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Aims & Scope

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Congruence of the NYC and Swiss lex arbitri regarding extension of arbitral jurisdiction to non- signatories

BGE 145 III 199 (BGer Nr. 4A_646/2018¹)

SIMON GABRIEL²

New York Convention – Form – Arbitration agreement – Extension to non-signatories – Interference of third party – Swiss PILA – Switzerland

The Swiss Federal Tribunal considers that the formal requirements for arbitration agreements of the NYC and the Swiss PILA are congruent. This position of the Federal Tribunal has already been known since 1995 with respect to the (limited) signature requirement when using modern means of communication. The present judgment, however, seems to expressly extend this concept of congruence to further issues such as extension of arbitration agreements to non-signatories.

1. Background

The Slovenian company “C” and the Swiss company “R” maintained a distribution relationship between 2009 and 2015. The relationship had been based on a distribution agreement (“Agreement”) the official term of which had ended in 2014, but the relationship was thereafter *de facto* continued until the end of 2015 (sec. A).

R forms part of a group of companies which includes R’s affiliate “RX AG” (sec. A).

The Agreement contains an arbitration agreement which refers to any claims arising out of or in relation to the Agreement to arbitration of the Slovenian Chamber of Commerce in Ljubljana (Slovenia; sec. A).

¹ ASA Bull. 4/2019, p. 918.

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The Agreement was signed by C. This fact is not in dispute (sec. A).

On the other hand, the Agreement was not signed by R, but rather “*for and behalf of the ‘Distributor’ RX AG*”. The person who signed the Agreement under this caption has at all relevant times been a (solely) authorized signatory of R and RX AG (sec. A).

By submission dated 6 May 2018, C filed several claims under the Agreement against R with the Commercial Court in Aargau (i.e. a state court in Switzerland; sec. B).

R answered that the Commercial Court should reject C’s claims for lack of jurisdiction as these claims were subject to arbitration in Slovenia (sec. B).

Thereupon, C apparently submitted that R was not a signatory of the Agreement (and neither of the arbitration agreement contained therein) and arbitral jurisdiction would thus not apply between C and R (sec. B).

By judgement dated 5 November 2018, the Commercial Court rejected C’s claims for lack of jurisdiction. In particular, the Commercial Court found as follows (sec. B):

By performing under the Agreement for many years, R expressed in an implied manner that it wanted to be a Party to the Agreement. Therefore, R joined the Agreement and thus also the arbitration agreement contained therein.

At the same time, the Commercial Court considered that the formal requirements for arbitration agreements pursuant to Article II paragraph 2 New York Convention (“NYC”) were not fulfilled as (i) R did neither sign the arbitration agreement contained in the Agreement, nor (ii) did it exchange documents to that effect with C as is required by the relevant language of the NYC.

The Commercial Court at the same time found that C had acted in a contradictory manner and thus lost its right to rely on this formal failure (prohibition of *venire contra factum proprium*) because C had expressly confirmed its position that C and R were parties to the Agreement when it submitted the claims on 6 May 2018.

Consequently, the Commercial Court in Aarau rejected C’s claims for lack of jurisdiction (sec. B).

This decision was challenged by C before the Swiss Federal Tribunal (sec. C).

In essence, C disputed any contradictory behaviour and argued that (i) its submissions regarding the Agreement did not necessarily encompass the arbitration agreement which was a separate agreement and (ii) its action before a state court sufficiently demonstrated that it was of the view that the arbitration agreement was not valid (sec. 2). Therefore, its formal arguments should not have been disregarded by the Commercial Court.

2. Decision

First, the Swiss Federal Tribunal largely accepted C's arguments and confirmed that there was no contradictory behaviour of C which would have justified to disregard its formal arguments (sec. 2.2).

Second, the Federal Tribunal also disagreed with the Commercial Court on the issue of the parties to the Agreement. It would have been for the Commercial Court to determine through interpretation of the Agreement whether R was a Party thereto from the very beginning. If this had been the case, the arbitration agreement had been formally valid as it was signed by a solely authorized signatory of R (sec. 2.3).

Third, the Federal Tribunal also disagreed with the Commercial Court on the interpretation of Article II paragraph 2 NYC:

In particular, the Federal Tribunal stated with reference to its earlier decision BGE 121 III 38³, section 2.c that the formal requirements of the NYC were congruent (in German: "*decken sich mit*") with those of Article 178 paragraph 1 of the Swiss Private International Law Act ("PILA"; sec. 2.4).

As a result of this statement, the Swiss Federal Tribunal applied its long-standing practice regarding the extension of arbitration agreements to non-signatories under the PILA (including for parties that interfere with the performance of a contract) to the present case. The Federal Tribunal thus considered that "*signed by the parties*" as mentioned in Article II paragraph 2 NYC meant signed by the initial parties and there was no need for the interfering party (here: R) to be a signatory itself (sec. 2.4).

C's argument that the PILA provided for different and milder formal requirements than the NYC was not accepted by the Federal Tribunal. It rather explained with reference to French and English judgments that even a treaty-autonomous interpretation of the NYC would lead to a result in conformity with the one found by the Federal Tribunal based on the concept of congruent interpretation (sec. 2.4).

After these considerations, the Federal Tribunal accepted for the case at hands R's argument pursuant to which it had interfered with the Agreement in full knowledge of the arbitration agreement and thus expressed its acceptance of the (formally valid) arbitration agreement (sec. 2.5).

Also with respect to the *de facto* continuation of the Agreement after its term had lapsed in 2014, the Federal Tribunal considered that C and R were still bound by the arbitration agreement (sec. 2.6).

³ ASA Bull. 3/1996, p. 488.

In conclusion, the Swiss Federal Tribunal found that an arbitral tribunal in Ljubljana had jurisdiction over C's claims and the judgement of the Commercial Court was thus correct (even though the reasoning was not so in several regards). Therefore, the challenge of C was dismissed (sec. 2.7 and sec. 3).

3. Comments

There are two issues of interest in the present case: namely, the overall congruence of the formal requirements for arbitration agreements under the NYC and the PILA on the one hand and the extension of arbitration agreements to non-signatories on the other hand. For another recent decision dealing with aspects of public policy in connection with an enforcement action under the NYC reference is made to the case BGer 4A_663/2018⁴.

On the **first issue**, the Federal Tribunal's statement that the formal requirements for arbitration agreements under the Swiss PILA and the NYC are in all respects "congruent" (beyond its application to modern means of communications such as telefax or e-mail) is new, important, and at least a little bit surprising in consideration of the different language of the respective provisions:

Article II paragraph 2 NYC provides:

"The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".

Article 178 paragraph 1 of the Swiss PILA provides:

"The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text". (Translation of www.swissarbitration.org, visited on 24 June 2019)

In particular, the requirement of an "exchange" of communications (if the arbitration agreement is not contained in the signed contract) which is expressly provided for in the NYC cannot be found in the text of the PILA.

The last time when the Federal Tribunal made a comparison between the formal requirements of the PILA and the NYC was in the year 1995 in the case BGE 121 III 38⁵, section 2.c to which the Federal Tribunal also referred in its present judgment. This previous case seems to have particularly considered the question of whether a handwritten signature was formally

⁴ ASA Bull. 3/2019, p. 666.

⁵ ASA Bull. 3/1996, p. 488.

necessary or whether modern means of communications should be sufficient, if they evidence the arbitration agreement by text:

“La convention d’arbitrage est passée en la forme écrite. Elle respecte la forme écrite si elle est contenue dans un document signé par les parties ou dans un échange de lettres, télex, télégrammes ou tous autres moyens de transmission d’informations qui permettent d’en établir la preuve ...’ [quote of a commentary on the Uncitral Model Law on International Commercial Arbitration]. L’art. 178 al. 1 LDIP s’inspire manifestement de cette formulation. Celle-ci, qui a pris en compte le développement des moyens modernes de communication, doit donc également servir à l’interprétation de l’art. II al. 2 de la Convention de New York. Il suit de là que les exigences formelles posées par ce traité international se recourent en définitive avec celles de l’art. 178 LDIP (...).”

“The arbitration agreement is concluded in written form. It respects the written form, if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or any other means of transmission of information which permit to establish prove thereof...’ [quote of a commentary on the Uncitral Model Law on International Commercial Arbitration]. Art. 178 para. 1 PILA obviously takes inspiration from this language. This language took into consideration the development of modern means of communication and must therefore also serve as means of interpretation for art. II para. 2 New York Convention. It follows from this that the formal requirements of this international treaty correspond to those of art. 178 PILA.”
(Informal translation)

One could thus have understood this previous case from the year 1995 to specifically concern the question of the signature in modern means of communication, but not any and all aspects of form such as extension to non-signatories.

The Swiss Federal Tribunal has now clarified that it considers – as a rule – formal aspects under Article II paragraph 2 NYC and Article 178 paragraph 1 of the Swiss PILA to be congruent. Whether this congruence also extends to issues where the language of the two provisions expressly differs (such as the requirement of the “exchange” of communications which is merely provided in the NYC) is not specifically addressed in the present case.

A difficulty of this clarified position of the Swiss Federal Tribunal lies, in the author’s view, in the methodological approach chosen: Swiss national principles are applied for the interpretation of the NYC to the extent that they do not conflict with a potential treaty-autonomous interpretation. This is expressed in the following statement of the Swiss Federal Tribunal:

“Es ist daher davon auszugehen, dass sich die Abgrenzung zwischen formeller und materieller Gültigkeit der Ausdehnung einer Schiedsvereinbarung auf eine Drittperson unter der Anwendbarkeit des New Yorker Übereinkommens nicht abweichend von der beschriebenen bundesgerichtlichen Rechtsprechung gestaltet.” (sec. 2.4)

“It thus follows that the distinction between formal and substantive validity of the extension of an arbitration agreement to a third party pursuant to the NYC is not different from the described jurisdiction of the Federal Tribunal.” (Informal translation)

As the NYC is an international treaty, one would rather have expected, as a first step, the autonomous interpretation of the NYC which would then influence the interpretation of Swiss national law – and not application of the Swiss national law to the extent that it does not conflict with the NYC. This former approach was even previously accepted in principle by the Swiss Federal Tribunal (BGE 138 III 520⁶, sec. 5.4.1 with reference to the Vienna Convention).

Indeed, the summarized considerations of English and French decisions show that these courts apparently apply quite different legal concepts than the Swiss Federal Tribunal when it comes to the interpretation of the NYC (the English Supreme Court apparently does not even expressly refer to any formal aspects of arbitration agreements and merely focuses on the issue of substantive consent; sec. 2.4 of the present judgment).

The said analysis of the Federal Tribunal does – at least *prima facie* – not imperatively lead to the conclusion of full congruence between the Swiss *lex arbitri* and the NYC on all formal aspects of arbitration agreements.

If the autonomous interpretation of the NYC in the future should (further) deviate from the long-standing practice of the Swiss Federal Tribunal on Article 178 paragraph 1 PILA the present judgment of the Federal Tribunal may unfortunately lead to legal uncertainty, rather than being a helpful clarification. In particular, it would be entirely unclear whether or not the interpretation of Article 178 PILA would have to follow any developments in the treaty-autonomous interpretation of the NYC (e.g. with respect to the requirement of “*exchange*” of communications which is only provided for in the NYC).

On the **second issue**, the present case is a fair opportunity to recall the specific situations in which the effects of an arbitration agreement can be extended to non-signatories:

⁶ ASA Bull. 1/2013, p. 156.

- (i) if an assignment of a claim, an assumption of a debt or a transfer of a contract takes place;
- (ii) if a third party intentionally interferes with the performance of a contract in full knowledge of the fact that this contract contains an arbitration agreement; or
- (iii) if a contract for the benefit of a third party is concluded; the third party then needs to respect an arbitration agreement as well (unless otherwise stated in said arbitration agreement).

A summary of this legislation can partly be found in the present judgment of the Swiss Federal Tribunal in section 2.4 and in BGer 4A_627/2011⁷, para 3.2 (with further references).

More importantly however, the present decision appears to apply the extension of an arbitration agreement for intentional interference with the performance of a contract **in favour of** the interfering party. To the best of the author's knowledge, the extension for reasons of intentional interference has, to date, typically been applied **against** the interfering party. The reasoning was thereby always based on a "*venire contra factum proprium*" argument: The interfering party should not be in a position to object to an arbitration agreement in a contract under which it had (knowingly) performed.

In the present case, R successfully relied on its own interference with a contractual performance, in order to force C into arbitration. R argued in essence: "Because I have interfered with the performance of this contract and C did not object, I am entitled to rely on the arbitration agreement therein". The Swiss Federal Tribunal did, however, not analyse in detail to what extent C had given its consent to arbitrate with the non-signatory R.

This is an interesting development and it remains to be seen whether or not this is the new standard of the Swiss Federal Tribunal for such cases or rather the exception.

In **conclusion**, while the result of the present decision is certainly correct, there seems to be a risk that the presently applied concept of congruence between the PILA and the NYC on all formal issues of arbitration agreements may lead to legal uncertainty in the future. This could be the case when the treaty-autonomous interpretation of the NYC develops into a direction that is no longer congruent with the PILA.

⁷ ASA Bull. 3/2012, p. 647.

Simon GABRIEL, *Congruence of the NYC and Swiss lex arbitri regarding extension of arbitral jurisdiction to non-signatories*. BGE 145 III 199 (BGer Nr. 4A_646/2018)

Summary

The present decision concerns two relevant subjects:

First, it clarifies the relationship between the formal requirements for arbitration agreements in the NY Convention and in the Swiss PILA. Irrespective of the different wording in these two bodies of law, the Swiss Federal Tribunal considers the formal requirements as congruent.

Second, the issue of the extension of arbitral jurisdiction to non-signatories is analysed: The Swiss Federal Tribunal once more accepts the extension of arbitral jurisdiction for reasons of interference of a third party with the performance of a contract containing an arbitration agreement. Quite unusually however, it did so to the advantage of the interfering third party which is an interesting development.

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