

Arbitration & ADR - Switzerland

Arbitration agreement binding on non-signatory parent company

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In a recent decision the Supreme Court partially set aside an arbitral award on the grounds that the arbitral tribunal had wrongly denied jurisdiction over the non-signatory parent of a party to the arbitration agreements on which the arbitration proceeding was based.⁽¹⁾ The Supreme Court found that the parent had become a party to the arbitration agreements based on the principle of good faith.

Facts

The dispute arose out of three contracts for the delivery of a factory for the production of aluminum sheets entered into between X and YE (belonging to the Y Group). Each contract was governed by Swiss law and contained an arbitration clause in favour of an arbitral tribunal to be constituted pursuant to the Rules of Arbitration of the International Chamber of Commerce in Geneva.

The project was suspended and the parties entered into negotiations. During these negotiations they agreed that:

- a specific division of YE's parent (ie, YG) would carry out the project instead of YE;
- a member within this division would be responsible for the project; and
- YG would provide X with an irrevocable guarantee.

The division was subsequently acquired by Y, which also belonged to the Y Group.

YE started arbitration proceedings against X to obtain the payment of outstanding invoices. X then brought counterclaims against both YE and Y. In the final award, the arbitral tribunal found that it had no jurisdiction over Y. X challenged this award before the Supreme Court.

Decision

First, the Supreme Court recalled that there are exceptions to the principle that only the parties to the main contract are bound by the arbitration agreement contained therein.⁽²⁾ Such exceptions may apply in the following situations:

- the assignment of a debt;
- the assumption of a debt; or
- the transfer of a contractual relationship.

Moreover, an exception may be made where a third party participates in the performance of the contract to such an extent that it may be inferred from this participation that the third party intended to be a party to the arbitration agreement.⁽³⁾ The Supreme Court also admitted that situations in which there is confusion between the activity of a company and that of its parent may exceptionally justify the refusal to uphold the two companies' independence. Such may be the case if a parent company creates the appearance to be bound by an arbitration agreement that results in the other party's erroneous understanding that it entered into a contract with the parent instead of the subsidiary, or with both the companies.⁽⁴⁾

The Supreme Court analysed whether any of these situations were realised in this case to justify an extension of the arbitration agreements to Y. Based on the interpretation of a letter referring to the complete transfer of responsibility for the project from YE to YG's division (which reflected X's express intent that YE be replaced by another company), and in view of the unlikelihood of a parent being the representative of its subsidiary, the Supreme Court rejected the arbitral tribunal's finding that YG was simply a representative of YE.⁽⁵⁾ Considering the confusion that existed among the Y Group, the Supreme Court also acknowledged that X should not be blamed for being unable to identify its actual

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Referring to the practice that the parties' conduct following the statement of intent may help to interpret the parties' common actual intent (as opposed to situations in which an objective interpretation is carried out), the Supreme Court found that the parties' conduct following the abovementioned letter was not decisive since it revealed no common actual intent.⁽⁷⁾ The Supreme Court further found that other evidence on record was not useful to determine whether YE's responsibility was transferred to YG.⁽⁸⁾

Finally, the Supreme Court relied on the legal opinion of two experts that if the existence of a tripartite agreement between X, YE and YG or the cumulative assumption of debt by YG were denied, X's right to act directly against YG must still be admitted based on the principle of good faith. According to the experts, X was entitled to understand in good faith that it had a contractual relation with YG based on YE's and YG's conduct and this understanding was sufficient to extend the original relationship between X and YE to YG, and thus to allow X to bring claims against YG before the arbitral tribunal.⁽⁹⁾ Without explaining which of these views best applied to the case, the Supreme Court concluded that the principle of good faith required YG to be bound by the contracts and the arbitration agreements.⁽¹⁰⁾

Consequently, the Supreme Court found that the arbitral tribunal had been wrong to deny jurisdiction over Y based on the finding that YG was not bound by the arbitration agreements.⁽¹¹⁾ However, since the arbitral tribunal had not determined whether it had jurisdiction over Y, because it had stopped its reasoning after finding that YG had not become a party to the arbitration agreements, the Supreme Court remanded the case to the arbitral tribunal for a new decision on this issue.

Comment

This decision constitutes one of the few cases in which the Supreme Court has set aside an arbitral award, albeit partially. Although recognising that the arbitral tribunal's decision to deny jurisdiction over Y may turn out to be right, the Supreme Court seemed to blame the arbitral tribunal for not having completed its reasoning.

The practical lesson here is that if companies of the same group are involved in the performance of a project, but the parties' intent is that only one of these companies shall be a party to the agreements underlying the project, this intent should be expressly indicated in the agreements.

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Endnotes

(1) Supreme Court, 4A_450/2013, April 7 2014 (in French). See www.bger.ch.

(2) Ground 3.2, referring to ATF 129 III 727, Ground 5.3.1 and 5.3.2.

(3) *Ibid.*

(4) Ground 3.2, referring to ATF 137 III 550, Ground 2.3.2.

(5) Ground 3.5.3.1.

(6) Ground 3.5.3.3.

(7) Ground 3.5.4.

(8) Grounds 3.5.4.1 to 3.5.4.4.

(9) Ground 3.5.5.1.1.

(10) Ground 3.5.5.1.2.

(11) Ground 3.6. The applicant's additional argument that the arbitral tribunal had violated its right to be heard was rejected by the Supreme Court (Ground 4).

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