JURISDICTIONAL PROBLEMS IN INTERNATIONAL ARBITRATION: SOME SALIENT ISSUES, BY STELIOS KOUSSOULIS

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This is a short book written about jurisdictional problems in international arbitration from an academic or theoretical standpoint rather than from the standpoint of a legal practitioner. It examines and discusses many of the leading state court decisions in Europe and the United States dealing with, and delimiting, the respective roles of state courts, on the one hand, and arbitration tribunals, on the other, in relation to international arbitration.

The volume begins with an "Introduction" which discusses the legal nature of arbitration. This chapter discusses three theories:

(1) the "procedural" theory which, in brief, is said to equate a foreign arbitral award to a foreign court decision and to consider that arbitrators perform a kind of public function,

(2) the "contractual" or "substantive" theory which, in contrast to the "procedural" theory, is said to emphasize the contractual starting point and general contractual nature of the arbitral award (the arbitrators being considered as representatives of the parties who conclude an arbitral award on their behalf), and

(3) the "jurisdictional" theory which emphasizes that the arbitrators' task is to resolve disputes arising between the parties with the consequence that, among other things, arbitrators must be neutral and independent of the parties and respect basic rules of due process.

Professor Koussoulis then ends this chapter by referring to what he calls the "present-day position" which he describes as the "combined – jurisdictional – theory" according to which:

> "... arbitration constitutes an adjudication process contractually defined by private parties. This combined view on the one hand stresses the contractual starting point of arbitration and on the other hand emphasises the exercise of a jurisdictional function by non-state organs."

After the "Introduction", the book is broken down into three parts. Part I, which is called "Jurisdictional Prerequisites of the Arbitration Mechanism", is divided into two chapters, the first being entitled "Arbitrability" which discusses the well known U.S. cases, *Wilko v. Swan*, *Scherk* and *Mitsubishi*, in addition to well known European cases such as the French *Impex* case. The second chapter is entitled "Separability of the Arbitration Agreement" and again discusses well known U.S. and European cases such as the U.S. case *Prima Paint*, the English cases *Heyman v. Darwins* and *Harbour Assurance*, and several well known French cases, *Gosset, Hecht* and *Menicucci*.[1]

Part II, which is entitled "Jurisdictional Structure of the Arbitral Tribunal", comprises two chapters, the first being entitled "The Competence of Competence Doctrine" and the second being entitled "Challenge of Arbitrators". Again, the author here reviews well known case law in the field of arbitration as well as national laws on arbitration and rules of arbitral institutions principally in Europe and the U.S.

In this Part, while the author is clearly a supporter of international arbitration, some might think he does not go far enough. For example, on pages 63 to 65 the author writes approvingly of court decisions and/or legislation in Greece, England, Germany and Sweden which enable a party to seek a declaratory judgment from a state court regarding arbitrators' jurisdiction **after** arbitration proceedings have begun and until an arbitral award is issued. The present reviewer, at least, would consider this out-moded and would prefer a solution like that provided for already in 1980 by Article 1458 of the French New Code of Civil Procedure, which provides that, if a dispute falls within the purview of an arbitration clause, then a state court may not take jurisdiction except where the arbitration agreement is "manifestly void" and that where such dispute is, in addition, **the subject of a pending arbitration**, a state court may not take jurisdiction of it at all during the pendency of the arbitration.[2] In the present reviewer's opinion, this position is better as it limits the risk of dilatory tactics and multiple proceedings by leaving the question of the arbitrators' jurisdiction in all but the most extreme

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1 This chapter also discusses the interesting decision of the European Court of Human Rights in the *Areios Pagos* case involving Greece. In that case, the Greek State had concluded an agreement for the construction of an oil refinery which contained an arbitration clause. Thereafter, the State adopted a law which unilaterally suspended the whole contract including the arbitration clause. The State's action appears to have been upheld by the Greek administrative courts. However, it was overruled in 1994 by the European Court of Human Rights which, while acknowledging that a State has the power to terminate or suspend an agreement it may have concluded with private parties, held that this does not apply to the arbitration clause.

2 Article 1458 of the French New Code of Civil Procedure provides as follows (translation):

type of case (that is, the case where the arbitration agreement is "manifestly void" and arbitration proceedings have not begun) to the arbitrators, in the first instance, confining court review to the enforcement stage. This, in the reviewer's opinion, is all that is required.[3]

The author also advances another opinion which international arbitration practitioners may question. He states on page 77 that the position that:

> "... the arbitrator appointed by one of the parties serves in fact as a representative of the interests of this party and thus carries out his duties accordingly"

is a "realistic" approach and "seems to continuously gain ground especially in the field of international arbitration". In the reviewer's opinion, the opposite is in fact the case: the tradition of independence of **international** arbitrators is increasingly widely accepted, *e.g.* in the United States, where the **domestic** practice is for an arbitrator to act in effect as the representative or advocate for the party who has appointed him[4].

Part III of this book, which is entitled "Awards as Jurisdictional Acts", is divided into two chapters: the first dealing with the "Review of Arbitral Awards" and the second with "*Ordre Public* as a Means of Controlling Awards". Again, this is a review of legislation and case law in the U.S. and Europe, including specifically, Greece, on this issue. Among the cases discussed in the first chapter are *Norsolor*, *Hilmarton* from France and *Chromalloy* from the U.S. Among the cases discussed in the second chapter are the French case *Mardelé* and the Greek case *Areios Pagos*.

"When a dispute submitted to an arbitral tribunal by virtue of an arbitration agreement is brought before a national court, such court shall decline jurisdiction.

If the arbitral tribunal has not yet been seized of the matter, the court shall also decline jurisdiction **unless the arbitration agreement is manifestly void.**

In neither case may the court decline jurisdiction on its own motion." [Emphasis added]

While Article 1458 relates to domestic arbitration and there is no specific counterpart in French legislation relating to international arbitration (Articles 1492 to 1507 of the New Code of Civil Procedure), in practice the French courts are even more supportive of arbitration in the case of international disputes than domestic disputes.

3 Article 8 of the UNCITRAL Model Law on International Commercial Arbitration of 1985 is to similar effect. *See also* Article 5 of this model law.

4 *See* Article 8 of the International Arbitration Rules of the American Arbitration Association (1997) which, unlike the American Arbitration Association's domestic arbitration rules, requires an arbitrator to be independent and impartial. The UNCITRAL Model Law on International Arbitration of 1985, which has been adopted (with modifications) by many states, similarly requires an arbitrator to be independent and impartial, *see* Article 12.

Overall, this book provides a competent, general overview of the leading cases and laws in those European countries that are in the forefront of international arbitration, as well as in the U.S., relating to jurisdictional issues in international arbitration. While it will contain little that is new for experienced international arbitration practitioners (and, indeed, the book is not entirely up-to-date [5]), it may serve as a useful theoretical introduction for students or others who are entering upon the field of international arbitration for the first time.

However, the reviewer cannot end without expressing regret that the English language used in the book is poor and, occasionally, almost incomprehensible. The book has been published by a Greek publishing firm and one wonders whether it would have even been accepted for publication by a legal publisher in an English-speaking country. One example of the poor English used in the book is the following passage taken word-for-word from page 104:

> "However, if the relevant formative court decision has already vitiated the legal repercussions arising from the authentic adjudication by the arbitrators, the application for *exequatur* seems to become moot. Therefore, in fact, the opinion put forth in the above cases modifies the basic character of an application for the recognition and enforcement of a foreign arbitral award, mutating the relevant application from a filter through which the effects of the foreign award pass on to the domestic order to a means whereby the validity itself of the arbitral award is reviewed."

Another example is footnote 21 on page 116:

> "On the obligation of the arbitral award to take care in order to ensure the enforcement of the award, thus anticipating all the legal orders to which such an enforcement may take place *see* Berger, *supra* note 18, 487, note 191 ..."

It is a pity that this book is written in a style that is difficult to understand and, therefore, not always a pleasure to read. It is to be hoped that, if the author prepares a second edition, he will ensure that, before publication, the text is thoroughly vetted by a lawyer whose native language is English.

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5 While the preface indicates the book to have been completed in April 2000, and the book includes a 27-page bibliography, no reference is made therein to such standard works as Fouchard Gaillard Goldman Traite de l'Arbitrage Commercial International, published in 1996 (an English version was published in 1999) or to the third edition of Redfern and Hunter, Law and Practice of International Commercial Arbitration, published in 1999 (only the second edition of Redfern and Hunter published in 1991 is listed).