Swiss Supreme Court rejects extension of arbitration agreement to non-signatory

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In *decision 4A_473/2016*, the Swiss Supreme Court considered a request to set aside a jurisdictional award, in which the sole arbitrator had rejected the petitioner's arguments to extend the arbitration agreement to a non-signatory.

Speedread

In a decision dated 16 February 2017, but only recently published, the Swiss Supreme Court rejected a request to set aside a jurisdictional award in which the sole arbitrator had found that there was no basis to extend the arbitration agreement to the respondent, a non-signatory.

The case concerned a real estate brokerage agreement containing an arbitration agreement, between two individuals. The broker sought payment of his commission from the company that ultimately bought the property, which however was not a signatory to the brokerage agreement. According to the main arguments of the petitioner, the company was bound by the arbitration agreement, as the signatory was its representative, or alternatively because it had intervened in the performance of the agreement.

The Supreme Court held that the petitioner had failed to properly challenge the sole arbitrator's main findings on the issue of representation and had confused substantive and jurisdictional requirements in relation to the issue of intervention in the performance of the agreement. The Supreme Court also seemed to imply that the theory of "reverse piercing of the corporate veil" might have served as a basis for jurisdiction in this case, but the petitioner had also failed to make an argument in this respect.

The decision serves as a cautionary reminder that, even though the principle of *jura novit curia* (the court knows the law) applies both in arbitral proceedings and before the Swiss Supreme Court, this does not relieve the parties from the burden of articulating their case with sufficient clarity. The Supreme Court will only consider arguments that have been properly raised. The decision also addresses, in passing, the parties' right to be heard in connection with requests for document production. (*Decision 4A_473/2016.*)

Background

Article 393 of the Swiss Code of Civil Procedure (CPC) provides that an award will be set aside if:

> "(...)
>
> (b) the arbitral tribunal wrongly accepted or rejected jurisdiction; or

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(...)

(d) the parties' right to equal treatment or their right to be heard is not respected".

Facts

X, a real estate broker, found a property on Lake Geneva that was potentially for sale. Following failed negotiations with A.M., the president of the board of directors and a manager of the company Z SA (a Swiss development company) to enter into a brokerage agreement, X met with A.N., the brother of A.M. X and A.N. entered into a brokerage agreement on 18 August 2012, pursuant to which X was to receive a 4% commission on a future sale of the property to A.N. It was only when signing the agreement that X gave A.N. the details of the property. The agreement was governed by Swiss law and included a dispute resolution clause providing for arbitration in Lausanne, under the Swiss Rules of International Arbitration.

In April 2013, Z SA drafted a development project that it submitted to the property's owner. The property was then split into three plots which were sold to Z SA in January, May and June 2014. The seller, X, A.M. and one of his colleagues from Z SA had lunch together to celebrate the deal, which X argued demonstrated A.M. and Z SA's involvement in the brokerage agreement.

X did not receive a commission on the sale and he initiated arbitration proceedings against Z SA in September 2015. In the Notice of Arbitration sent to the Swiss Chambers of Commerce, he argued that Z SA was bound by the agreement of 18 August 2012, entered into between X and A.N. on any of three grounds:

- A.N. had apparent authority to act for Z SA.
- Z SA subsequently ratified the agreement.
- By buying the property, Z SA interfered in the performance of the agreement and therefore displayed an intent to be bound by it.

The sole arbitrator found that he did not have jurisdiction to hear X's claim against Z SA. He considered that A.N. had not acted as a representative of Z SA and the latter could therefore not be bound by the 18 August 2012 agreement on either of the first two grounds advanced by X. As to the third ground, the sole arbitrator held that the mere fact that Z SA had bought the property did not constitute sufficient evidence that it intended to be bound by the agreement. The sole arbitrator also rejected several requests for document production made by X.

X challenged the award before the Swiss Supreme Court, arguing that the sole arbitrator had wrongly declined jurisdiction under Article 393(b) of the CPC. X also argued that the denial of his request for document production constituted a violation of his right to be heard under Article 393(d) of the CPC and therefore a ground to challenge the award.

Decision

The Swiss Supreme Court rejected the request to set aside the sole arbitrator's award.

The Supreme Court first held, obiter, that it is for the petitioner to draw its attention to the relevant the legal arguments that could justify setting aside the award, and it is not for the court to search for such arguments. That

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being said, the Supreme Court may reject a challenge to a jurisdictional award on another basis than the one indicated in the award – meaning that the Supreme Court is not limited to confirming the arbitral tribunal's legal analysis, even if it is bound by the tribunal's findings of fact. Conversely, the Supreme Court may also admit a challenge to a jurisdictional award on the basis of new arguments developed by the petitioner in response to findings of fact in the award (arguments that were not presented in the arbitration).

Apparent authority to act

Arbitration agreements must be entered into in writing or an equivalent form, allowing for proof of the agreement by text. The Supreme Court confirmed that, under Swiss law, for an act of a representative to bind the principal, a representative must as a rule:

- Indicate or give the objective impression that they are acting not on their own behalf, but on behalf of the principal.
- Have authority to act for the principal (have a valid power of attorney).

It is only if the first requirement is fulfilled, but not the second, that the issue of apparent authority arises. According to the Supreme Court, both the petitioner and the sole arbitrator confused these requirements. Ultimately, however, the sole arbitrator found that A.N. had not indicated or given the objective impression that he was acting on behalf of Z SA when he entered in the agreement of 18 August 2012. Therefore, the first requirement for valid representation was not fulfilled and both the issue of apparent authority and the issue of ratification were obsolete. The petitioner failed to challenge the main reasons set out by the sole arbitrator in support of this decision, choosing instead to challenge only some additional findings set out by the arbitrator "in the interest of completeness" (*à titre superfétatoire*). As the main findings remained unchallenged, the Supreme Court found that the petitioner had failed in this line of argument.

Intervention in the performance of the agreement

The petitioner argued that the sole arbitrator appeared to have held that Z SA had no knowledge of the arbitration agreement before the arbitration proceedings commenced. According to the petitioner, Z SA must have been made aware of the details of the property, which the petitioner had given A.N. on signing the brokerage agreement, in order to buy the property.

The Supreme Court held that the petitioner was confusing substantive and jurisdictional requirements with this argument. Indeed, the petitioner was arguing that Z SA profited from the information provided to A.N. and therefore owed the commission. However, this could not lead to an extension of the arbitration agreement.

Piercing the corporate veil

The Supreme Court further held that the petitioner had never sought to argue, either in the arbitration or in the challenge proceedings, that this was a case where it would be justified to "pierce the corporate veil" in reverse. In such scenarios, a company can be held liable for obligations entered into by an individual with which it forms an economic unit. The petitioner had requested production of various documents regarding the flow of funds in relation to the acquisition of the property and the relationship between Z SA and A.N. (including beneficial ownership rights). However, the sole arbitrator rejected those requests on the basis that the documents were not relevant to the grounds put forward by the petitioner (apparent authority, ratification and intervention in the performance of the agreement).

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Those documents could have been relevant if the petitioner had sought to make the argument that Z SA and A.N. formed an economic unit and that there should therefore be a reverse piercing of the corporate veil. However, as X had never sought to make this argument and the award consequently contained no findings of fact that could support this argument, the Supreme Court held that there was no (further) ground to set aside the award on the basis that there ought to have been an extension of the arbitration clause (*Article 393(b), CPC*).

The Supreme Court considered that the sole arbitrator had not violated X's right to be heard (*Article 393(d), CPC*) by refusing to grant the document production requests, as they were not relevant to the arguments advanced.

Comment

Although this decision pertains to a domestic arbitration, the findings of the Supreme Court would apply equally to an international arbitration.

Both the petitioner and the sole arbitrator appear to have confused several legal arguments and requirements. Ultimately, the petitioner must bear the burden for not properly pleading its case. The Supreme Court appears to indicate that there may have been an argument to be made for a reverse piercing of the corporate veil, but the petitioner failed to raise this.

The result may appear somewhat harsh when one considers the facts of the case. However, this decision serves as a cautionary reminder that, even though the principle of *jura novit curia* (the court knows the law) applies both in arbitration proceedings and before the Swiss Supreme Court, this does not relieve the parties from the burden of articulating their case with sufficient clarity.

Two other issues are worth noting. First, the Supreme Court mentions "piercing the corporate veil" as a seemingly standard basis for the extension of the arbitration agreement. Parties would therefore do well to bear this theory in mind when seeking to bring claims against non-signatories. Secondly, this appears to be the first case in which a party has sought to argue that a negative decision on a request for document production could constitute a violation of its right to be heard and therefore a ground to challenge the award. Given the wide discretion afforded the arbitrators when it comes to the (anticipated) assessment of evidence, it is doubtful that there are many cases where an award could in fact be set aside on that basis, but the decision may alert some parties to a further possible angle for challenging the award.

Case

Decision 4A_473/2016 (Swiss Supreme Court).

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