explaining to clients the distinction between arbitration and other dispute resolution methods.. By and large, though, as the French experience shows, they are poor tools for resolving difficult practical questions. An arbitration award is not a contract and it is not a municipal court judgement. It is a “contractually-suffused” judgement.¹³ In practice, courts use discussions of the nature of arbitration to support pragmatic solutions to difficult problems. This does not contribute greatly the intellectual quality of the debate. What courts need to be doing here is balancing the relevant interests. In the arbitration context, this involves considering the private contractual entitlements and any public interest elements that may be implicated in the case concerned.

The big issue then is whether there is any overriding public policy reason to apply “litispendance” at the expense of the parties’ contractual rights. The debate about the nature of arbitration fails to answer this question.

(iii) Public policy and lis alibi pendens

There is certainly much to be said for the view that conflicting enforceable judgements on the same issue are a menace. Having an arbitration award performing a similar role is equally messy. The question, though, is one of priorities. Which deserves the greater consideration where they conflict: the arbitration or the foreign judgement? Does it or should it matter in practice?

The problem does not arise where the seat of arbitration concludes that the dispute is not covered by a valid arbitration agreement. However, when it cannot reach that conclusion, why should the arbitration be prevented by a foreign court judgement that erroneously fails to apply the agreement to arbitrate? In such a situation, the relevant public policy is not one of preventing the existence of conflicting judgements capable of enforcement. Public policy should lead the court to reduce as far as possible the impact of a judgement, which ought not to be enforced, on an arbitration that should be allowed to proceed.

So, the situation of conflicting judgements and arbitration awards simply should not arise. A foreign court judgement should not be recognised where there is a valid agreement to

¹³ J Rubellin-Devichi, L’Arbitrage: nature juridique: droit interne et droit international privé, Librairie générale de droit et jurisprudence, Paris 1965 at p. 17.

arbitrate covering the case. If such an agreement does not exist, the arbitrator has no jurisdiction.

One can see that the analogy between an arbitration award and a court judgement that the Tribunal fédéral uses as its basis for applying the notion of “litispendance” breaks down here. Since there is more than one acceptable basis for court jurisdiction, there will inevitably be cases where more than one court could be entitled to decide the case. In the arbitration field, this should not happen. The only exception, created by the court in this case, is where a court applies different conflict of laws rules to the foreign judicial proceedings and the domestic ones relating to the arbitrator’s jurisdiction. The best approach is not to do that since it allows foreign courts to fail to enforce valid arbitration agreements

Unfortunately perhaps, article 178(2) LDIP allows the arbitrator to do just that in giving him jurisdiction if the agreement is substantively valid under any of number of possible different laws. Unwittingly, it creates the one possible excuse for the application of litispendance, namely the view that a foreign court (not bound by article 178(2)) might apply one of those laws might find the agreement invalid. Its uniqueness in modern arbitration statutes should ensure that this issue is confined to Switzerland. Anyway, there is no reason why a Swiss court should not apply article 178(2)’s conflict rule in a case where the seat is in Switzerland and find substantively valid any agreement complying with one of the listed applicable laws. Alternatively, if the view is taken that waiver is not a matter of the validity of the arbitral agreement, Swiss law could be applied on the basis of any or a combination of Articles 176(1), 186(2) or the fact that applicability of the arbitral agreement is governed by the law whose performance is most closely connected to it, namely its seat. Where the seat is elsewhere, article 178(2) is irrelevant (except as a possible analogy). The Court would then apply its ordinary private international law rules and thus the the law of the place of arbitration.

The French courts, of course, have faced a similar problem in a series of cases beginning with Pabalk c/ Norsolor.¹⁴ Since that decision, the Cour de cassation has consistently taken the view that the clearly expressed view of the legislature overrides concepts of res judicata where a foreign court had set aside an arbitral award. It had a similar problem in the Hillmarton case.¹⁵ There, two conflicting awards were issued in Switzerland, the second after the first was set aside. The French courts, though, did not decline to recognise the first award on the basis that a second equally enforceable award was about to be issued. To do so, would have sabotaged the well known aim of Article 1504 NCPC to maintain the rule that the setting aside of an award abroad is not a defence to enforcement in France.

¹⁴Pabalk Ticaret c/ Norsolor, [1985] Dalloz 101

¹⁵ [1997] Rev. Arb. 376.

The French courts recognised the original award because it emanated directly from the parties' agreement to arbitrate. Deference to the Swiss courts was not on its agenda. While one can find obnoxious the French refusal to recognise foreign setting asides, their approach has a coherence to it. French arbitration law recognises certain defenses to enforcement and does not recognise others.

In the same way, Article 178(2) of the Swiss LDIP seems to establish a clear conflict of laws rule on substantive validity which can be reinforced by the application of the law of the seat if necessary. This presumably reflected the legislature's view on this. It did not provide for *litispendance* as an exception to this. It merely reserved public policy. It is hard to see that "the basic notions of justice and morality", the common international yardstick of public policy¹⁶ require the application of this rather nebulous concept of *arbitral lis alibi pendens*.

The irony of course is that the French had to resort to *res judicata* as a principle of public policy to deny enforcement to the second Hilmarton award. It would have been more coherent for the courts to reject the second award as not resulting from the parties' agreement unlike the first untainted (from a French perspective) award. At least, that would provide a better basis for resolving an obvious conflict.

What this all means is that the public policy argument in favour of applying "*litispendance*" to arbitration is illusory if one takes the view that a foreign judgement rendered in breach of arbitration agreement valid applying the correct conflicts rule should not be enforced. That seems to be a superior public policy rule to the one put forward by the Tribunal fédéral. It also seems more consistent with the view expressed by the Swiss legislature in 1987 when it passed the LDIP.

(iv) The Jurisdiction of the Foreign Court

¹⁶Parsons & Whittemore Overseas Corp. v. Société Generale de l'Industrie du Papier (RAKTA), 508 F. 2d 969 (1974)

As the Tribunal fédéral points out, the doctrine of “litispendance” does not apply if the foreign court judgement could not be recognised in Switzerland. It does not explain in any detail the reason for its conclusion that the Panamanian judgement was entitled to such recognition. The obvious reason is that the defendant in the Panama proceedings was domiciled in that country.¹⁷ For that reason alone, the ambit of this decision may not be as great as it appears. If the defendant in the lawsuit does not come within any other basis for jurisdiction provided for under the LDIP and only participates in the litigation under protest,¹⁸ the foreign judgement will usually be unenforceable in Switzerland.

The Tribunal fédéral stated clearly that a judgement rendered in breach of an arbitral agreement complying with the New York Convention would not be enforced in Switzerland. This further reduces the risk that this case will be relied upon in subsequent cases. (That subject will be discussed further on.) The initial problem here, though, is to identify the court proceedings to which the Swiss court was trying to show deference: the Panamanian judgement on the merits of the dispute or its ruling on jurisdiction.

For “litispendance” to exist, there must be a reasonable expectation of the foreign proceedings producing an enforceable judgement within “un delai convenable”¹⁹ “a reasonable time”. The time that the Panamanian courts took to resolve the jurisdictional issue suggests that the judgement on the merits would not fall into this category. Therefore, it looks as though the court is only talking about the Panama decision on jurisdiction. So, it can be argued that it does not matter whether the Panamanian court made the right decision on jurisdiction including the continued applicability of the agreement to arbitrate. It was entitled to rule on this subject and, therefore, its proceedings are entitled to “litispendance” protection. The problem with this argument is its consequence that every court in the world has the right to have its judgements recognised subject only to public policy limitations.

The argument also confuses two notions: right and jurisdiction - or - entitlement and power. In Swiss as in other legal systems, an arbitrator has the “right” to rule on his own jurisdiction. However, that ruling is subject to ultimate review by a court in almost all cases. Only a valid exclusion or an agreement after the dispute has arisen can exclude that. Even then, the applicability of any exclusion agreement entered into with the original contract is likely to be subject to at least the same questioning as the original agreement.

The arbitrator has the right to continue with an arbitration even though his jurisdiction has been challenged by one of the parties. This does not of itself entitle his decision on

¹⁷LDIP Arts 25(a) and 26(a).

¹⁸LDIP Art 26(c).

¹⁹LDIP Art 9(1).

jurisdiction to any binding effect. That is delivered by a court enforcing or reviewing that decision. In the absence of any treaty conferring specific powers on foreign courts, there is no case for conferring any legal right on a ruling by a court on its own jurisdiction. Any other view entitles the court to confer on itself powers it does not have from the perspective of any other legal system.

While it looks as though the Tribunal fédéral was according recognition solely to the Panamanian ruling on jurisdiction, it appears have been quite wrong to do so. Even if such a ruling might normally be entitled to this deference, surely the weakness of the arguments in favour of such a course should tip the scales against the use of public policy to defeat an otherwise applicable arbitration agreement.

The moment that one accepts this argument, the enforceability of the Panamanian judgement on the substance and the time before it became available should have been the only issue under discussion. It was argued by the respondent before the Tribunal fédéral that the court's approach would allow states to sabotage the arbitration process by allowing parallel court proceedings. The court rightly dismissed this argument saying that such judgements would not be entitled to recognition by the Swiss Courts. Clearly, public policy remains a defence to the enforcement of a foreign judgement.²⁰ Anyway, as already indicated, the Court cited one of its prior decisions which concludes that a foreign judgement rendered in breach of Article II of the New York Convention is unenforceable in Switzerland.²¹

Strictly speaking the Convention does not apply to the enforcement of foreign judgements in this way. It only relates to arbitration awards and the declining of jurisdiction in the presence of an arbitration agreement. Essentially, the Swiss Courts are refusing to give their imprimatur to a judgement rendered in breach of a treaty to which they are party.

There are problems with using the New York Convention in a way in which it was not intended. Happily, Peru and Panama, the two countries involved in the case referred to and Fomento, are New York Convention countries. It might be difficult logically to apply the same approach to a court in a non-Convention state. The court would presumably overcome this by stating that the Swiss court had to decline jurisdiction over the enforcement proceedings in the face of the Convention requirement under Article II of that Treaty. Switzerland after all has never used the reciprocity reservation to the Convention.

²⁰ See p. 285.

²¹ ATF 124 III 83 at p. 87.

More critically, the New York Convention's requirements of an agreement in writing are not as liberal as the domestic Swiss position, let alone the situation under the laws of most arbitration centers. A letter, e-mail or fax confirming the agreement including the arbitral clause would usually not be covered by the New York Convention's Article II(3).²²

It would be much simpler if the Swiss courts reverted to a conflict of laws approach here. While Article II(3) of the Convention has been highly effective politically in generating an improvement in arbitration law standards worldwide, it is a bit of a juridical disaster. Where a formally valid agreement is illegal under the law of the place of arbitration, the agreement is unenforceable under Article II on the basis that it is incapable of being performed. So, Article II(3) does not even provide a minimum standard. Where, as in Switzerland, there is no legislation laying down pro-enforcement provisions over-and-above those provided by the Convention, it can just prevent the enforcement of perfectly good agreements. The effect of this has been that the Swiss Courts have used a variety of devices to interpret the Convention very broadly.

Anyway, where the arbitration is due to take place in Switzerland, there is no reason why the courts cannot apply Chapter 12 of the LDIP which governs such cases, including Article 178(2), rather than the more restrictive New York Convention. It would not impinge on the Swiss court's duty to apply the Convention. As already indicated, the Convention lays down the maximum not the minimum number of objections that can be raised to an agreement to arbitrate.

Either way, the scope of the problem is not very great. Most judgements rendered in breach of an agreement to arbitrate will be declined enforcement through the application of the New York Convention or, as suggested, Swiss domestic law.

(v) Deciding whether to refuse enforcement to the arbitration agreement

(a) The conflict of laws question

The Tribunal fédéral applied existing caselaw²³ to decide that the waiver of the agreement to arbitrate by participating in court proceedings is determined by the law of the country in

²² LDIP Art. 178(1). For a discussion of this in more detail, see A Samuel, "Arbitration clauses incorporated by general reference and formal validity under article II(2) of the New York Convention" in Études de procédure et d'arbitrage en l'honneur de Jean-François Poudret, ed Ferrari, Lausanne 1999, 505

²³ ATF 111 II 62.

which those proceedings take place. While this may be a correct interpretation of the caselaw, it is thoroughly bad law.

It is worth restating the issue which the court had to address. Did the respondent waive or agree not to rely on its right to arbitrate by its behaviour in the Panamanian proceedings? The court had to determine whether the arbitration agreement remained applicable to the dispute in question. That is a question of its scope.

Article 178(2) is clearly applicable (since there is no formal validity issue here). This, as already mentioned, decides that the arbitral agreement is valid if it passes such a test under any one of the law of the place of arbitration, Swiss law (the same here), the law chosen by the parties or the law applicable to the merits of the dispute.

(b) The Nature of Waiver - a matter of substantive validity

It has been suggested, though, that waiver is not a matter of substantive validity of the agreement to arbitrate. This is the only logical way to defend the Swiss court's position which overrides without discussion the provisions of Article 178(2).

This is curious in the light of the Tribunal fédéral's analysis in Fomento. Its analysis²⁴ correctly indicates that an arbitration agreement can be replaced by a subsequent agreement.

It is argued that the duty to raise any jurisdictional objections promptly is not a matter of contract but statute. This view can be defended by reference to Articles 7(a) and 186(2) of the LDIP. However, this confuses form and function. It does not matter greatly whether, as a result of contract a statute, a party gives up a right to submit a dispute to arbitration by failing to mention the arbitration clause early enough. Either way, he loses his right to arbitrate. This must be an issue as to whether the agreement is "valable" "au fond". It must, therefore, be governed by Article 178(2).

This approach fits the pattern of the LDIP better than the court's. Article 176(1) seeks to apply the Chapter 12 of the statute to all arbitrations whose seat is in Switzerland. There are specific rules which apply in this way: notably those on subject-matter arbitrability and formal validity. There is then Article 178(2) that governs applicability of the agreement "au fond". That has to mean everything else for which no rule has been laid down.

(c) The decision to apply Panamanian law

If one accepts that Article 178(2) of the LDIP should have been applied, it can be seen that the court is excluding its application by reference to the public policy arguments favouring

²⁴ at p. 287.

“litispendance” At the very least, the court needs to say this and explain why. It fails to do so. Since the LDIP applies to all international arbitrations in Switzerland (subject to certain insignificant limitations), it really should be applied to any analysis of whether an arbitration agreement has been waived in relation to a case where the seat is in that country.

Even if one accepts the logical implication of the Tribunal fédéral’s approach that waiver is somehow a sui generis issue, the application of the law where the waiver took place runs counter to good private international law practice.

The whole subject of the law applicable to the agreement to arbitrate has suffered from caselaw which lacks coherence. This is in spite of a relatively clear legislative approach to the subject. The traditional starting point is the parties’ agreement. Since very few parties select the law to govern the arbitral agreement, one is usually left with the closest and most real connection argument. Swiss law contains a double conflicts rule. First, Article 176 applies the law of the seat in effect to everything. This is then subject to some exceptions. As we have seen repeatedly, Article 178(2) makes the substantive validity subject to any law chosen by the parties, the law applicable to the substance of the dispute or Swiss law whichever makes the agreement valid. Most other countries apply their statutes and nothing else to agreements providing for arbitration on their territory. Even the Swiss statute by changing the subject-matter arbitrability rule has rightly subjected that issue to the law of the seat where it previously was governed by the law applicable to the substance. Article 178(1) has the same effect on formal validity.

Conflict of laws issues only arise normally where the arbitration statute in the seat of arbitration is silent. Then, the Court has to determine the law most closely connected to the agreement or the country where the most significant performance takes place. The seat of the arbitration is the only realistic candidate. What the Swiss courts have done is to apply the law with the closest connection to the issue, not the agreement, which creates the distortion here. Notably, the Swedish Högsta Domstolen (Supreme Court) recently assumed without argument that the law of the seat governed the question of whether a breach of confidentiality in relation to the arbitration amounted to a waiver of the right to continue the arbitration.²⁵

The previous decision relied upon by the Tribunal fédéral is interesting but actually nothing to do with the problem. There, the Swiss Cantonal court had to decide whether a party by participating in an action before it had waived its rights. The Court concluded that the cantonal judge had not broken fédéral law when it applied its own procedural rules to

²⁵ Bulgarian Foreign Trade Bank Ltd c/ A.I. Trade Finance Inc. reported in French in [2001] Rev. Arb. 821. The distinguished editors of that journal may have been making a point when they printed this judgement directly in front of the Fomento decision.

determine whether a waiver of the right to arbitrate had occurred. Nobody argued that French law, that of the seat in Le Havre, should apply. At best, the decision is per incuriam. With no evidence of French law presented and no indication that it was in any way different to the local cantonal rules, the first instance judge had no reason to apply the “correct” law, that of the seat. In any event, the case was not governed by Article 178(2) of the LDIP since the seat was abroad.

Mattias Scherer²⁶ has tried to defend the court’s view in Fomento, by saying that it only applied Panamanian law to the analysis of its legal system. Unfortunately, the court does not say that. Even if it had, it would still have been wrong. The last thing one needs here is depeçage, more than one law applying to a single issue. A description of the workings of the Panamanian legal system for this purpose is a matter of fact, not law. Either way, the Tribunal fédéral is clear on insisting on the application of Panamanian not Swiss law to the whole issue.

One of the aims of modern arbitration legislation is to make it user-friendly. Most of the great legislative reforms of the second half of the 20th century in this field have aimed to reduce the number of possible applicable laws.²⁷ This is also true of the LDIP as a whole. Arbitration users do not want esoteric discussions of different legal systems. They select the seat or it is selected for them by an organization on the basis of a sound legal system allied to the appropriate logistical help. In the case in question, neither party when it agreed to arbitrate in Switzerland would have expected Panamanian law to be applicable except possibly in the event of the agreement being contrary to local public policy. Panamanian civil procedure has now become relevant to a dispute where the parties agreed to Swiss arbitration, all for no obvious reason.

The arbitration agreement, providing as it did expressly for Swiss arbitration, should clearly have been governed by Swiss law. Yet somehow that law was disapplied to the a dispute as a result of one party seeking to break it. This does not make sense.

More generally, it is very easy to state a simple conflict of law rule for everything except the substance of the dispute. The place of arbitration applies subject to the public policy of any forum considering the issue. For reasons given above, although this is a throw-back to the Geneva Protocol, it complies with Article II(3) of the New York Convention and it works neatly in practice.

²⁶M Scherer, “When Should an Arbitral Tribunal Sitting in Switzerland Confronted with Parallel Litigation Abroad Stay the Arbitration?”, [2001] ASA Bulletin 451.

²⁷ For a survey of the relevant legislation and the author’s view on all this, see “The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate” in The Place of Arbitration, ed., M. Storme & P. De Ly, Mys & Breesch, Ghent 1992, 40 & 8 Arbitration International 257 (1992)

(vi) Consequences of the different approaches to the applicable law and “litispendance”

We have suggested that the only issue should have been whether the parties waived their right to arbitrate under the law of the seat, that of Switzerland. Armed with this analysis, the court should have been able to take the undisputed facts and decide whether the arbitrator had jurisdiction. The Tribunal fédéral would have had the advantage of applying its own law which always makes matters easier. There would also have been no need for the court or arbitrator to wait for the Panamanian legal system to make its decision.

The only risk would have been that the court might have concluded in favour of waiver and the Panamanian court could have reached the opposite result. In practice, the Swiss court decision could presumably have been used in a fresh application to the Panamanian court to show that the arbitral agreement was no longer capable of being performed in the light of the Swiss court ruling.

A more desirable consequence of the Tribunal fédéral's approach is that successful litigants in foreign arbitrations can convert their awards into judgements in the seat of the proceedings and then seek to enforce the judgement as well as the award in Swiss proceedings so long as they can show that the defendant is either domiciled in the seat or submitted to the jurisdiction voluntarily. Such a submission is likely to be found in the form of failed setting aside proceedings. Indeed, the fate of those proceedings in the seat of arbitration, assuming that they are conducted fairly, should largely determine whether enforcement is likely to be allowed.²⁸

In such a situation, the court will only be interested in whether enforcement contravenes public policy and whether the enforcement proceedings were fair. This can be used to protect an award based on an indifferent jurisdiction ruling from being attacked in the Swiss courts. Clearly, though, if the arbitrator's ruling was wholly unacceptable, it could be challenged on the basis that the enforcement of the foreign judgement was contrary to Swiss public policy as contravening *pacta sunt servanda*.

(vii) A last point on the nature of waiver

²⁸ See Jurisdictional Problems in International Commercial Arbitration – A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law, Schulthess, Zurich 1989 at pp. 300-302 for more details of the author's views.

The Court's analysis of waiver poses a further practical problem. It correctly analyses the behaviour of the parties in terms of an offer (made by the party commencing foreign proceedings) followed by an acceptance through the defendant continuing with the case on the merits. However, does this leave room for the other type of waiver: starting court proceedings followed by an act of detrimental reliance by the defendant? There is no reason to think that the Swiss court thought that waiver could not occur in this way. Traditionally, waiver of arbitration has always been possible through both offer and acceptance and detrimental reliance routes. So, where the claimant in an arbitration has started court proceedings in New York, the trouble it puts the defendant to in responding to the claim there should be sufficient to amount to a waiver. This is certainly the view taken by the LDIP where one side brings court proceedings in Switzerland in breach of an agreement to arbitrate abroad.²⁹

VI: THE TRIBUNAL FÉDÉRAL'S OVERALL VIEW OF ARBITRATION

When the Fomento judgement first appeared, there was much consternation in the Swiss arbitration world that the pro-arbitration bias of the Swiss courts was being eroded. The judgement barely conceals the court's contempt for the arbitral tribunal in the case:

“On ne comprend dès lors pas pourquoi il n'a pas attendu l'arrêt de la Cour suprême. Cette position est insoutenable.

Il semble que le Tribunal arbitral, profitant du fait qu'il statue en instance unique, a voulu prendre de vitesse les instances panaméennes. Une telle manière de procéder est dépourvue de tout fondement juridique.”³⁰

“One, consequently, fails to understand why it did not wait for the decision of the Supreme Court. This approach is indefensible.

It seems that the arbitral tribunal intended to use the fact that there was only one level to its proceedings to outpace the Panamanian legal process. Such a way of proceeding is wholly without legal basis.”

These are strong words.

However, one can ask whether an avowedly pro-arbitration bias is good for Swiss arbitration and the process as a whole. Arbitration is put at risk if it overreaches the parties' agreement. The view expressed informally that certain arbitrators “never decline jurisdiction” is damaging for the whole concept of contractually based adjudication. The random addition of solvent parties and unrelated transactions to those set out in the document providing for arbitration are all too common phenomena. Parties do not always

²⁹ LDIP Art. 7(a); UNCITRAL Model Law, Art. 8 (1).

³⁰ At p. 287.

have the resources or the desire to waste money over challenges to many of these awards - not to mention the risk of annoying a tribunal which may have to resolve other disputes involving them.

In the US, there was for a while a strong presumption in favour of finding that disputes were subject to arbitration.³¹ This had to be sat on firmly by the same US Supreme Court (albeit differently composed) that had played a part in propounding the doctrine in the first place.³² The English courts had in the meantime expressly rejected this approach In Ashville, May LJ made it clear that the judges had to construe arbitral agreements neutrally.³³

In Switzerland, the Tribunal fédéral previously expressed strong pro-arbitration bias in its approach to jurisdictional issues in the Westinghouse case.³⁴ In that case, the court declined to review the arbitrator's findings of fact on which he had based his decision on jurisdiction. In this, court went far too far. In the hands of arbitrators of much less integrity than Claude Reymond, this could be perceived as an invitation to manipulate findings of fact to bind a party to an arbitration to which he had never agreed.

It may be that in its comments about the arbitrators quoted above, the Fomento court was reacting to the determination of the arbitral tribunal to find that it had jurisdiction regardless of the facts. Swiss arbitration can only be damaged by arbitrators taking such an approach. They have far too many advantages (in terms of logistics, the linguistic and technical skills of its legal profession and distinguished arbitral tradition) to need to go looking for cases by expanding the scope of their authority. If the Tribunal fédéral succeeds in issuing a corrective message to the arbitration community through its remarks here, it will do the latter's business no harm at all.

The problem with the arbitrators upsetting the Tribunal fédéral in this way is that it may have led the court to reach a poorly reasoned judgement. The Fomento judgement may become an invitation to companies to start court proceedings in breach of arbitral agreements in the hope of slipping a case through the New York Convention net. As the court indicates, such applications have a very slim chance of succeeding in future. Nevertheless, people will try, generating often unrecoverable costs in foreign jurisdictions for those who thought that they had agreed to arbitrate in Switzerland. Those parties might regret that Switzerland has never adopted the Anglo-American tradition of issuing injunctions to stop parties breaking arbitration agreements abroad.³⁵

³¹ Moses H Cone Memorial Hospital v. Mercury Construction Corp. 460 U.S. 1 at p. 24 (1983).

³² First Options v. Caplan 514 U.S. 938 (1995)

³³ Ashville Investments Ltd. v. Elmer Contractors Ltd. [1989] Q.B. 488

³⁴ ATF 119 II 380 at p. 383 (1993).

³⁵ See for an example involving Swiss legal proceedings where in the end the English court was proved right on the validity of the arbitral clause: Tracomin v. Sudan Oil

VIII: "LOOSE TALK COSTS LIVES"³⁶

Seeds (No. 2) [1983] 1 W.L.R. 1026. The subsequent English award was later enforced in Switzerland. On this, see C. Reymond, "La clause arbitrale par référence" in Recueil de travaux suisses sur l'arbitrage international, ed. C. Reymond & E. Bucher, Schulthess, Zurich 1984, 85. One can always claim damages for breach of the arbitration agreement in the arbitral proceedings.

³⁸ The New York Herald of November 17th 1942 reports Franklin D Roosevelt referring to posters "Loose talk costs lives". "Careless talk" also featured on posters during World War II.

As part of its fury at the arbitral tribunal, the court leaves open an unpleasant memory of times past: the application for a declaration of inapplicability of the arbitral agreement.³⁷

This is not the old-style English application where the court determines the issue once and for all. This is an application which will only succeed if the court finds the arbitral agreement obviously invalid or inapplicable.³⁸ As the court notes, a similar review takes place where court proceedings are commenced in Switzerland and the seat is in that country.

None of this is actually in the LDIP. One of the great hopes of the UNCITRAL Model Law³⁹ was to limit court intervention to events and grounds clearly set out in municipal legislation. Already, the Tribunal fédéral has introduced a "Arévision" of the award to correct clerical errors. Without statutory authority, it has created different standards of review where court proceedings are commenced in breach of an arbitral agreement, depending on whether the seat is Switzerland. The completeness of the LDIP is further threatened by the possible revival of the application for a declaration mentioned in *Fomento*.

What is pernicious about the last two judicial changes is that a summary, as opposed to a full, review helps to prolong jurisdictional challenges by an instance. In the *Westland* case where Egypt sought the type of declaration discussed, it failed in its original effort, it then failed in front of the arbitrators before winning in front of the Tribunal fédéral who concluded that it should never have been a respondent to the arbitration in the first place.⁴⁰ Legal

³⁷At p. 286. See the commentary on this in J-F Poudret, C Reymond, P Lalive, Le droit de l'arbitrage interne et international en Suisse, Payot, Lausanne 1989 at p. 386. My own similar view can be found in Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law, Schulthess, Zurich 1989, at pp. 189-191

³⁸ See page 286 and SJ 1987 p. 230.

³⁹ Article 5.

⁴⁰ République arabe d'Égypte c/ Westland Helicopters Ltd 19 July 1988, [1989] ASA Bulletin 49; 28 I.L.M. 687 (1989). The late Francis Mann, a great friend of Claude Reymond, kindly sent me his collection of judgements in this case, some of which remain unpublished.

systems need a single judicial review of jurisdiction and not three looks at the question by differently constituted tribunals.

CONCLUSION

The Fomento judgement seeks to range freely over the big issues of private international law and arbitral jurisdiction. The court probably reached the right decision on the facts. However, its reasoning contains a number of discordant notes. The court seems to be trying to take Swiss law through a series of complicated hoops through which it does not need to go. In doing this, the court is creating potential obstacles for future generations of arbitration users.

Above all else, though, the court has missed the calm, straightforward and practical approach to adjudication that has so characterised the work and life of Claude Reymond over many years and will hopefully do so for many more.