

Arbitration - Switzerland

Third parties and arbitration clauses in promissor/promissee contracts

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November 17 2011

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Introduction

With respect to arbitration agreements, the Supreme Court has been consistent in its restrictive application of the formal requirement for written consent to arbitrate under Article 178(1) of the Private International Law Act.⁽¹⁾ However, it has also favoured an extensive construction of the scope of such consent, sometimes⁽²⁾ in derogation to the relativity of contractual obligations.⁽³⁾ The court recently reaffirmed this practice. It upheld the extension of an arbitration clause, agreed in the context of a complex restructuring scheme, to one of the companies to benefit from such restructuring, notwithstanding that the company was not formally a party to, or signatory of, the set of agreements that governed the restructuring and contained the clause.⁽⁴⁾

Facts

The case arose from the reorganisation of a family-owned group of companies into two separate entities following a dispute between family members. The reorganisation was carried out in part through share and equity reallocation, and in part through share capital increase or reduction. The various transfers occurred either directly at partner level or indirectly at the level of the companies controlled by them. The reorganisation was governed by two main agreements concluded exclusively between the partners – namely, a memorandum of agreement and memorandum of replication – both of which contained a similar arbitration clause.

A dispute occurred when one of the partners, AX, declined to take part in the implementation of the agreements following an adverse arbitral ruling in a prior dispute between him and the other partners. In particular, AX refused to consent to the increase in the share capital of VX BV – one of the companies controlled by the partners – and to release his own shares in VX BV under the terms of the agreements. Consequently, the other partners and VX BV filed for arbitration, relying on the arbitration clause contained in the agreements, seeking an arbitral award to force AX to consent to the increase in the share capital of VX BV and to release his own shares in the same company. The arbitral tribunal confirmed its jurisdiction and VX BV's *locus standi* (ie, right to proceed in arbitration), and granted the relief sought. AX challenged the award before the Supreme Court on the grounds of lack of arbitral jurisdiction on VX BV's claim (under Article 190 (2)(b) of the act), among other grounds.

Decision

The Supreme Court reserved judgment on the admissibility of the challenge for lack of jurisdiction. It considered that the questions as to whether prayers for relief may be taken in favour of a third-party beneficiary were not merely a matter of jurisdiction of the arbitral tribunal, but rather pertained to the merits of the case.⁽⁵⁾ Even assuming with AX that VX BV's involvement in the arbitration proceeding had so fundamentally biased the whole process that it justified the annulment of the final award, the court upheld the arbitral tribunal's view that the agreements provided VX BV with rights which the latter was entitled to enforce (ie, so-called 'perfect third-party beneficiary undertakings' under Article 112(2) of the Code of Obligations). Consequently, the court held that AX could not, in good faith, object to the beneficiary of such contractual commitments enforcing its rights through the same dispute resolution mechanism that was agreed upon by the main parties to the contract:

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"one fails to see on which ground the appellant, who signed the agreements containing the arbitration clause, could question the right of the third-party beneficiary to claim the prerogative derived from the agreements following the same procedural mechanism as that agreed upon by itself and the other contracting parties to resolve the disputes that might arise therefrom, namely arbitration."⁽⁶⁾

The court further recalled its consistent practice whereby, in the case of perfect third-party undertakings, in the absence of an agreement between the parties to the contrary, "the beneficiary... is vested, as debtor (or obligee), with a claim to all the right of prevalence and accessory rights related thereto, including the arbitration clause".⁽⁷⁾ The challenge was thus dismissed and the award confirmed.

Comment

This case resolves only part of the question regarding the extension of the arbitration clause contained in a third-party beneficiary contract to the beneficiary: this extension should be allowed when the third-party beneficiary invokes (and hence expresses its consent to) the arbitration clause to enforce whole or part of the third party undertaking.

However, the wider question of the automatic extension of the arbitration clause, regardless of the third party's express consent thereto, remains controversial: some commentators endorse the theory that the clause extends automatically,⁽⁸⁾ while others consider that the third party's further consent is required.⁽⁹⁾ A third category of commentators questions whether an arbitration clause can be the object of a third-party undertaking at all.⁽¹⁰⁾ The Supreme Court's decision in *X v BX* leaves these questions unanswered.⁽¹¹⁾

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Endnotes

(1) For a recent reminder of the prevailing practice, see Decision 4A_128/2008, August 19 2008; such written form does not require the parties' signature.

(2) See, for instance, Decision 4A_128/2008, (subjective scope); and Decision 4A_452/2007, February 29 2008 (material scope) and references.

(3) Zuberbühler, "Non-Signatories and the Consensus to Arbitrate", Bull ASA, 2008.18 and reference.

(4) Decision 4A_44/2011, April 2011, in the matter *X v BX*. The full text is available, in French, at www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm.

(5) Ground 2.3.

(6) Ground 2.4.1 medium part (authors' translation).

(7) Ground 2.4.1, last part (authors' translation).

(8) Schwab/Walter, *Schiedsgerichtsbarkeit*, 7th ed 2005, N36 ad Chapter 7; Lachmann, *Handbuch für die Schiedsgerichtspraxis*, 3rd ed 2008, N502 p141; Ruede/Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht*, 2nd ed 1993, p81; concurring subject to the third-party beneficiary having accepted: Poudret/Besson, *Comparative Law of International Arbitration*, 2nd ed 2007, N289; referred in ground 2.4.1.

(9) See, for example, Fouchard/Gaillard/Goldman, *Traité de l'arbitrage commercial international*, N498 p298; Wenger/Müller, in *Internationales Privatrecht*, 2nd ed 2007, N66 ad Article 178 PILA; concurring Kaufmann-Kohler/Rigozzi, *Arbitrage international*, 2nd ed 2010, p146 note 172; referred in ground 2.4.1.

(10) Berger/Kellerhals, *International and Domestic Arbitration in Switzerland*, 2nd ed 2010, N455 and N514; referred in ground 2.4.1.

(11) Ground 2.4.1, first part.

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