Swiss Supreme Court denies the extension of an arbitration clause to a third party for lack of (implicit) consent

By Dr. Valentina Hirsiger-Meier - December 22, 2020

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In a recent decision published 13 November 2020, the Swiss Federal Supreme Court ("SFSC") granted the appeal against the partial final award of an arbitral tribunal, with which the latter had extended the arbitration agreement to the appellant as a non-signatory party to the agreement. In the opinion of the SFSC, the appellant had not sufficiently interfered in the conclusion and execution of the underlying main contract to an extent where such inference could, in good faith, be interpreted as a declaration of consent to the arbitration clause (case no. 4A_124/2020 (in German)).

Factual background

The reported dispute stems from an agreement for the construction and operation of a major power generation in Bangladesh between a Korean company and several South Asian companies (respondents). Subsequent to numerous issues, the Korean company initiated ICC arbitration proceedings against those other contracting parties. The defendants (and respondents) subsequently demanded that the subcontractor (appellant) be included as a party in the arbitration proceedings. The arbitral tribunal decided to limit the proceedings initially to this question of jurisdiction to clarify which parties are bound by the arbitration agreement. The arbitral tribunal issued a partial final award on jurisdiction and declared itself competent with regards to the claims raised by the respondents confirming that the subcontractor was bound to the arbitration agreement as well. The subcontractor filed an appeal against this decision with the SFSC, arguing that it was not a party to the arbitration agreement.

Wrong ruling on jurisdiction examined by the SFSC

An award may be set aside if the arbitral tribunal wrongly accepts or declines jurisdiction (Art. 190(2)(b) Swiss Private International Law Act ("PILA")). As a general rule under Swiss law, the arbitration agreement binds only the parties that have originally agreed to it. However, according to confirmed practice of the SFSC, the arbitration agreement may under certain conditions also bind parties who did not sign or agree to it (i.e. non-signatories), such as for instance in the case of the assignment of a claim, the (simple or cumulative) assumption of a debt or a contract or in the case of interference by a party in the execution contract to which it is not a signatory.

In the case at stake, the SFSC examined whether an extension of the arbitration agreement could result from the fact that the appellant had interfered in the conclusion and execution of the main contract in such way that, in good faith, this would constitute a declaration of consent to the arbitration clause.

According to the reasoning of the arbitral tribunal, the appellant had been listed in the underlying contract as the seller or supplier of certain components of the work to be delivered. This also explained why the subcontractor was present at the first meetings between the contracting parties. According to the SFSC, however, this could not be seen as sufficient interference in the conclusion of the contract. In view of the importance of the
components supplied by the appellant, it did, in the opinion of the SFSC, not appear unusual for representatives of the appellant to attend meetings or on-site inspections following the conclusion of the main contract, nor was it surprising that the warranty provisions in the main contract and the subcontractor contract were concurring. Based thereon, the SFSC came to the conclusion that the appellant’s contractual involvement in the supply of components of the main contract could not be seen or interpreted in good faith as consent to agree to the arbitration clause and thus as a waiver of the state jurisdiction, which is why it granted the appellant’s appeal.

The extension of the arbitration agreement to third parties may not be seen as general rule

According to Swiss doctrine and jurisprudence, the arbitration agreement may be extended to third parties under specific circumstances (e.g. legal succession, lifting of the corporate veil or group of companies). This undisputed practice was repeatedly confirmed in the SFSC’s rulings (e.g. Decisions of the SFSC 145 III 199 (202), 134 III 565 (567 et seqq.) or 129 III 727 (735)).

In its confirmed case law, the SFSC implied that the extension to third parties should not be made subject to excessively strict requirements (Decisions of the SFSC 130 III 71 (71) or 129 III 681 (679)). However, this latest precedent gives a new approach and perspective in practice on the constant case law of the SFSC with regards to the heretofore liberal extension of the arbitration agreement to third parties. The extension of the arbitration agreement to third parties may not be seen as general rule and may result only in specific cases under specific circumstances.
Switzerland: extension of arbitration clause to third parties is the exception

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