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EXTENSION OF AN ARBITRATION AGREEMENT TO NON-SIGNATORIES: SOME REFLECTIONS ON SWISS JUDICIAL PRACTICE

The Article deals with the question whether a party that has not signed an arbitral agreement may nevertheless be bound to arbitrate. The author analyzes Swiss legal doctrine and, in particular, the recent practice of the Swiss Federal Tribunal which has repeatedly dealt with this issue. According to the Swiss Federal Tribunal, an arbitral agreement may be extended to a non-signatory party where such party, through statements or behaviour, has created a fair and reasonable expectation with another party that it considered itself bound by such arbitral agreement. The criteria to determine such 'fair and reasonable expectations' are identical to the ordinary criteria of (Swiss) contract law for the interpretation of statements or behaviour of a party to a contract.

Key words: *Arbitration agreement. – Extension to Non-Signatories. – Jurisdiction. – Piercing the corporate veil. – Group of companies. – Accession. – Assumption (of indebtedness).*

1. INTRODUCTION AND TERMINOLOGY

The topic of this paper – the extension of an arbitration agreement to non-signatory parties – appears in a vast number of varieties and has been dealt with by countless arbitral tribunals, sometimes convincingly, sometimes rather adventurously. The present paper does not endeavour to provide an overview over the various theories and ideas put forward by arbitral tribunals why an arbitration agreement should or should not be binding upon a third, non-signatory party. Rather, this presentation is guided by the principle that every arbitral award ultimately may have to

stand the test of judicial review, be it because it is challenged before a municipal court at the place of arbitration or because it is subject to court review at the enforcement stage. It is thus the courts' practice, and due to the author's legal background, the Swiss Federal Tribunal's practice, which is the focus of this paper.

An arbitration agreement, even though it mostly forms part of a contract between two or more parties, is an independent agreement, and its scope and validity are examined separately from the main contract. Having the topic of this paper in mind, the term "extension" of an arbitration agreement is somewhat misleading: The discussion is not about extending an arbitral agreement to a non-party but rather about determining who the parties to an arbitral agreement really are. Arbitration being a voluntary alternative to litigation in state courts, an arbitration agreement may only be binding for such party that has either explicitly or impliedly consented to it.

2. THE ARBITRATION AGREEMENT IN SWISS ARBITRATION LAW

The decision by an arbitral tribunal to extend an arbitration agreement to a non-signatory party is a jurisdictional decision: The arbitral tribunal holds that a particular party is (or is not) party to the arbitration agreement and the arbitral tribunal therefore has (or has not) jurisdiction over such party. When faced with the challenge of such jurisdictional decision, the Swiss Federal Tribunal's starting point is Article 178 of the Swiss Private International Law Act (hereinafter: SPILA)¹. This provision reads as follows:

"(1) As to form, the arbitration agreement shall be valid if it is made in writing, by telegram, telex, telecopier, or any other means of communication that establishes the terms of the agreement by text.

(2) As to substance, the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties, or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law."

When discussing the extension of an arbitration agreement to non-signatories under Swiss arbitration law, two questions must therefore be distinguished: (1) the application of the formal requirements for an arbitral clause also to the extension of such clause, and (2) the possibility of the extension as such. These two questions shall be dealt with separately hereunder.

¹ This Act applies to all international arbitral tribunals having their seat in Switzerland.

3. FORMAL VALIDITY OF THE EXTENSION OF AN ARBITRATION CLAUSE

Article 178 SPILA states in para. 1 that the arbitration clause must be in writing. This formal requirement does not mean that the arbitral clause must be signed by the parties bound by it but that it at least must be “proven by text”. The question now is whether this ‘in writing’ requirement must also be fulfilled with regard to parties that are not formal (signatory) parties to the contract containing the arbitration clause but to which the arbitration clause is to be extended. In other words: While there need not be any concrete signature (neither by the initial parties nor by any further parties to which the clause should be extended), must there at least be some written expression of intention to become party to the arbitration clause or do merely oral statements (or behaviour) suffice for such third party to be bound by an arbitral clause?

The question whether or not the extension of an arbitral clause to non-signatories is subject to the same formal requirement of para. 1 of Article 178 SPILA is controversial in Swiss arbitration doctrine, in particular because of the Federal Tribunal’s decision of 16 October 2003². In that decision, the Federal Tribunal has taken the (very apodictic) position that the formal ‘in writing’ requirement of Article 178 para. 1 SPILA applied only to the arbitration clause concluded between the initial parties, but not to third parties to which it eventually may be extended³. In other words, the arbitral tribunal held that, once the formal requirements of Article 178 para. 1 SPILA are fulfilled as far as the initial parties are concerned, the extension of this arbitral clause to non-signatories is not subject to the same formal requirements but only to para. 2 of Article 178 SPILA (which provision states that an arbitration agreement otherwise is valid if it complies with the law chosen by the parties or, eventually, with Swiss law). Thus, pursuant to this decision of the Federal Tribunal, the extension of an arbitration clause to third, non-signatory parties would also be possible in the absence of any written statement, on the basis of mere oral statements, conclusive evidence and behaviour.

Some authors are rather critical vis-à-vis the Federal Tribunal’s apparently ‘liberal’ interpretation of the ‘in writing’ requirement and hold that, except situations of abuse of rights, the extension of an arbitral clause to non-signatories must also comply with the formal requirement of Article 178 para. 1 SPILA⁴.

² DFT 129 III 727, 735 etc.

³ *Ibid.*, 736

⁴ See J.-F. Poudret, S. Besson, *Droit comparé de l’arbitrage international*, Zurich / Basle / Geneva 2002, 258, with further references in fn. 496; Poudret in his Case Note to DFT 129 III 727 in *ASA Bulletin* 2004, 390 etc.; W. Wenger, M. Schott Article 186 N

A compromise solution is offered by Habegger in his Case Note to DTF 129 III 727⁵: While it is recognized that Article 178 para. 1 SPILA also plays its part in the question of extension of an arbitral clause to a third, non-signatory party, Habegger argues that “no overly strict requirements should apply to the formal validity of an extension of the arbitration clause to a third party”⁶. This compromise solution well summarizes the Swiss Federal Tribunal’s approach as to the formal requirements for an arbitration agreement in matters of extension to non-signatories. To put it briefly: It is not the “in writing”-requirement which is an obstacle to the extension of an arbitration agreement. The true test is whether there was – explicit or implied – consensus by the non-signatory party to be bound by the arbitration agreement.

4. THE EXTENSION OF AN ARBITRATION CLAUSE TO NON-SIGNATORIES IN SWISS PRACTICE

When determining whether there was – explicit or implied – consensus by the non-signatory party to be bound by the arbitration agreement, the Swiss Federal Tribunal applies the ordinary rules of Swiss contract law to ascertain and interpret the behaviour and statements of a non-signatory party. However, one important procedural limitation must be borne in mind: The Swiss Federal Tribunal is not an ordinary appellate body in matters of (international) arbitration. Its scope of review of an arbitral award excludes the facts of a dispute and is limited to the proper application of the law. Consequently, to the extent an arbitral tribunal has concluded that a non-signatory party in fact agreed to be bound by the arbitration agreement in question (i.e. concluded that there was factual consensus by such party), such conclusion will not be reviewed or questioned by the Swiss Federal Tribunal. Thus, only where an arbitral tribunal has interpreted the statements and behaviour of the non-signatory party under aspects of good faith and established a so-called “normative” (implied) consensus, such conclusion is subject to review by the Swiss Federal Tribunal.

28, in *Basler Kommentar IPRG*, 2007². The contrary view – i.e. that the extension of an arbitral clause is not subject to the formal requirements of Article 178 para. 1 SPILA at all – is advocated by M. Blessing, *Introduction to Arbitration – Swiss and International Perspectives*, Basle 1999, 189 etc. This absolute view appears to be shared also by B. Berger, F. Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Berne 2006, 520.

⁵ Ph. Habegger, “Extension of arbitration agreements to non-signatories and requirements of form”, *ASA Bulletin* 2004, 398 etc.

⁶ *Ibid.*, 410.

On what basis may thus an arbitral clause be extended under Swiss law? Two situations must be distinguished: The interpretation of the behaviour and/or the statements of the non-signatory party on the basis of the principle of confidence (*Vertrauensgrundsatz*) and the abuse of rights, in particular the theory of ‘piercing the corporate veil’ (*Durchgriff*), including also the theory of the ‘group of companies’.

4.1. Interpretation of behaviour – Principle of confidence

An arbitral clause may be binding for a third, non-signatory party by virtue of that party’s own behaviour. In other words: The third party may, by its own behaviour, have created the expectation with the counterparty that it (the third party) considered itself bound by the contract and the arbitral clause contained therein. The third party is thus bound by the arbitral clause where the counterparty in good faith interpreted the behaviour of that third as accession to the agreement and the arbitral clause⁷.

Thereby, it must be distinguished between the (implicit) accession to the arbitration clause and the accession to the main contract: A non-signatory party may, based on an interpretation of its behaviour or statements, well be deemed to have agreed to arbitrate disputes in relation to a contract to which it otherwise neither explicitly nor implicitly is a party. Thus, the (sometimes same) statements or the behaviour of a party must be examined twice, once with regard to a possible accession to an arbitral agreement, and once with regard to a possible accession to the main contract.

In a case opposing a Turkish building contractor and a Russian building principal under a construction agreement, the Turkish contractor had sued the Russian principal and a second Russian company (which had not signed the construction contract) for the payment of remuneration. The arbitral tribunal confirmed its jurisdiction over the second, non-signatory defendant in an interim award which was challenged before the Swiss Federal Tribunal. In its decision⁸, the Federal Tribunal upheld the jurisdictional award and confirmed the extension of the arbitration clause to the second, non-signatory party because of various written statements this second party had made to the Turkish claimant in the course of the contractual relationship between that contractor and the principal. In these statements, the second defendant had confirmed an assignment of the rights and obligations under the construction contract from a predecessor company to the current principal, confirmed the financing under the con-

⁷ B. Berger, F. Kellerhals, 521.

⁸ 4P.126/2001 of 18 December 2001.

struction contract and confirmed, together with the principal, the indebtedness for the remuneration towards the Turkish contractor. The Swiss Federal Tribunal held that, to the extent such statements did not already amount to a factual consensus to be bound by the arbitration agreement, they could in any event be understood in good faith as expressing consent to be bound. The second, non-signatory party had not given a separate guarantee but had assumed its indebtedness (*Schuldiübernahme*); in such situation, the arbitral clause follows the assumed obligation. This was the more so since in its statements the second party had made explicit references to the construction agreement.

Another case opposed three Lebanese companies, parties to a construction agreement. The claimant company had also sued an individual (non-signatory of the construction agreement) who was said to exercise control over the defendant companies and who had repeatedly intervened in their management. The arbitral tribunal had held on the basis of Lebanese law (which was said to be influenced by French legal doctrine) that the third party had repeatedly interfered with the execution of the contract by the signatory parties and thus manifested its intention to be party (also) to the arbitral clause. The non-signatory defendant challenged this award before the Swiss Federal Tribunal which rejected the appeal in the above-mentioned decision 129 III 727 of 16 October 2003. This decision is sometimes referred to as example for the Swiss Federal Tribunal's alleged tendency to take a liberal approach to the extension of arbitral clauses to non-signatories. However, the appeal was not rejected because the Swiss Federal Tribunal concurred with the arbitral tribunal's reasoning as to the extension but simply for formal reasons, because the appellant did not properly state its reasons of appeal. Thus, apart from the (more general) statement as to the formal requirements for an extension of an arbitral clause to non-signatories, this decision should not be relied upon too strongly.

Said decision DFT 129 III 727 was referred to and examined in a subsequent decision of the Federal Tribunal⁹, where the Federal Tribunal again emphasized that it is necessary for an arbitral clause to be extended to a non-signatory party that such party constantly and repeatedly intervened in the performance of an agreement and, by doing so, expressed its intention to become party to the arbitral agreement contained therein. In said case, the Federal Tribunal held that the fact that the non-signatory party had given the sellers of a company a guarantee on behalf of the purchaser and subsequently financed the transaction does not amount to such non-signatory party becoming party to the arbitral agreement between sellers and purchaser. The fact that the Federal Tribunal, by refer-

⁹ 4P.48/2005 of 20 September 2005.

ring to decision 129 III 727, again emphasized that an involvement by a non-signatory in the negotiations and the performance of a contract alone is not sufficient for an extension of an arbitral clause shows that it is determined to follow a rather cautious approach vis-à-vis extensions of arbitral clauses.

This is also confirmed by the Swiss Federal Tribunal's decision in case 4A.128/2008 of 19 August 2008: In this case opposing a sub-contractor company from Cyprus and the main contractor company from Qatar regarding the construction of a building complex in Qatar under a construction agreement, the sub-contractor had sued the main contractor as well as the latter's (non-signatory) Italian mother company for remuneration. The involvement of the Italian mother company was based on a "Parent Company Guarantee" in relation to the construction agreement in which the Italian mother company had stated that it "will indemnify [the subcontractor] as if the Guarantor [the Italian mother company] was the original obligor". The arbitral tribunal had refused to extend the arbitral clause of the construction agreement to the Italian mother company. Upon challenge by the claimant Cyprus company, the Swiss Federal Tribunal confirmed the non-extension. It stated that a guarantee was not the same as an assumption of indebtedness and that not every security given by a third party under an agreement between two other parties entailed the extension of the arbitral clause to that third party. The Federal Tribunal held that an extension was only warranted where there existed a specific arbitral agreement with that third party, a sufficient reference to the arbitral clause in the main contract, or a sufficient expression of explicit or implicit consent to be bound by the arbitral clause. Absent any other statements by the mother company, neither the mere parent-daughter relationship nor the mere reference to the main contract in the guarantee were sufficient to justify the assumption of an (implicit) consent to be bound by the arbitral agreement.

4.2. Abuse of rights, 'piercing of the corporate veil' and 'group of companies'

The above examples show that the Swiss Federal Tribunal follows a rather cautious approach when it comes to the interpretation of statements or behaviour of non-signatories with a view to extending an arbitral clause to them. However, even where no such behaviour by the third, non-signatory party exists, such party may be bound by the arbitral clause, based on the theory of 'piercing the corporate veil', or more generally, in cases of abuse of rights, pursuant to the following argument: The autonomy of a legal entity A which is party to an arbitral agreement may be disregarded where a third, non-signatory party B is economically identi-

cal with party A and party B (ab)uses the autonomy of party A merely for the purpose of circumventing otherwise binding obligations vis-à-vis third parties or frustrate a third party's rights¹⁰.

In this respect, the term 'piercing the corporate veil' may be misleading in two ways: On the one hand because it may designate both the reason for extending an arbitral clause to a non-signatory party as well as the ground for a cause of action on the merits against such party, and on the other hand because it may give rise to the assumption that an extension of an arbitral clause is warranted in all situations where a group of companies exists. These issues must be clearly distinguished.

First, the two different instances – jurisdiction and cause of action on the merits – must not be confused, and their separate examination may well lead to different results: While a party may be liable for damage on the basis of theories such as liability for confidence (*Haftung für Konzernvertrauen*), *culpa in contrahendo*, etc., this does not mean that such party automatically also is subject to an arbitral clause of a contract to which it is not party. Second, the mere fact alone, that a concern (i.e. a group of companies) exists does not yet lead to an extension of the arbitral clause to which a company of such group is party to other companies of such group¹¹.

Thus, when examining instances of 'piercing the corporate veil', two (separate) ways may lead to an arbitral clause being binding also for a non-signatory party¹²:

- (i) where the 'piercing of the corporate veil' leads to disregarding the autonomy of the signatory party of the contract and, consequently, to a replacement of such signatory party as party to the contract by the controlling non-signatory party (so-called *echter Durchgriff*); or
- (ii) where it can be established that such third, non-signatory party, by virtue of its own behaviour, has created the bona fide expectation that it considers itself bound by the arbitral clause and, where so found, also by the main contract; in such case the non-signatory party does not replace the signatory party but becomes an additional party to the arbitral clause.

¹⁰ B. Berger, F. Kellerhals, 527.

¹¹ See the decision of the Federal Tribunal in the famous Westland-case of 19 April 1994, DFT 120 II 155 etc., 172; see also the unequivocal statements of the Federal Tribunal in its decision of 29 January 1996, ASA Bulletin 1996, 496 etc., reprinted in F. Knoepfler, Ph. Schweizer, *Arbitrage International*, Zurich / Basle / Geneva 2003, 241 etc., 244; for further decisions see J.-F. Poudret, S. Besson, 234

¹² See B. Berger, F. Kellerhals, 530; W. Wenger, M. Schott, 29; concurring also J.-F. Poudret, S. Besson, 253.

It appears that the Federal Tribunal so far has only once accepted to pierce the corporate veil for reason of abuse of rights, in a decision of 1991¹³, where the sole shareholder of a company had stripped the subsidiary of its assets and even dissolved it.

The piercing of the corporate veil was rejected in the above-referenced decision of 29 January 1996. In that decision, the Federal Tribunal also held, with regard to the group of companies doctrine, that such theory could only be applied very restrictedly and in any event only in cases where particular circumstances exist which would justify the claimant party's confidence in a situation created by the third, non-signatory party. In the referred case, no such circumstances existed as, pursuant to the findings of the arbitral tribunal to which the Federal Tribunal was bound, the claimants (subcontractors) had been aware of their counterparty being their only contractual partner and not member of the consortium of the contractors and the non-signatory mother company (itself a member of the consortium) had not interfered with the performance of the contract other than was required by its position as main contractor to the entire project¹⁴.

5. SUMMARY

Letting aside the question of formal validity of an arbitral clause in relation to non-signatory parties, the practice of the Swiss Federal Tribunal regarding extension of an arbitral clause may be summarized as follows: A non-signatory party is obliged to arbitrate where the statements and behaviour of a such party must in good faith be interpreted so as to meaning that such party considered itself bound by the main contract as a whole or at least by its arbitral clause. Where the statements and behaviour of a non-signatory party may not in good faith be interpreted so as to meaning that such party considered itself bound by the arbitration agreement and/or the main contract, this party may nevertheless be obliged to arbitrate if it has abusively relied on and invoked the autonomy of the signatory party and therefore must, based on the theory of 'piercing the corporate veil', itself be considered to be bound by the arbitration clause as well as the main agreement. This latter argument also applies to the situation where, in a group of companies, a non-signatory party, by its behaviour and statements, has created a bona fide expectation which would justify an extension of the arbitral clause to such party.

The above-referenced cases and the summary show that there exists no objective standard which would be applied by the Swiss Federal

¹³ *ASA Bulletin* 1992, 202, reported in J.-F. Poudret, S. Besson, N 259.

¹⁴ See F. Knoepfler, Ph. Schweizer, 244.

Tribunal to statements or behaviour of a non-signatory party. Rather, the Federal Tribunal's reasoning may be put in the short formula that the decisive factor is the "fair and reasonable expectations" of the parties involved in the dispute. In other words, it does not suffice to examine what has been said or done by a non-signatory party, it must also be taken into account vis-à-vis whom such statement or action was made or was intended to be made. Only the combination thereof would lead the Swiss Federal Tribunal to confirm the extension of an arbitration agreement also to a non-signatory.