ARBITRATION & ADR - SWITZERLAND

Valid and binding arbitration agreement in draft contract

May 19 2016 | Contributed by Tavernier Tschanz

AUTHORS

Frank Spoorenberg

Daniela Franchini

In a recent decision, the Supreme Court found that an arbitral tribunal may have jurisdiction based on the arbitration agreement contained in a draft contract.(1)

Facts

In relation to a sales contract for steel products, the seller asked the buyer to sign a so-called 'frame contract', which provided for the modalities of performance of the sales and was governed by Swiss law. The frame contract also contained an arbitration clause providing that any dispute in relation to that contract must be resolved by arbitration in accordance with the Swiss Rules of International Arbitration. Instead of signing the frame contract, the buyer sent it back to the seller with a number of modifications and comments, including on the arbitration clause. The parties subsequently exchanged modified versions of the frame contract. In the last two versions exchanged by the parties, the arbitration clause remained unchanged. The parties never signed the frame contract and the seller never supplied the products to the buyer – who had not complied with its obligation to pay the purchase price in advance.

Relying on the arbitration clause contained in the last exchanged version of the frame contract, the seller began arbitration proceedings against the buyer, who raised a jurisdictional objection. In an award on jurisdiction, the sole arbitrator appointed by the Court of the Chamber of Commerce of the Canton of Ticino found that although the underlying contract had never been signed by the parties, there was nonetheless an agreement on the arbitration clause, and thus declared that he had jurisdiction to decide the dispute.

The buyer challenged the award before the Supreme Court for breach of Article 190(2)(b) of the Private International Law Act (ie, lack of jurisdiction).

Decision

Referring to the lack of precision of Article 178(3) of the Private International Law Act and to the opinions of different Swiss and French authors, the Supreme Court made clear that the principle of autonomy of the arbitration clause can apply even if the main contract never came into existence and that the invalidity of the main contract may actually affect the validity of the arbitration clause.(2) In this respect, the Supreme Court held that:

> *"the exchange of draft contracts, in the context of negotiations between potential partners, will not permit, ordinarily, to deduce, according to the principle of trust, the legal will of the interested parties to be bound, in respect of an individual clause of the future contract, even before this contract has been concluded."*

However, the Supreme Court went on to say that:

"the existence, in a specific situation, of additional qualified circumstances will permit, when appropriate, to admit the contrary, exceptionally, and to ground the arbitral tribunal's jurisdiction to deal with a claim based on culpa in contrahendo *further to the exchange of draft contracts."*(3)

According to the Supreme Court, these circumstances include:

- the instances in which the parties previously entered into several contracts which always contained the same arbitration clause;
- the parties' objectively understandable and acknowledgeable interest to opt for arbitration (eg, neutral forum, choice of an international language and confidentiality); and
- the exchange of drafts establishing the parties' common will to enter into an arbitration agreement (eg, where the modified version of the arbitration agreement remains unchanged in subsequent drafts), irrespective of the outcome of the negotiations regarding the main contract.(4)

The Supreme Court also held that Article 178(1) of the Private International Law Act, which provides that an arbitration agreement is valid as to its form if it is made in writing, even if it is not signed, mandatorily applies to arbitrations in Switzerland. However, although refusing to provide a definitive answer to the question, the Supreme Court seemed to agree with a number of authors(5) that the parties can agree on stricter requirements of form (eg, that the arbitration clause must be signed to be valid).(6)

Relying on these principles, the Supreme Court rejected the plaintiff's argument that the parties had agreed on a stricter form than the one required by Article 178(1) of the Private International Law Act because this argument had not been raised before the arbitrator, who had thus found no common will by the parties to replace the written form provided by Article 178(1) with a stricter requirement of form.(7)

The Supreme Court also rejected the plaintiff's argument that the persons involved in the negotiations of the frame contract lacked the necessary power to represent the buyer because the seller could understand in good faith that these persons had the necessary power to bind the buyer and because the buyer could be held to have ratified its representative's acts.(8) In this respect, the Supreme Court recalled that if a finding is based on two different reasons, the plaintiff must establish that both reasons are wrong.(9)

Regarding the substantive validity of the arbitration clause, the Supreme Court recalled that arbitration agreements must be interpreted according to the general rules of contract interpretation (ie, by researching first the parties' actual and common intent and, if such an intent cannot be established, by applying the principle of trust).(10) Considering that the sole arbitrator had established the parties' actual and common intent to resort to arbitration, the Supreme Court was precluded from reviewing this question.(11)

Finally, further to the plaintiff's argument that the dispute did not fall within the scope of the arbitration clause contained in the frame contract, assuming that this argument was admissible, the Supreme Court referred to the theory of the group of contracts. According to this theory, in the absence of a rule to the contrary, where different contracts are connected and only one of them contains an arbitration clause, it should be presumed that the parties intended to submit all of the contracts of the same group to this arbitration clause.(12)

Comment

From an arbitration-science viewpoint, this decision matters because it comes close to acknowledging that the parties may agree on stricter form requirements for their arbitration agreement than those provided for by Article 178(1) of the Private International Law Act. It is also of interest because it clarifies, if need be, that the principle of separability of a broadly drafted specific arbitration agreement also means that an arbitral tribunal constituted under this agreement has jurisdiction to rule on the existence of the main contract in which the arbitration agreement is included, unless the reason why the main contract does not exist extends to the arbitration agreement itself.(13)

From a practical viewpoint, this decision actually invites the negotiators of contracts to clarify from the outset of the negotiations when the arbitration agreement should come into existence (ie, even before the main agreement is concluded or only on such conclusion).

For further information on this topic please contact Frank Spoorenberg or Daniela Franchini at Tavernier Tschanz by telephone (+41 22 704 3700) or email (spoorenberg@taverniertschanz.com or franchini@taverniertschanz.com). The Tavernier Tschanz website can be accessed at www.taverniertschanz.com.

Endnotes

(1) Supreme Court, 4A_84/2015, February 18 2016 (in French).

(2) Ground 3.2.1.

(3) *Id.*

(4) *Id.*

(5) Tschanz, *Commentaire Romand, Loi sur le droit international privé, Convention de Lugano*, Helbing & Lichtenhahn, 2011, N 113 to Article 178; Gränicher, *Basler Kommentar, Internationales Privatrecht*, 2013, N 15 to Art. 178; Stacher, *Einführung in die internationale Schiedsgerichtsbarkeit der Schweiz*, 2015, N 68; Berger/Kellerhals, *International and Domestic Arbitration in Switzerland*, 2015, N 493.

(6) Ground 3.3.1.

(7) Ground 3.3.2.2.

(8) Ground 4.1.

(9) Ground 4.2.

(10) Ground 5.2.1.

(11) Ground 5.2.2.

(12) Ground 5.2.3.

(13) See also Supreme Court, 4A_103/2011, September 20 2011, ground 3.2.1; 4A_210/2008, October 29 2008, ground 3.2 where the Supreme Court found that the language of the arbitration clause extended to disputes on the existence of the main contract.