

## Arbitration - Switzerland

### Arbitration Clause Need Not Mention All Parties Bound to Arbitrate

April 01 2004

[Facts](#)  
[Decision](#)  
[Reasons](#)

#### Facts

X, Y and Z entered into a contract containing an arbitration clause. Z initiated arbitration proceedings against X, Y and A, on the grounds that A constantly intervened in the execution and performance of the contract. X and Y objected to the arbitral tribunal's jurisdiction regarding A in the absence of any arbitration agreement binding X, Y and Z to A.

The arbitral tribunal found that it also had jurisdiction with respect to A, and issued an award ordering X, Y and A, jointly and severally, to pay damages to Z.

X, Y and A challenged the award before the Swiss Supreme Court.

#### Decision

The court upheld the award, finding that on the basis of the law chosen by the parties, an arbitration clause can be extended to a third party on the basis of that party's continuous involvement in the execution and performance of the contract. The court expressly reserved its position as to the validity of a similar extension under Swiss law.

#### Reasons

For a valid agreement to arbitrate, Article 178 of the Swiss Private International Law Act requires both consent (substantive validity) and a text evidencing the agreement to arbitrate (formal validity). Whether a party is bound by such text is an issue of consent (ie, substantive validity). Thus, the text need not evidence the consent of all the parties.

Regarding substantive validity, Article 178(2) provides that an arbitration clause is valid if it fulfils the requirements either of the law chosen by the parties to govern the arbitration agreement, the substantive law applicable to the dispute, or Swiss law, whichever is more favourable to the validity of the agreement. In the case at hand, the parties had agreed to subject the dispute to both Lebanese law and relevant trade practices. The arbitration tribunal found in the relevant trade practices the legal justification for the extension of the arbitration clause to a third party on the basis of that party's continuous involvement in the execution and performance of the contract.

*For further information on this topic please contact [Pierre-Yves Tschanz](#) at Tavernier Tschanz by telephone (+41 22 347 77 07) or by fax (+41 22 347 9789) or by email ([tschanz@ttv.ch](mailto:tschanz@ttv.ch)).*

#### Endnotes

(1) X SAL v Z Sàrl, CCI, October 16 2003, 4P.115/2003 published as 129 III 727; also available from the website of the Swiss Supreme Court, [www.bger.ch](http://www.bger.ch) (using the French-language version, select "jurisprudence", then "principaux arrêts dès 1954").

#### Author

[Pierre-Yves  
Tschanz](#)



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