

Arbitration - Switzerland

Arbitration Agreements and Piercing the Corporate Veil

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[Facts](#)
[Decision](#)
[Comment](#)

A recent case before the Swiss courts considered whether the piercing of the corporate veil can be considered (i) grounds for extending arbitration agreements to non-signatories, or (ii) grounds for disregarding such arbitration agreements.⁽¹⁾

Facts

In April 2003 Swedish citizen A, residing in Italy, and British Virgin Islands-registered corporation Y entered into a sale and transfer agreement pertaining to the company X. Swedish citizen B, residing in Italy and majority shareholder of corporation Y, acted in the name and on behalf of corporation Y throughout the transaction discussions. The sale agreement provided for arbitration in Switzerland pursuant to the International Chamber of Commerce Rules and for Swedish substantive law to be followed.

In March 2007 Swedish citizen A initiated an arbitration proceeding in Sweden against corporation Y for the payment of the outstanding purchase price agreed in the sale agreement. Both corporation Y and B failed to accept the notice of arbitration, resulting in the immediate termination of the Swedish arbitration proceeding. Corporation Y was liquidated without A's knowledge at an unspecified time prior to the filing for arbitration.

Thereafter, B filed a negative declaratory action before the judicial authorities in Sweden for the acknowledgement of the non-binding character of the sale agreement on B.

Following the termination of the arbitration proceeding in Sweden, A initiated judicial proceedings in Switzerland against B for the payment of the outstanding purchase price as per the sale agreement. A contended that B had purportedly induced corporation Y's economic disintegration in order to frustrate any arbitration proceeding brought against the company. Hence, A further contended that B should be held liable for corporation Y's outstanding liabilities under the sale agreement. B contested the jurisdiction of the Swiss judicial authorities, relying on the arbitration clause contained in the sale agreement.

The cantonal courts upheld B's jurisdictional objection. In summary, the courts found that, although not a signatory of the sale agreement, B was bound to the agreement based on the principle of piercing the corporate veil. Thus, the courts denied jurisdiction.

A sought the annulment of the cantonal decisions before the Supreme Court.

Decision

The Supreme Court, like the cantonal courts, addressed the jurisdictional objection exclusively from the perspective of Article 7 of the Private International Law Act. In doing so, the courts followed the well-established (but not undisputed) principle whereby a positive conflict of jurisdiction between a judicial authority and an arbitral tribunal, respectively seated in the same jurisdiction (in this case, Switzerland), ought to be decided with reference to domestic law and not by the application of Article 2(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award.⁽²⁾

Article 7 provides that Swiss courts, except in very limited circumstances, will deny jurisdiction if an arbitration agreement exists.⁽³⁾ Therefore, based on Article 7, the Supreme Court first had to decide whether an arbitration agreement existed – that is, had the parties entered into an arbitration agreement with respect to an arbitrable dispute? If so, as a rule, the lower courts should have denied jurisdiction in favour of

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arbitration.

Existence of an arbitral agreement

On the issue of the existence of an arbitration agreement binding on both A and B, the court confirmed its well-established practice whereby, under certain circumstances, the corporate veil may be pierced and contractual agreements extended to members of the same group of companies – or to a company's majority shareholder – when the use of the corporate structure would constitute an abuse of rights. Such practice also applies to arbitration agreements.

The court concurred with the lower courts in finding that, in the case at hand, the arbitration clause contained in the sale agreement was binding on B based on the principle of piercing the corporate veil, regardless of whether A had concluded the sale agreement with B or corporation Y.

The court found no contradiction in: (i) B's filing of a negative declaratory action before the judicial authorities in Sweden for the acknowledgment of the non-binding character of the sale agreement; and (ii) B's invoking of the arbitration agreement to object to the jurisdiction of the Swiss courts. The court pointed out that no party should be expected to invoke the piercing the corporate veil principle to its own detriment. However, the court found some contradiction in A's relying on the reversed principle of piercing the corporate veil to hold B liable for corporation Y's outstanding liabilities under the sale agreement, while contesting the application of the principle with respect to the arbitration clause stipulated therein.

Therefore, the court found that an arbitration agreement binding upon B existed. Consequently, the question before the court was whether this arbitration agreement should have been disregarded for one of the reasons set forth in Article 7.

Thus, the second question that the court had to rule on was whether the criteria for allowing an arbitration agreement to be disregarded, as set out in Articles 7b and 7c of the act, had been met. That is, was the arbitration agreement null and void, inoperative or incapable of being performed, or was it impossible to appoint the arbitral tribunal for reasons that were obviously attributable to the defendant in the arbitration?

Validity of agreement and appointment of tribunal

The Supreme Court concurred with the finding of the lower courts that, as a matter of principle, the termination of the Swedish arbitration proceeding filed by A exclusively against corporation Y did not, as such, imply the caducity of the arbitration agreement or in any way hamper the appointment of an arbitration tribunal, because B had not formally been a party to the Swedish arbitration proceeding.

However, the court considered that A's allegations based on Articles 7b and 7c could not be dismissed outright on this sole basis without any further investigation of the effective role played by B in causing the termination of the Swedish arbitration proceeding. In doing so, the court implied that the piercing the corporate veil principle should be resorted to by courts not only when defining the subjective scope of an arbitration agreement, but also when assessing whether such an agreement has become extinct or the appointment of the arbitration tribunal impossible due to circumstances imputable to the defendant.

Therefore, the Supreme Court annulled in part the lower courts' decisions and referred the matter back to the lower courts for a full investigation into B's alleged behaviour in the Swedish arbitral proceeding from the perspective of Articles 7b and 7c.

Comment

There is no great innovation in the Supreme Court's finding that the principle of piercing of the corporate veil can be applied to determine the subjective scope of an arbitration agreement in Switzerland, and, in particular, in determining whether an agreement may be extended to non-signatories of the arbitration clause. This principle is now well enshrined in arbitration practice in Switzerland, although it is applied with great caution.

(4)

Of particular interest, however, is the court's reliance on the principle of piercing the corporate veil in order to take into consideration the conduct of the non-signatory in another proceeding when determining whether the extended arbitration agreement should be disregarded under Article 7.

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Endnotes

(1) Decision 4A_160/2009 of the Swiss Supreme Court in *A v B*. The full text of the

decision, which will not be published in the official reports of the Swiss Supreme Court's decisions, is available in German at www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm.

(2) See in particular ATF 122 III 139 ground 2; *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* (1981) pp 61-63, Albert Jan Van Den Berg.

(3) Article 7 provides that: "*If the parties have entered into an arbitration agreement with respect to an arbitrable dispute, any Swiss Court before which such dispute is brought shall deny jurisdiction unless... (b) the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or (c) the arbitral tribunal cannot be appointed for reasons that are obviously attributable to the defendant in the arbitration.*"

(4) See, for example, unpublished decision 4P198/2005 of October 31 2005, in the matter *X AS Turquie c/ Y Corp Etats Unis and Schiedsgericht der Zürcher Handelskammer*, ground 2.1 and references).

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