

Award set aside for lack of consent to arbitrate

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In a recently published decision, the Supreme Court set aside an arbitral award on the grounds that the parties had not consented to submit their dispute to arbitration.⁽¹⁾

Facts

The dispute arose between two insurers (A and B), which were to reinsure a third insurer (E). A had initially sought to act as E's direct reinsurer. For this purpose, it had sent an offer to E with an "insurance slip" and a "contract endorsement no. 1", which incorporated E's general conditions. These conditions contained an arbitration clause in favour of an *ad hoc* arbitral tribunal seated in Zurich. However, E eventually decided to insert B as its direct reinsurer in the relationship between E and A. On the basis of A's abovementioned contractual documents, the parties validly entered into a "retrocession agreement", which contained a jurisdiction clause in favour of state courts, and a "contract endorsement no. 2". The reinsurance contract between E and B incorporated E's general conditions.

B started arbitration proceedings before an *ad hoc* arbitral tribunal seated in Zurich to seek payment of certain amounts from A. The latter objected to the arbitral tribunal's jurisdiction on the grounds that any dispute between the parties should have been brought before the state courts. In a partial award, the arbitral tribunal admitted its jurisdiction to decide the dispute.

A challenged the partial award before the Supreme Court on the grounds that the arbitral tribunal had wrongly accepted jurisdiction in the absence of an agreement to arbitrate.

Decision

The Supreme Court recalled that the interpretation of arbitration agreements follows the principles of contract interpretation. An arbitral tribunal must thus first research the parties' common actual intent (subjective interpretation) and, if such an intent cannot be proven, the objective meaning of the parties' declarations must be elicited by determining what reasonable persons in the parties' situation could and should have understood in good faith in the circumstances at the time of making the contract (objective interpretation). The subjective interpretation is based on the assessment of evidence and thus cannot be reviewed by the Supreme Court (Article 105(1) of the Supreme Court Act), whereas the objective interpretation is an issue of law, which can be reviewed by the Supreme Court.⁽²⁾

The Supreme Court also recalled that the existence of an arbitration agreement must be admitted restrictively because it involves a strong limitation of the legal remedies. However, once the parties' intent to submit a dispute to arbitration is established, arbitral tribunals must choose the interpretation that is most favourable to the validity of the arbitration agreement.⁽³⁾

After analysing the findings in the challenged decision, the Supreme Court concluded that the arbitral tribunal had interpreted the parties' declarations objectively, and thus that it could review these findings.⁽⁴⁾

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Such a review led the Supreme Court to conclude that, contrary to the arbitral tribunal's view, the objective interpretation of the parties' declarations did not establish a consent to arbitrate. The Supreme Court noted that the agreements entered into by the parties did not contain any arbitration agreement, but only one jurisdiction clause in favour of state courts.⁽⁵⁾ Also, according to the Supreme Court, while it would have made sense to provide for the same legal regime in all the levels of the reinsurance arrangement (including in respect of the dispute resolution mechanism), the convenience of such a regime was no basis to conclude that such a regime was indeed agreed.⁽⁶⁾

Finally, the Supreme Court found that the enforceability of the jurisdiction clause in favour of state courts was not affected by the fact that it did not designate specifically the competent court because it demonstrated, at least objectively, that the parties did not intend to waive the jurisdiction of state courts.⁽⁷⁾

Comment

This is one of the rare cases in which the Supreme Court set aside an arbitral award.

The Supreme Court's decision shows the importance of the distinction between the subjective and objective interpretation – the former being excluded from review by the Supreme Court, while the latter is included in such a review. Awards should thus clearly identify for each finding of contractual interpretation whether it stems from subjective or objective interpretation. Likewise, counsel should bear this distinction in mind when assessing the chances of success of a challenge.

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Endnotes

(1) Supreme Court, 4A_150/2017, October 4 2017 (in German).

(2) Ground 3.2.

(3) *Id.*

(4) Ground 3.4.

(5) Ground 3.5.

(6) Ground 3.5.1.

(7) Ground 3.5.5.

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