

Challenge to formal and substantive validity of arbitration agreement dismissed (Swiss Supreme Court)

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

Legal update: case report | Published on 29-Mar-2022 | Switzerland

In *Decision 4A_460_2021*, the Swiss Supreme Court dismissed an application to set aside a partial award on jurisdiction on the ground that the arbitral tribunal had affirmed jurisdiction despite the lack of formal and substantive validity of the arbitration agreement. The applicant based its application on article 190(2)(b) of the Swiss Private International Law Act.

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In a recently published German-language decision, the Swiss Supreme Court (SSC) rejected a motion to set aside a partial award on jurisdiction based on article 190(2)(b) of the Swiss Private International Law Act (PILA).

The dispute concerned an insurance policy provided by insurer "A" to policyholder "B Group". In late 2013, A issued an insurance slip which included a jurisdiction clause in favour of the domestic courts of Basel. In April 2014, after several drafts had been exchanged, a company within the B Group (C) signed the policy on behalf of the B Group. The 2014 policy referred to arbitration seated in Basel.

Another company within the B Group (D) initiated arbitration in April 2020. A challenged the tribunal's jurisdiction, alleging that it had not signed the version of the 2014 policy relied on by D. A contended that it had signed a different version in which C and not the entire B Group was the policyholder. A argued that it had thus not entered into an arbitration agreement with D and that Basel court had jurisdiction pursuant to the slip. The tribunal dismissed A's arguments and affirmed its jurisdiction in a partial award.

Before the Supreme Court, A alleged that the tribunal had wrongly affirmed jurisdiction. First, the arbitration agreement did not comply with the formal requirement of article 178(1) of the PILA which requires an arbitration agreement to be signed, which A had not done. Second, A alleged that the tribunal had erred in finding that the parties actually intended to enter into an arbitration agreement (subjective interpretation), and that the tribunal had in fact made an objective interpretation of the parties' declarations.

Regarding formal validity, the court confirmed that article 178(1) of the PILA does not require an arbitration agreement to be signed to be valid, provided the agreement is evidenced in written form.

Regarding substantive validity, the court held that the tribunal had correctly applied the rules of interpretation to ascertain the parties' actual intention to enter into an arbitration agreement, which amounts to a finding of fact that the court may not review.

This decision confirms that an arbitration agreement may be validly concluded by an exchange of drafts, or in a document signed by only one party. Moreover, it serves as a reminder that if the tribunal has established the actual intention of the parties, that finding cannot be reviewed by the Supreme Court.

Case: *Decision 4A_460_2021 (Swiss Supreme Court) (3 January 2022)*.

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