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

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In *decision 4A_459/2016*, the Swiss Supreme Court considered an application to set aside a partial award on jurisdiction where the petitioner argued that the tribunal had wrongfully declined jurisdiction by holding that the arbitration agreement did not extend to a non-signatory third party.

In a German language decision dated 19 January 2017, but only recently published, the Swiss Supreme Court rejected an application to set aside a partial award on jurisdiction, where the tribunal had denied that it had jurisdiction over the second respondent.

The petitioner commenced domestic arbitration proceedings against two respondents based on a partnership agreement relating to the development of an apartment complex, which was signed by the petitioner and the first respondent. The partnership agreement provided that the entire development of the apartment complex was to be contracted out to the second respondent. A separate agreement was concluded with the second respondent to that effect. In the arbitration, the second respondent raised a jurisdictional objection, submitting that it was not a party to the partnership agreement. In the partial award, the tribunal accepted the second respondent's objection. It found that the second respondent was a distinct party even though the second respondent was connected to one of the partnership partners. It held that the second respondent had not interfered with matters of the partnership agreement but only fulfilled its own contractual obligations. Therefore, the second respondent had not given the impression of being a de facto partner of the partnership.

The Supreme Court held that the petitioner could not, or at least not based on the facts established by the tribunal, show that the second respondent intervened in the performance of the partnership agreement in a way that would lead to a conclusion that it had given its implied consent to the arbitration agreement.

This decision confirms previous judgments of the Supreme Court, in which it upheld the privity of the arbitration agreement and refused to extend arbitration agreements to non-signatories lightly. While rendered in a domestic context, its reasoning, which summarises the case law regarding non-signatory third parties in a clear and succinct way, is equally applicable in international arbitration.

Case: *Decision 4A_459/2016* (Swiss Supreme Court).

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Country Q&A
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Published on 08-Mar-2017

Resource Type
Legal update: case report

Jurisdiction
Switzerland

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