Lack of valid arbitration agreement cannot be raised for first time in enforcement proceedings (Swiss Supreme Court)

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In decision *5A_441/2015*, the Swiss Supreme Court considered an appeal of a decision to enforce an award in which the underlying arbitration agreement had not been signed or exchanged in writing by the parties, nor was it concluded by the parties themselves but rather by a broker.

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Speedread

In a French-language decision, the Swiss Supreme Court enforced a GAFTA arbitral award rendered in London despite the absence of an arbitration agreement in writing as required by the New York Convention. The debtor had raised the argument relating to the absence of a written arbitration agreement for the first time in the enforcement proceedings, having never questioned the existence of the arbitration agreement in the arbitration proceedings - and even submitted itself to the agreement in its written submissions. The Supreme Court found that under Swiss law this constituted an abuse of rights by the debtor. It emphatically stressed that since the formal validity of an arbitration clause is one of the conditions for the arbitral tribunal's jurisdiction, it cannot be challenged for the first time during the enforcement of the award.

Further, the Swiss Supreme Court confirmed the lenient approach of the lower Swiss Courts to the formalities necessary to obtain recognition and enforcement under Article IV of the New York Convention. (Decision *5A_441/2015*.)

Background

Article II(1) of the ***New York Convention (www.practicallaw.com/6-205-5196)*** provides, in substance, that each contracting state shall recognise an agreement in writing under which the parties undertake to submit their dispute to arbitration.

Article II(2) of the New York Convention specifies that the term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.

Under Article IV(1) of the New York Convention, the party applying for recognition or enforcement shall supply, at the time of the application, the duly authenticated original award or a duly certified copy thereof (*Article IV(1)(a)*), as well as the original arbitration agreement or a duly certified copy thereof (*Article IV(1)(b)*).

Under Article IV(2) of the New York Convention, if the award or the arbitration agreement are not made in the official language of the country in which the award is being relied on, the party applying for recognition or enforcement shall produce a translation of these documents in such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Under Article V(1)(a) of the New York Convention, recognition or enforcement of an award may be refused if, *inter alia*, the arbitration agreement is not valid under the law to which the parties have subjected it.

Article 2 of the Swiss Civil Code provides that every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.

Facts

Two parties entered into a contract for the sale of wheat through a broker, which provided for GAFTA arbitration in London. None of the parties had actually signed the contract; only the broker had (although the exact capacity in which he did so is not mentioned).

The seller initiated arbitration proceedings against the buyer. At no time during the arbitration proceedings did the buyer raise any jurisdictional objection based on the parties' failure to comply with the requirement prescribed under Article II of the New York Convention that an arbitration agreement be in writing.

An arbitral award was rendered in London ordering the buyer (hereinafter the "debtor"), a company domiciled in Switzerland, to pay certain sums to the seller (hereinafter the "creditor"). On the basis of this award, the creditor served on the debtor, through the debt collection authorities in Switzerland, a summons to pay (*commandement de payer*), to which the debtor objected. The creditor initiated judicial proceedings before the Swiss courts requesting the lifting of the debtor's objection as well as the enforcement of the foreign arbitral award. The Swiss courts of first and second instance lifted the debtor's objection and ordered enforcement of the award.

The debtor filed an appeal before the Swiss Supreme Court.

Decision

The Supreme Court rejected the appeal, and endorsed the lower court's findings, which were as follows:

- That the creditor had supplied a copy of the arbitral award accompanied by an attestation signed by GAFTA's general director certifying that the attached copy was a true copy of the original award. The authenticity of the general director's signature had been certified by an English notary public, whose capacity had also been certified by an apostille affixed by the English competent authority. In these circumstances, the creditor had complied with the requirement of Article IV(1)(a) of the New York Convention to supply a duly certified copy of the award.

- The arbitration agreement supplied by the creditor in the enforcement proceedings was not duly certified as required under Article IV(1)(b) of the New York Convention. However, during the arbitration proceedings, the debtor itself had admitted it was bound by the arbitration clause contained in the contract and that the contract was submitted to GAFTA arbitration. This was sufficient to conclude *prima facie* that the arbitration agreement was authentic and binding on the parties.

- The fact that the creditor had not produced a complete translation of the award, but only of the operative part of the award, in French (that is, one of the official languages used by the Swiss Supreme Court), nor of the arbitration clause, was not a ground for refusing enforcement of the award, since Article IV(2) of the New York Convention is not mandatory, especially when the foreign language is English. In any case, the creditor filed a French translation of an excerpt of the debtor's written submissions in the arbitration, which included the arbitration clause. This was considered sufficient. In addition, it did not matter that the translation was not certified.

- The sales contract containing the arbitration clause had not been signed by the parties, but by a broker, apparently in accordance with relevant trade practice. Hence, the arbitration clause was neither signed by the parties nor confirmed by letters exchanged between the parties nor sent by them to the broker. It was therefore not "in writing" as required under Article II(2) of the New York Convention. Article VII(1) of the New York Convention, regarding the application of a more favourable local law, was irrelevant since under Swiss law, the parties' intention to submit to arbitration must also be expressed in writing.

- The substantive validity of the arbitration clause within the meaning of Article V(1)(a) of the New York Convention was governed by English law. Under section 5(5) of the English Arbitration Act 1996, "*an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged*". Again, it resulted from the written submissions exchanged by the parties in the arbitration that, not only had the debtor not denied the existence of an arbitration agreement between the parties, but it had also referred itself to the arbitration agreement and admitted that the contract was subject to GAFTA arbitration. Therefore, this constituted a written arbitration agreement between the parties within the meaning of section 5(5) of the English Arbitration Act 1996 and, there was no ground for refusing enforcement under Article V(1)(a) of the New York Convention.

- Regarding the lack of formal validity, the lower court considered that the debtor had committed an abuse of rights, within the meaning of Article 2 of the Swiss Civil Code, by arguing for the first time in the enforcement proceedings that the arbitration agreement did not comply with the written form prescribed by Article II(2) of the New York Convention having never questioned the existence of the arbitration agreement in the arbitration proceedings and having even referred to the agreement in its written submissions.

The Supreme Court endorsed all of these reasons and upheld the decision. In particular, it stated that the lower court had rightly considered that, by raising the formal invalidity of the arbitration agreement for the first time in the enforcement proceedings, the debtor had committed an abuse of rights.

The Supreme Court emphasised that the duty to act in good faith and the prohibition on abuse of rights also apply to the recognition and enforcement of foreign arbitral awards. A party cannot, when in receipt of an adverse award, avail itself of a formal defect that could have been raised at an earlier stage of the proceedings. In particular, in international arbitration, a certain course of conduct may nullify a failure to comply with formal requirements, in accordance with the good faith principle. This notably applies to the grounds for refusing enforcement of an arbitral award under the New York Convention.

The Supreme Court emphatically stressed that since the formal validity of an arbitration clause is one of the conditions for the arbitral tribunal's jurisdiction, it cannot be challenged for the first time during the enforcement of the award.

Comments

This decision reflects the Swiss courts' pro-arbitration stance and their narrow interpretation of the grounds for refusing recognition and enforcement, in line with the underlying philosophy and objectives of the New York Convention. More particularly, it confirms its previous case law regarding the lenient approach Swiss Courts will take when it comes to the application of Article IV of the New York Convention.

The decision is particularly noteworthy in that it demonstrates that a party may be precluded, on the basis of good faith considerations, from relying on a ground for refusing recognition and enforcement of an arbitral award if it behaved in a contradictory manner in the arbitration, for example, if it failed to invoke the formal invalidity of the arbitration agreement during the arbitration proceedings, as was the case here.

The arbitration clause had rather obvious formal and substantive imperfections in that the underlying arbitration agreement was not signed or even exchanged in writing by the parties in the arbitration nor was it even concluded by the parties themselves (but rather a broker). In these circumstances, as this case shows, in order to avoid difficulties in enforcement proceedings, arbitrators and parties should seek to correct any imperfections in the early stages of the arbitration, for example, by signing terms of reference including the parties' confirmation that they are bound by the arbitration agreement.

Case: *Decision 5A 441/2015* (Swiss Supreme Court).

Resource information

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