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Arbitration - Switzerland

Separability of the Arbitration Agreement and Assignment

May 09 2002

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Facts

X and F entered into a contract containing an arbitration clause. X refused to participate in the arbitration initiated by F. F then assigned its claim to O, which proceeded with the arbitration. X objected to the arbitrators' jurisdiction. The arbitral tribunal decided in an interim award that it had jurisdiction based on a valid assignment from F to O. X challenged the award before the Swiss Supreme Court.⁽¹⁾

Decision

The partial award was set aside for lack of jurisdiction.

The court found that the contract contained a provision prohibiting the assignment of the contract. Therefore, the contract, and its arbitration clause, had not been validly assigned to O. In the absence of any arbitration agreement between X and O, the arbitral tribunal had no jurisdiction.

Comment

This case illustrates the practical limit of the separability doctrine, in particular in the case of assignment. On the one hand, the separability of the arbitration clause requires the arbitrators to decide separately on the validity of the arbitration clause in order to determine their jurisdiction, generally in an interim award. On the other hand, this determination may depend on

the status of the main contract, in particular in the case of an assignment: the arbitration clause follows the main contract in which it is contained when the main contract is assigned. As a result, the arbitration clause is separable from, but in effect also dependent on, the main 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).

Endnotes

(1) *X v O*, October 16 2001, 4P.176/2001, published as ATF 128 III 50.

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