Arbitral jurisdiction to decide claims secured by a retention right confirmed

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Facts

In a recently published decision, the Supreme Court has confirmed its jurisdiction to decide claims secured by a retention right as provided for by Swiss law (Article 895 of the Swiss Civil Code).(1)

Decision

The Supreme Court first summarised the findings in the challenged award and A’s arguments against such findings, as follows:

- Considering that arbitral tribunals can decide incidental questions that are relevant to their decision, even if such questions do not fall within the scope of the arbitration agreement or are not arbitrable, and that arbitration agreements cover also ancillary rights such as retention rights (subject to the parties agreeing otherwise), the arbitral tribunal admitted its jurisdiction to decide prayer for relief 1 – including the question whether A’s claims for outstanding payments were justified – and prayer for relief 10.(3)
- A argued that the arbitral tribunal failed to make any findings in relation to the objective scope of the arbitration agreement. According to A, he had never disputed the arbitrability of the claims underlying the retention right. Further, the arbitral tribunal misconceived the difference between the retention right (ie, the lien) and the claims secured by the lien and, to the extent that the arbitral tribunal had no jurisdiction to decide such claims, the retention...
right could not definitively be decided before the secured claims were finally decided by the tribunal having jurisdiction to do so.(4)

The Supreme Court then noted that the arbitral tribunal had not established a common and actual intention of the parties regarding the scope of the arbitration agreement. Therefore, such scope had to be interpreted objectively.(5) In this respect, the Supreme Court recalled that, in the absence of specific circumstances, it must be assumed that the parties want to submit their entire dispute to the arbitral tribunal and to avoid that single questions must be submitted to other tribunals for decision, which is why arbitration agreements covering disputes arising out of a specific contract also cover disputes over the conclusion and termination of that contract.(6)

The Supreme Court thus found that even if the arbitration agreement rather restrictively referred to "disputes arising out of" the mandate agreement, it had to be understood in good faith as also encompassing disputes in relation to the conclusion and termination of that agreement. Therefore, to the extent that A brought claims in relation to the termination of the agreement, the arbitral tribunal had rightly admitted its jurisdiction to decide prayer for relief 10.(7)

Regarding the alternative part of prayer for relief 1, the Supreme Court held that, if there is a "sufficiently strict natural link" between the retained object (ie, the share certificate) and the secured claims (ie, the outstanding payments) and ultimately with the mandate relationship, it must be assumed that the parties agreed to submit to the arbitral tribunal not only the contractual claim for the return of the certificate, but also the secured claims. This assumption remains even if the possession of the retained object and the secured claims do not have the same legal cause. Therefore, the Supreme Court found that the arbitral tribunal's jurisdiction encompassed also the claims that showed a sufficient link with the possession of the share certificate.(8)

The Supreme Court thus rejected the challenge and confirmed the arbitral tribunal's jurisdiction to decide both the disputed prayers for relief. However, the Supreme Court made clear that such jurisdiction did not exist in respect of claims unrelated to the termination of the mandate agreement or unconnected with the retention of the share certificate.(9)

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Endnotes

(1) Supreme Court, 4A_583/2017, 1 May 2018 (in German).

(2) The mandate agreement and other agreements between A and C were terminated by a lawyer on behalf of C after a number of custodial measures had been ordered due to C's status of health. A disputed such terminations.

(3) Ground 3.1.2.

(4) Id.

(5) For further details regarding the interpretation of arbitration agreements see "Award set aside for lack of consent to arbitrate".

(6) Ground 3.4.

(7) Ground 3.5.

(8) Ground 3.6.3.

(9) Ground 4.
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