SWISS COURT DISTINGUISHES BETWEEN EXPERT DETERMINATION AND ARBITRATION[1]

INTRODUCTION

In a decision of 17 November 2008 (4A_438/2008) the Swiss Supreme Court found that an "auditor" making a "final and unchallengeable decision" as to the calculation of commission payments would be an expert and not an arbitrator. In so doing, it purported to base itself upon three criteria it had recently selected for this, but in fact reverted to criteria within a former, broader set. This is symptomatic of the continuing difficulties faced by Swiss law in separating arbitration from expert determination in a practical and predicable fashion. A number of other relevant questions were left unanswered.

FACTS

A group of companies led by an English company, and its owner (A), sold their interests in a particular company to a group of companies at the head of which was a German company. The sellers and the purchaser (Purchaser) also entered into a commission agreement (Commission Agreement) connected with this sale of shares providing that the Purchaser would pay to A a percentage on orders received by the company sold, over a certain period.

The Commission Agreement provided that the Purchaser and A would jointly appoint an "Auditor" to determine the amount of commissions due over a series of periods. The Purchaser was required to submit to A and the Auditor certain information on the relevant orders received as well as to accede to the Auditor's requests for further information and documentation. A and the Purchaser were each granted the right to provide the Auditor with certain classes of information.

The Auditor was invested with the responsibility of "controlling and certifying as true and correct" the Purchaser's statement of commissions.

It was provided that in the event of a discrepancy between the Purchaser's statement and the Auditor's opinion, then the latter would prevail. Moreover, "[t]he Auditor's decision shall be final and both parties waive all challenge of this decision."

The Commission Agreement also contained a standard ICC arbitration clause.

The decision of the Supreme Court gives no indication of the law applying to the Commission Agreement.

The parties appointed the Auditor, who set about determining the amount of commission payments for the various periods foreseen in the Commission Agreement. A disagreement arose between the parties over whether certain orders from Nigeria and Malaysia should be included for the commission calculation of the final period. The Auditor wrote a letter to the parties informing them that she would prefer that they either come to an agreement on these disputed orders or settle their differences in arbitration as provided for in the standard ICC arbitration clause in the Commission Agreement.

A initiated ICC arbitration proceedings, seeking, among other things, a declaration that these disputed orders should be included in the commission calculation, and an award in the amount of the value of these commissions. The Respondent Purchaser challenged the jurisdiction of the arbitral tribunal arguing that it was the Auditor which was to make these determinations as, in the Respondent's view, the Auditor was an arbitrator over these specific matters and the standard arbitration clause applied only to all other matters.

In an incidental and partial award the arbitral tribunal accepted jurisdiction over these disputed matters. It decided in this award moreover that the orders from Nigeria and Malaysia in dispute ought to be included in the commission calculation. The arbitral tribunal interpreted the term "orders placed" in the Commission Agreement, that is the basis of the calculation, as providing for commission on every order placed within the stipulated period, even if the commission itself was only due after delivery and after payment upon the order. Having established this principle, the arbitral tribunal deferred the quantification of the resultant commissions to a later reward.

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REASONING OF THE SUPREME COURT

The Supreme Court observed that the distinction between an arbitral award and an expert determination is that the first entails res judicata effect whereas the effect of the second is to decide questions of fact or law in such a way as to bind the parties without res judicata effect. The Supreme Court further observed that judicial decisions had discerned various criteria upon which to make this distinction, notably reference to the terms used in the parties' agreement, the extent of the powers conferred upon the decision-maker, as well as the capacity of the decision made by this third party to constitute the basis for judicial enforcement. Lastly, the Supreme Court recalled that arbitration and expert determination are not mutually exclusive such that it is possible to encounter a combination of the two.

The Supreme Court then proceeded to assess the facts purportedly against the designated criteria.
It noted that the Commission Agreement did not contain any real procedural rules and did not confer on the Auditor the power to decide questions of law and to render decisions capable of judicial enforcement.
The Supreme Court pointed out that, procedurally, the Commission Agreement went no further than to indicate that the parties could provide comments to the Auditor, to oblige them to do so upon request of the Auditor, and, further, to allow the parties to furnish the auditor with information and suggestions of a technical nature concerning the machines subject to the orders.

As regards the purpose of the Auditor's activity, the Supreme Court observed that it was strictly limited since the Auditor was only empowered to verify the annual accounts of commissions established by the Purchaser. The Supreme Court said that this power was essentially an accounting power even though it necessitated, to a certain degree, some interpretation. In the Supreme Court's view, this limited power of interpretation was not such as is generally conferred upon an arbitral tribunal.

The Supreme Court moreover said that no great weight should be placed upon the fact that the decision of the Auditor was final and unchallengeable as a result of the stipulation in the Commission Agreement that "the binding character of the decision made by the expert is an inherent quality of an expert's determination".
In the result, in the Supreme Court's view, the decision of the Auditor could not be treated as a basis for judicial enforcement in the amount decided upon by the Auditor. In particular, the Supreme Court found that one could not derive from this provision any intention of the parties to treat the Auditor's decision as immediately enforceable under the Swiss administrative procedure for the enforcement of debt, which would insulate it from set off under Swiss law.
The Supreme Court therefore declared that the Auditor was an expert and not an arbitrator, and rejected this challenge to the arbitral tribunal's jurisdiction.

COMMENTARY

It is often supposed that judicial determination and arbitral awards together exhaust the field of binding adjudication - in Swiss law and elsewhere. The long history of expert determination in a great many countries, however, gives this supposition the lie. Expert determination is moreover of very great practical significance in a wide variety of commercial contexts. The classical situation remains that in the case at hand, an expert's determination of the value of certain activities or assets. Here it was sales generating commissions. Paradigmatically, experts are employed to determine the value of shares of corporations.
Although expert determination has a long history in Switzerland, in particular in insurance and construction contracts, it was only in a decision of 14 December 2006 (4P.299/2006) that the Supreme Court finally crystallised its distinction analysis, winnowing down a long list of factors distinguishing arbitration from expert determination, and coming to focus upon the three factors cited in the case at hand: the terms used by the parties, the scope of the decision-maker's powers, and the capacity of the decision for enforceability.
The application of the test which the Supreme Court has latterly enunciated brings to the fore a number of difficulties. First, the Supreme Court referred not only to the terms used by the parties and the scope of decision-making powers, but also to other factors. The Supreme Court focused on the lack of procedural provisions in aid of the conclusion that the Auditor was an expert and not an arbitrator. The Supreme Court also regarded the absence of powers over legal matters and the fact that the Auditor's role was essentially an "accounting" role as evidence that the Auditor was an expert and not an arbitrator. Inasmuch as this relates to limited scope of powers, this falls within the test. Inasmuch, however, as it attempts to distinguish arbitration from expert determination with a reference to the fact that the latter tends to deal more with factual determinations, in particular in certain classic situations, although not always, it again falls outside of the test, and reverts to an earlier, more inchoate state of the law.

The Supreme Court analysis of the parties' intention as to enforceability or not of the outcome of the Auditor's work is strikingly unconvincing. It proceeds upon the erroneous assumption that such an intention is ascertainable, in this concrete case and more generally. In this particular case, it wrongly assumes that the parties would have averted to the institution of administrative enforcement of debt under Swiss Law as a determinant of any intention to arbitrate. Such a procedure is not available under the German law of the domicile of the Purchaser which is the party that would be debtor under any award or determination of the Auditor. Moreover, the fact that in the Commission Agreement the parties actually waived all challenges to the Auditor's decision would if anything tend to argue for enforceability effect. First, if there are no challenges to the Auditor's decision, it cannot achieve any enforceability it does not already have,

and there must be a powerful presumption against any attempt to exclude enforceability as to any determination on the subject matter under dispute. Secondly, as will be mentioned presently, it is unlikely that a waiver of challenges to an expert determination is valid under Swiss law, and the parties can be assumed not to have sought vainly to provide for such an exclusion.

It should be noted that in treating the Auditor as an expert and not as an arbitrator, the Supreme Court may have been concerned about the slenderness of the procedure provided for in the Commission Agreement and the stipulated waiver of challenges to the Auditor's decisions. There is a far greater prospect of such an exclusion being effective if the decision is an arbitral award where such exclusions are supported upon clear statutory authority (Article 192(2) of the Swiss Private International Law Act). Although the Supreme Court recently reversed its former case law to hold that parties may validly effect a prior waiver of appeals from first instance judgments (see 4P.110/2006, decision of 17 July 2006), by the very reasoning in that case (the assurance of procedural regularity and protections in first instance decisions of ordinary Swiss courts) it is unlikely that such waivers against expert determinations will be valid. So faced with the spectre of rather spare procedural protections, and what might be an effective waiver of challenges to any arbitral award of the Auditor, the Supreme Court was doubtless more comfortable in treating the Auditor as an expert.

It is remarkable that there is no mention of applicable law in this decision of the Supreme Court. In fact, the case law of the Supreme Court considering the distinction between arbitration and expert determination quite often passes over this matter in silence. Yet there are strong grounds to believe that the starting point in determining which law applies in making this distinction is the pro-arbitration Article 178(2) of the Swiss Private International Law Act, in accordance with which arbitration would be discerned, providing the requirements for this were satisfied under any of the law of the contract, the expressly stipulated law of the dispute settlement clause, or Swiss law. Here there is already a general submission to arbitration in the standard ICC clause. Thus denying the Auditor status as an arbitrator would in the result not be anti-arbitration – a different type of arbitration would apply. But that is no reason not to articulate the rules governing the determination of applicable law. It may be that in omitting to do so the Supreme Court was concerned not to raise certain very lean dispute resolution procedures to the dignity of arbitration. The dangers of this are discussed below.

The distinction between the effects of expert determination and arbitral awards is very often a fine one, under Swiss law and other legal systems. Swiss law treats expert determinations as being characteristically binding upon the parties, to the extent that any challenge to them, whether judicial or arbitral, must be upon specific, limited grounds identified in the case law, which, together, disclose great deference to the expert determination. These limited grounds are as follows: the expert's determination was manifestly unjust, arbitrary, defective, or seriously contrary to equity, or based upon an erroneous determination of the factual situation, or vitiated by lack of consent (see ATF129 III 535 consid. 2.1 cited by the Supreme Court in the present decision).

Materially, the result of arbitration and determination is not that different. The deference with which Swiss courts will treat expert determinations has been mentioned above. Where, therefore, a party wishes to obtain the enforcement of an expert determination the judicial or arbitral procedure for this will almost always be pretty undaunting.

Formally, however, the differences are stark. To begin, the rules for challenging arbitral awards and expert determinations are very different. Challenges to a decision upon the erroneous basis will fail, and the time for proceeding on the other basis will very often have run out. Moreover, the procedural requirements for a valid arbitration award are distinctly higher than those for an expert determination. If the parties have created what is really an arbitration using effectively a slimmed-down expert determination procedural apparatus, the result of that arbitration will be vulnerable to attack as in violation of procedural public policy under Article 190(2)(e) of the Swiss Private International Law Act.

For these reasons, it is essential that arbitration and expert determination be readily and predictably distinguishable ideally in such a way as will give vigour to decisions and not favour their nullity. Since the fundamental exercise is the ascertainment of the parties' intentions, clearly what they intended about the essential difference in result between the two types of dispute settlement is material to this assessment. But it will be a rare case indeed where the parties' views on res judicata effect and enforceability will be susceptible of discernment. So this factor will not generally be of much practical use in guiding the parties as to which of arbitration or expert determination they are dealing with.

It is significant, however, to note that the nature of the procedures intended by the parties may be relevant here. The parties may be held not to have intended to opt for arbitration where the procedures they have provided for do not meet the public policy requirements of Article 190(2)(e) of the Swiss Private International Law Act, or, perhaps more broadly, to result in an arbitration award which is more difficult to challenge than an expert's determination, and indeed in respect of which it would appear that challenges are more easily excluded.

The other two factors, namely the terms used in the parties' agreement, and the extent of the powers conferred on the decision maker, have the virtue of being easily assessable. Although not in and of itself dispositive of the matter, the use of the term "arbitration" must always weigh heavily in this assessment as would the use of the term "expert"