

Switzerland: Separability of the Arbitration Agreement and Assignment

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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.

Held: 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.

This case illustrates the practical limit of the separability doctrine, in particular in 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 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 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.

Source: X. v. O., 16 October 2001, 4P.176/2001, published as ATF 128 III 50; also available from the website of the Swiss Supreme Court, <http://www.bger.ch> (using the French language version, select "jurisprudence", then "principaux arrêts dès 1954").