

EXTENSION OF SUBJECTIVE SCOPE OF ARBITRATION CLAUSES UNDER SWISS LAW UPON REQUEST OF RESPONDENT¹

As broad a weave as is the Swiss Supreme Court's review of arbitration awards for consistency with public policy, its review for arbitral jurisdiction is increasingly emerging as a tight one, and thus the route to go for any party discontented with an arbitration in Switzerland.

This is trenchantly in evidence in a recently released decision (4A_376/2008) of the Swiss Supreme Court. The Court substituted its view of jurisdiction for that not only of the sole arbitrator but also of the ICC Court, which latter purports only to take the type of view it did where the matter is obvious.

The question was one of binding non-signatories to an arbitration clause, thus fairly standard stuff. But it raised the intriguing issue of a respondent's power to attract non-signatories into an ICC arbitration. As Anne Marie Whitesell and Eduardo Silva Romero aptly pointed out in a recent article ("Multiparty and Multicontract Arbitration: Recent ICC Experience" in ICC Bulletin Special Supplement 2003: Complex Arbitrations: Perspectives on their Procedural Implications, 7 at 10), this is an area in which the ICC's thinking has been evolving. The Swiss Supreme Court has shown that, at least for arbitrations located in Switzerland, that thinking may well need to move forward at a faster pace.

FACTS

The facts involved a sale of shares in a company, B. Ltd. But pending payment of the purchase price, the seller, C. Ltd, wanted to maintain control over B. Ltd. A second agreement, of the same date as the sales contract, was therefore necessary. This second agreement took the form of an employment contract whereby C. Ltd, although not formally a party to this agreement, had the effective power to manage B. Ltd and to nominate the buyer, A., as manager at such time as A. satisfied the purchase price payment conditions in the sales contract.

The parties to the sales contract were not identical with the parties to the employment contract, although there was some overlap. The arbitration clauses in both agreements were, however, substantially identical.

The arbitration was launched by B. Ltd on the basis of the arbitration clause in the employment contract, to which the only other signatory was A. B. Ltd's claim was effectively that A. had violated its obligations under the employment contract in competing against the interests of B. Ltd.

A.'s answer to the request for arbitration petitioned the ICC Court to exercise its powers under Article 6(2) of the ICC Rules to extend the arbitration proceedings to three non-signatories to the employment contract, D., for whom C. Ltd was acting as trustee, C. Ltd, and B., who was a director of B. Ltd and who would receive part of the purchase price under the sales contract. Each of D., C. Ltd. and B. had signed the sales contract of the same date as the employment contract.

The ICC refused to join D., C. Ltd, and B. in the arbitration. This was in effect both an acknowledgement that its Article 6(2) powers extended to situations where it was the claimant contesting the scope of the arbitration agreement in respect of certain parties, and a decision that prima facie the arbitration agreement did not apply to those non-signatories.

A. thereupon submitted the jurisdictional question to the sole arbitrator himself. In an "interim award" ("lodo interlocutorio") on jurisdiction and certain other procedural questions the sole arbitrator agreed with the ICC Court and declared inadmissible and rejected the request for the extension of the arbitral proceedings to D., C. Ltd and B.

A. then challenged this decision of the sole arbitrator before the Swiss Supreme Court under Article 190(2)(b) of the Swiss PIL Act. A. requested that the Swiss Supreme Court annul the award and declare the extension of the arbitral procedure to D., C. Ltd and B.

DECISION OF THE SWISS SUPREME COURT

The Swiss Supreme Court treated the "interim award" as a partial award, and thus reviewable, and accepted A.'s request. Not only did it find that the arbitration should be extended to the three parties, it substituted its own decision

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on this matter for that of the arbitral tribunal, binding the sole arbitrator thereby to proceed with the involvement of these three further parties.

REASONING OF THE SWISS SUPREME COURT

Generally speaking, the only remedy which the Swiss Supreme Court deploys in challenges to arbitration awards is to strike them down in whole or in part. There is an exception to this rule, however, exclusively with regard to challenges to jurisdiction, in respect of which the Swiss Supreme Court is empowered to supply its own outcomes binding upon the arbitral tribunal.

The Swiss Supreme Court adopted a broad, purposive approach to the subjective scope of the arbitration clause, consistent with its decisional practice since 2003. According to that practice, once an arbitration agreement satisfies requirements of form vis-à-vis its signatories, its extension to other parties is not subject to formal requirements, but rather conduct alone can suffice to bind them in. On the other hand, in the decided cases that conduct has very often been extensive involvement of the non-signatory in not only the negotiation and adoption of the contract in which the arbitration clause was found, but also in relation to the performance of that contract.

The Swiss Supreme Court analysed the situation of each of the three non-signatories in turn. In doing so, it referred to certain rights and powers of these various non-signatories arising variously from the employment contract itself but also from the sales contract, which would have an effect on the performance of the employment contract.

As regards D., the Court found that although not formally a party to the employment agreement, D. (on behalf of C. Ltd) enjoyed the effective power to terminate the contract, a power typical of an employer, as well as the right to receive accounting information for B. Ltd. As for B., he had the right to resume acting as managing director of B. Ltd alongside certain others in the event of particular defaults by A. of the sales contract. As for C. Ltd, aside from being the seller under the sales contract, it was also obligated thereunder to cause B. Ltd to name A. as managing director with full powers, and to remove B. from this position.

The Supreme Court joined these three non-signatories in the arbitration based on their “intense involvement” in the negotiation of the employment contract and their role in its performance, as well as on the fact that its arbitration clause was identical to one they had signed, in the sales contract.

COMMENTARY

This decision of the Swiss Supreme Court is noteworthy in particular in showing that, at least as regards ICC arbitrations located in Switzerland, the ICC Court’s approach to respondents’ requests for joinder of parties is unsustainably restrictive and will need to be relaxed.

The ICC Court has proceeded quite gingerly in accepting even the principle that a respondent might cause parties to be joined to an arbitration proceeding. It has frequently been pointed out that Article 4(3) of the ICC Rules, determining the essential contents of a request for arbitration, proceeds upon the basis that it is for the claimant to determine the parties to the arbitration. It is, however, invariably the parties’ intention that all relevant disputes between all relevant parties be decided in one and the same arbitration proceeding, and it is often the respondent who has the incentive to ensure that that obtains.

Accordingly, the ICC Court, as confirmed by Whitesell and Silva Romero, has begun to accept joinder of parties in arbitrations upon the instance of respondents, upon the satisfaction of two cumulative criteria: first the third party must have signed the arbitration agreement; and secondly, the respondent must actually have made claims against the new party.

The Swiss Supreme Court has in this case gone further than the ICC Court in joining a third party at the instance of the respondent, on the basis of conduct, and in the absence of a signed arbitration agreement.

It is true that the ICC Court’s powers are expressly stated to be a prima facie review. But, like the ICC, the Swiss Supreme Court makes no independent enquiries on the facts in coming to its jurisdictional determinations. The difference may be that the ICC Court’s determination comes at the outset of a case, when the relevant facts may not yet have been identified and presented. The Swiss Supreme Court proceeds upon the facts as found by the arbitral tribunal in its award on jurisdiction, generally a fairly complete treatment of relevant matters.

But that cannot justify the ICC Court’s rigid formalism on the point. Rather the ICC would be well advised to accept the extension of an arbitration clause to non-signatories on the basis of their conduct where on the record before it there is a prima facie case for this, under relevant law. This is especially the case for ICC arbitrations located in Switzerland, where the Swiss Supreme Court’s view will invariably be sought by a party disappointed by a decision of the ICC Court at variance.

This would be moreover consistent with the purposes of Article 6(2) of the ICC Rules, which is designed to avoid obviously abusive attempts to arbitrate. The ICC Court's Article 6(2) powers, being limited to prima facie review, ought to err on the side of inclusiveness. The ICC's overly restrictive approach risks interfering with arbitrators' Kompetenz-Kompetenz, where the latter never get a look in, but rather the parties are constrained to challenge a decision by the ICC Court directly before the courts. Indeed, the view may be taken that by adopting the ICC Rules and Article 6(2) within them, the parties have restricted the arbitral tribunal's Kompetenz-Kompetenz and in particular any power to depart from the ICC Court's view in exercise of its Article 6(2) powers.

In this case, it is also significant that a palpably lower degree of involvement by the non-signatories appears to have sufficed to attract them into the arbitration than on facts leading to this result in previous decisions of the Supreme Court. While the Supreme Court did not accept submissions that factual matrices are to be considered as a whole in fashioning the subjective scope of arbitration agreements, one senses, with the lower standard of necessary involvement, that the functional necessity and convenience of joining all issues and all parties in one and the same arbitration may well have operated in this case, *sotto voce*.

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