Subjective scope of an arbitration agreement and non-signatories (Swiss Supreme Court)

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In *decision 4A_82/2016*, the Swiss Supreme Court considered the subjective scope of an arbitration agreement after several corporate restructurings, as well as mergers of the original parties to the arbitration clause. The decision concerns an interim award on jurisdiction in a domestic arbitration procedure.

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Speedread

In a German-language decision dated 6 June 2016, the Swiss Supreme Court dismissed a challenge to an arbitral tribunal's jurisdiction. It held that the arbitral tribunal had not based its decision on findings that were obviously contrary to the facts when interpreting two contracts and in deciding on the subjective scope of the arbitration agreement. In particular, the Swiss Supreme Court upheld the arbitral tribunal's decision that the rights assigned under the two contracts, especially with regard to the arbitration agreement, had been transferred to the respondent after several corporate restructurings and mergers of the original parties to the contract. The Swiss Supreme Court also rejected arguments that the arbitral tribunal had violated the petitioner's right to be heard.

While the award was rendered in the context of domestic arbitration, the Swiss Supreme Court confirmed that the prerequisites for jurisdictional challenges in domestic and international arbitration proceedings are the same. (*Decision 4A_82/2016.*)

Background

For setting aside proceedings in domestic arbitration Article 393 of the Swiss Civil Procedure code provides that an award will be set aside if:

> "[…]
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> b. the arbitral tribunal wrongly declared itself to have or not to have jurisdiction;
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> […]
>
> d. the principles of equal treatment of the parties or the right to be heard were violated;
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> e. the award is arbitrary in its result because it is based on findings that are obviously contrary to the facts as stated in the case files or because it constitutes an obvious violation of law or equity;"

Facts

The case concerned a dispute about the closure of a waste-water purification plant. A company (B) initiated arbitration proceedings against the respondent (A) maintaining that it should be liable for part of the costs incurred by the closure of the plant. It based its claim on a framework contract that was originally concluded between two companies (D and E), as well as the arbitration agreement contained therein.

In 1995, after undergoing several corporate restructurings, D outsourced part of its company to A on the basis of a so-called "umbrella agreement." One year later, D and E merged to become B.

Pursuant to Article 2(4) of the framework contract, D and E mutually guaranteed that their respective subsidiaries would fulfil each of their respective duties under the framework contract. Furthermore, Article 19 of the framework contract contained an arbitration agreement providing for disputes to be resolved by an arbitral tribunal seated in Basle, Switzerland.

In an interim award on jurisdiction, the arbitral tribunal held that it was undisputed that the claimant, B, was the legal successor of one of the original parties to the framework contract and therefore had the right to initiate the arbitration proceedings. According to the arbitral tribunal, A too was bound by the framework contract and the arbitration agreement contained therein because Article 2(4) of the framework contract constituted a proper obligation and not, as claimed by A, a mere letter of comfort. As obligations, duties pursuant to Article 2(4) were transferred to A by way of the umbrella agreement and the arbitration clause, being an accessory right, was thereby transferred as well.

The tribunal's interim decision on jurisdiction was then challenged by A, the petitioner before the Swiss Supreme Court. According to the petitioner, the clause should have been interpreted as a non-binding (and therefore non-transferrable) letter of comfort and not as a guarantee or guarantee-like promise. Against this background the petitioner argued that the arbitral tribunal should have examined the framework contract and its legal nature as a whole.

Decision

The Supreme Court rejected the petition.

The petitioners' main line of argument was that the arbitral tribunal wrongly interpreted Article 2(4) of the framework contract. The Swiss Supreme Court held that in order to decide on its jurisdiction, the arbitral tribunal merely had to examine, whether Article 2(4) was binding and whether the duties contained therein were transferrable. Only if they were transferrable, could the arbitration clause contained in Article 19 of the framework contract also be transferred as an accessory right. The Swiss Supreme Court concluded that the petitioner did not show that the arbitral tribunal was in violation of the law when interpreting the framework contract.

The second and third arguments submitted by the petitioner concerned its right to be heard in regard to the interpretation of Article 2(4) of the framework contract as well as the assertion that the arbitral tribunal's decision was grounded on findings that were obviously contrary to the facts as stated in the case file. Both of these arguments were rejected by the Swiss Supreme Court. It noted that the arbitral tribunal explicitly mentioned the petitioner's different submissions in its award and therefore respected its right to be heard. It also reminded the parties that the limits of Art 393 lit. e of the Swiss Civil Procedure Code are to be interpreted very narrowly.

Finally, the petitioner argued that the arbitral tribunal interpreted the umbrella agreement wrongly. However, the Swiss Supreme Court held that the arbitral tribunal was not in violation of the law when it concluded – contrary to what was claimed by the petitioners – that the transfer under the umbrella agreement comprised all rights and duties in connection with the transfer of a particular division to the petitioner, including Article 2(4) and the accessory right (the arbitration agreement) in Article 19.

Comment

The Swiss Supreme Court confirmed its long standing case law that, under certain conditions, non-signatories may be bound by an arbitration agreement. The case at hand concerned a transfer of an obligation linked to an arbitration clause. In terms of personal jurisdiction, this is usually less problematic than the factual involvement of a third party. However, here the specific issue as to whether a transferrable duty existed or not was at stake, which was correctly dealt with by the arbitral tribunal as a preliminary question to the jurisdictional challenge.

While the award was rendered in the context of domestic arbitration, the Swiss Supreme Court confirmed that the prerequisites for jurisdictional challenges in domestic and international arbitration proceedings are the same.

Case

Decision 4A_82/2016 (6 June 2016).

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