

## Arbitration - Switzerland

### Termination of arbitration agreement – decision takes parties by surprise

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#### Introduction

#### Facts

#### Decision

#### Introduction

In challenge proceedings against arbitral awards, the Supreme Court is not authorised to make corrections or amendments in respect of the findings of facts made by the arbitral tribunal (Articles 77(2) and 105(2) of the Federal Tribunal Statute), unless one of the grounds listed in Article 190(2) of the Private International Law Act is invoked against the factual findings or new facts or evidence must exceptionally be taken into account (revision).

The Supreme Court recently refused to review the merits of a challenge against an arbitral award in which the arbitrators had declined jurisdiction after having established the parties' common intent to terminate the arbitration agreement.<sup>(1)</sup> It held that the establishment of the parties' real and common intent constituted an issue of fact and assessment of evidence. In principle, issues of facts and assessment of evidence are not within the Supreme Court's purview. Hence, they cannot be reviewed in a jurisdictional challenge against an arbitral award.

The Supreme Court also ruled that the arbitral tribunal's exceptional duty to advise the parties before relying on a ground which was not submitted in the proceedings does not apply to the establishment of facts.

#### Facts

The dispute arose out of a distribution agreement between three parties (A, B and C) containing an arbitration clause. A, B and C decided to annul the entire agreement, including the arbitration agreement. Subsequently, a new distribution agreement was entered into between A, B and a new party (D), followed by an additional distribution agreement between the same parties. A, B and D also entered into a side letter under which D accepted to assume "all commitments, obligations and litigations out of the business of [C]", and into a settlement agreement under which D waived certain claims that it had raised against A and B before state courts. Subsequently, C brought claims under the original distribution agreement before state courts against A and B. A and B then raised an objection of arbitration and commenced an arbitration under the Rules of Arbitration of the International Chamber of Commerce, seeking a declaration that C had no claims under the original distribution agreement or in connection with its termination. The arbitral tribunal denied jurisdiction in an award which was then challenged by A and B.

#### Decision

The applicants challenged the arbitral tribunal's interpretation of the parties' agreement to terminate their original agreement. They contended that this interpretation was untenable and violated the principle of autonomy of arbitration agreements.

The Supreme Court rejected this argument. First, it explained that the termination of arbitration agreements is subject to no formal requirements.<sup>(2)</sup> It then recalled that the interpretation of arbitration agreements follows the principles applicable to the interpretation of private declarations<sup>(3)</sup> and held that: "[i]f the court of lower instance establishes the content of a contract based on the parties' joint actual intent, it is a finding of fact which in principle binds the Supreme Court."<sup>(4)</sup> In application of these principles, the Supreme Court found that the arbitral tribunal's conclusion relied not on a normative interpretation, but on a subjective interpretation establishing that the parties' common intent was to terminate the arbitration agreement which, as a finding of fact, was binding on the Supreme Court.<sup>(5)</sup>

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The Supreme Court further rejected the applicants' argument that the arbitral tribunal had violated their right to be heard in issuing a decision which would have taken them by surprise. Whereas arbitrators may, as an exception, be under a duty to advise the parties when they consider basing their decision on a provision or a legal consideration that was not raised during the proceedings, the Supreme Court made it clear that this exceptional duty does not apply to the establishment of facts.<sup>(6)</sup> Since the applicants' argument pertained precisely to the establishment of facts, the Supreme Court rejected the argument.

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## Endnotes

(1) Supreme Court, 4A\_305/2013, October 2 2013. See [www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.html](http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.html) (in German).

(2) Ground 3.2.1, referring to Poudret/Besson, Comparative Law of International Arbitration, 2<sup>nd</sup> ed, Sweet & Maxwell, 2007, N 379.

(3) Ground 3.2.2, referring to ATF 132 III 626, Ground 3.1.

(4) *Ibid* (authors' translation).

(5) Ground 3.4.

(6) Ground 4, referring to Supreme Court, 4A\_214/2013, August 5 2013, Grounds 4.1 and 4.3.1 and to Supreme Court, 4A\_538/2012, January 17 2013, Ground 5.1.

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