

Paying Here, Seeking Restitution There.

A negative consequence of the availability of multiple fora in international litigation is the risk of conflicting decisions. Several adjudicators can retain jurisdiction and then reach conflicting, if not opposite, results on the merits. Is it a problem? It could be argued that it is for two different reasons. The first is that the legitimacy of the legal process is undermined when inconsistencies are produced. This is certainly true when this happens in one given legal order. However, when it happens in different legal orders, it seems to be the sad consequence of the autonomy of the legal orders involved. Arguably, there is no real inconsistency when autonomous legal orders adopt different solutions. The second reason why conflicting decisions can be a problem is because the parties may be ordered to take inconsistent actions. If a party is enjoined to do something by one court and ordered to refrain from doing it by another court, the position of that party becomes unbearable.

An interesting example of this last hypothesis is the case of a party being ordered to pay a sum of money in one jurisdiction, but being also able to successfully seek restitution of that sum of money in another jurisdiction. I am not aware of many cases where this actually happened. Here is an interesting one involving a court and an arbitral tribunal.

The debtor was the State of Congo, which had borrowed money from a Libanese construction company, Groupe Tabet. Congo did not make the instalments repayment itself but ask Elf Congo, the Congolese subsidiary of the French oil company Elf, to do so, and to commit to do so to the lender. There were thus two different sets of contracts, the borrowing contracts between Congo and Tabet, and the repayment contract between Elf Congo and Tabet. There was certainly a third contractual relationship between Congo and Elf Congo, which explains why Elf Congo agreed to commit to the lender, but I do not have information on it, and it is not directly relevant.

Five years later, the State of Congo argued that the lender had received too much money and Elf Congo stopped paying back, probably after being instructed to do so by the State. The lender then decided to sue Elf Congo under the repayment

contract before Swiss courts (I do not know whether this venue was chosen because the contract contained a clause providing for the jurisdiction of Swiss courts). A Geneva court ordered Elf Congo to pay 64 million Swiss francs (EUR 38 million) in 2001. The Swiss Federal Tribunal eventually confirmed the judgement in 2003. The Swiss decisions were declared enforceable in France in 2003 or in 2004. The State of Congo counter attacked by initiating arbitral proceedings under the borrowing contracts against the lender, as those contracts contained a clause providing for ICC arbitration in Paris, France. The arbitral tribunal did not rule completely in the State of Congo's favour, as it found in a first award that the State still owned EUR 16 million. But the tribunal found that the remaining EUR 22 million were not owned. In a second award made in 2003, it thus ordered the lender to enter into an escrow account agreement with Elf Congo, and to put on this account any monies that it would have to pay as a consequence of the Swiss judgment beyond EUR 16 million.

A dispute concerning the enforcement of the second award was then brought before French courts. On the one hand, the lender decided to challenge the second award and sought to have it set aside. On the other hand, the State of Congo was applying for a court order to comply with the same second award *sous astreinte*, i.e. for a judgement ordering the performance of the award and providing that the lender would have to pay a certain sum for each day of non-compliance. French courts refused to issue such order, as the proceedings challenging the award suspended its enforceability. A debate arose as to whether an exception existed in the case in hand, making the award immediately enforceable. The French supreme court for private and criminal matters (*Cour de cassation*) eventually ruled in a judgement of July 4th, 2007 that the enforcement of the award was suspended and that its performance could not be ordered judicially.

The case raises many issues of international arbitration. As far as the conflict of laws is concerned, the issue is whether there is a way to prevent the two adjudicators involved (i.e. Swiss courts and the ICC arbitral tribunal) from further ruling the contrary of each other.