

## Arbitration - Switzerland

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### Expert Determination and Arbitration: An Uneasy but Necessary Distinction

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**Facts**  
**Decision**  
**Reasoning and Comment**

The Swiss Supreme Court recently ruled that when an expert determination agreement coexists with an arbitration agreement, parties intending to submit to the expert legal disputes arising in the context of the expert determination must expressly state this intention in the expert determination agreement (or presumably in the terms of reference of the expert).(1)

Swiss law dissociates arbitration from expert determination from the perspectives of both governing law and challenge proceedings. Therefore, it is paramount to ascertain in each case whether a given determination is an arbitrator's determination or an expert determination.

#### **Facts**

The purchasing company bought the entire share capital of a machine and equipment production company from the sellers. It also concluded a commission agreement with one of the sellers (Seller A). Among other things, the commission agreement authorized the company to use the brand registered under Seller A's name against payment of a 3% commission over all confirmed orders. The commission was to be calculated on the basis of annual statements duly certified by an independent auditor appointed by the parties.

The commission agreement provided that, in case of a discrepancy between the annual statements and the auditor's certification, the latter would prevail. The commission agreement also included an arbitration clause for any dispute, "arising out or in connection" with the commission agreement.

Following the parties' persistent disagreement on the reporting of certain orders in the certified annual statements, the auditor referred them to negotiation or arbitration without taking a position.

Seller A filed for arbitration. The purchaser contested the jurisdiction of the arbitral tribunal on the grounds that the matter should to be referred to the exclusive and final determination of the auditor.

The arbitral tribunal issued a prejudicial and partial award, whereby it admitted its jurisdiction and acknowledged as a matter of principle that the disputed orders should be included in the annual statement.

#### **Decision**

The Supreme Court upheld the arbitral tribunal's finding on jurisdiction. It considered that, in the case at hand, the auditor's mission was that of an expert in an expert determination, and not that of an arbitral tribunal. More particularly, it considered that the auditor's mission pertained exclusively to the certification of annual statements, and that it was not established that the parties had entrusted the auditor with the final determination regarding the inclusion of the disputed orders in the certified annual statements. Such determination should therefore be the exclusive responsibility of the arbitral tribunal.

#### **Reasoning and Comment**

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Pursuant to the consistent case law of the Supreme Court,<sup>(2)</sup> the agreement of expert determination pertains to substantive law, whereby the parties ask an independent and impartial third party to issue a final and binding determination on certain technical factual or legal questions. Such agreement is governed by the substantive law applicable to the relationship in connection with which the determination is requested, and not by arbitration law. It is generally admitted that the annulment of an expert determination can be sought exclusively through an ordinary proceeding subject to the demonstration of gross unfairness, arbitrariness and, on the merits, in the event of serious inequity, erroneous statement of facts or on the grounds of impaired consent.<sup>(3)</sup> Albeit final and binding on the parties and adjudicators, the expert determination has no *res judicata* effect and is not immediately enforceable; it must be endorsed in a judgment or an award.<sup>(4)</sup>

In contrast and according to the Supreme Court, arbitration award involves the judicial determination of proper claims<sup>(5)</sup> and is vested upon its issuance with a *res judicata* effect. An award can be modified only under the restrictive conditions of a revision proceeding and can be annulled on the limited grounds listed in arbitration law. Under Swiss arbitration law and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, an arbitral award is immediately enforceable without any further judicial endorsement.

In practice, however, it is often difficult to differentiate between arbitration and expert determinations. Courts and tribunals rely primarily on:

- the terms of the parties' agreement;
- the extent of the third party's authority; and
- the immediate enforceability of the final determination.

The Supreme Court has rejected the idea of a presumption in favour of either institution.<sup>(6)</sup>

In the case at hand, the Supreme Court noted the absence of any evidence showing the parties' intent that the expert determination should include the determination over legal disputes. It further found in favour of an expert determination based on the nature and extent of the mission attributed to the auditor (certification of the annual statements), and the existence of an arbitration clause for any dispute arising from the commission agreement. The Supreme Court considered that under these circumstances, any final determination of legal disputes arising in the context of the expert determination, such as the inclusion of the disputed orders in the certified annual statements, should lie with the arbitral tribunal.

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## Endnotes

(1) Unpublished Decision 4A\_438/2008 of the Supreme Court in *X AG v A*, issued on November 17 2008. 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](http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm).

(2) Decision, ground 3.2.1; for an overview of the controversy on the legal nature of the institution, see J Thorens, "*L'expertise-arbitrage en droit Suisse et en droit allemand*", *Sem Jud* (1968) 601, particularly 603.

(3) Decision, ground 3.2.1; ATF 129 III 535 ground 2.1 (German), excerpts in French in *Journaux des Tribunaux* (2003) I 590 and *Sem Jud* (2004) I 341. See also M Schöll, "*Réflexions sur l'expertise-arbitrage en droit Suisse*", 24/4 *ASA Bull* (2006) 621, particularly pp 629-632.

(4) J Thorens, *supra* n ii, particularly 604 *et seq.*

(5) ATF 117 Ia 365, ground 5b.

(6) ATF 117 Ia 365, ground 7.

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