

Arbitration - Switzerland

Arbitration Clause Extended to Non-signatories in Case of Performance Guarantee

December 11 2008

Facts Decision

The Supreme Court recently ruled that where a guarantor takes over a secured debt, the arbitration agreement regarding the debt should, in principle, also be transferred. However, no such transfer applies to other kinds of security.⁽¹⁾

Facts

A Qatar-registered contractor and a Cypriot subcontractor concluded a \$14 million contract for the construction of the marine portion of an industrial complex in Qatar. The contract contained an International Chamber of Commerce arbitration clause and a choice of law provision stating that the contract would be governed by Swiss law.

Under the terms of the contract, the contractor supplied a guarantee of its financial obligations in the form of a parent company guarantee letter. This was issued by the contractor's parent company, which was incorporated in Italy. The guarantee was unconditional and "on simple demand... as if the guarantor were the original obligor". It contained no arbitration clause and no choice of law provision.

The subcontractor initiated arbitration proceedings against the contractor and guarantor following their refusal to comply with their financial obligations. The guarantor objected on the grounds of jurisdiction, arguing that it was not bound by the arbitration clause.

Decision

The arbitral tribunal sustained the guarantor's jurisdictional objection in an interim award. The Supreme Court upheld the award.

While insisting on the relativity of contractual obligations - applying also to arbitration agreements - the court acknowledged the possibility for arbitration agreements to bind third parties that are not mentioned therein.

Such an extension would presuppose a degree of intrusion by the third party into the original contractual relationship covered by the arbitration clause, either alongside or instead of the original party, whether formally (eg, as the result of taking over a debt or a contract), or informally based on good-faith considerations.

Taking over a debt or contract would usually imply the transfer of all accessory rights and obligations, including an arbitration clause contained in the original contract, except where the parties specified to the contrary. This would apply in the case of substitution of debtors and addition of a debtor alongside the original debtor.⁽²⁾

However, unless expressly agreed otherwise, no such transfer is admitted in the event of other forms of security or warranty where the secured debt is not taken over by the guarantor and where the obligations of the latter remain distinct from those of the main debtor. This is the case, for example, for joint and several guarantees and for independent guarantees.

In this particular case the court held that the subcontractor had failed to establish in law that the guarantor had taken over the secured debt. The guarantee was governed by Italian law and the subcontractor argued that the guarantee qualified as a *fideiussione* (ie, first demand bank guarantee) under such law. However, the court considered that the subcontractor had failed to demonstrate that the *fideiussione* was tantamount to the taking over of a debt under Swiss law.

Author

Frank Spoorenberg



The court found that the references in the guarantee to the various provisions of the contract, while not specific to the arbitration clause, were exclusively intended to identify the secured obligations and should not be construed as the incorporation by reference of the arbitration clause set forth in the contract.

For further information on this topic please contact [Frank Spoorenberg](#) at *Tavernier Tschanz* by telephone (+41 22 704 3700) or by fax (+41 22 704 3777) or by email (spoorenberg@taverniertschanz.com).

Endnotes

(1) Decision 4A_128/2008 of the Swiss Supreme Court in *X Ltd v Y*, issued on August 19 2008, published in the reports of the Swiss Supreme Court's decisions volume 134 part III page 565. The full text of the decision is available in French at www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm.

(2) See, for example, the Swiss Supreme Court's decision in Case 4P 126/2001, ground 2e/bb.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.



Official Online Media Partner to the International Bar Association
An International Online Media Partner to the Association of Corporate Counsel
European Online Media Partner to the European Company Lawyers Association

© Copyright 1997-2009 Globe Business Publishing Ltd