

New Developments in International Commercial Arbitration 2016

Review of the Recent Case Law of the Swiss Federal Supreme Court

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Overview

I. Introductory Remarks and Statistics

II. Review of Specific Cases

- ATF 142 III 239
- ATF 142 III 296
- ATF 142 III 360

III. Closing Remarks

Introductory Remarks and Statistics

- Period under review: 25 August 2015 – 25 August 2016
- 30 decisions rendered by Supreme Court
 - 29 regarding setting aside proceedings
 - 1 regarding enforcement proceedings
- 4 decisions published in the Supreme Court's reporter
- Only 1 successful challenge in a commercial arbitration
 - low success rate of 3.4%
- Most frequently invoked grounds:
 - Violation of the principle of equal treatment and the right to be heard (Art. 190(2)(d) PILA)
 - Incorrect decisions on jurisdiction (Art. 190(2)(b) PILA)
 - Incompatibility with public policy (Art. 190(2)(e) PILA)

Specific Cases – ATF 142 III 239

4A_84/2015 of 18 February 2016

I. Facts

- Parties
 - Iranian company X
 - Cypriot company Z
- Sale of steel from Z to X
- Spring 2012: conclusion of transactions and sales contract
- Negotiations regarding framework contract (long-term relationship) – exchange of drafts
- Wording of the arbitration clause remained unchanged in later drafts

Specific Cases – ATF 142 III 239

4A_84/2015 of 18 February 2016

I. Facts (continued)

- No signing of framework contract
- Dispute arises – Z initiates arbitration proceedings based on unsigned framework contract for payment of outstanding invoices
- X claims lack of jurisdiction
- Sole arbitrator upholds jurisdiction – Art. 178(3) PILA
- Appeal is made by X to Supreme Court – Art. 190(2)(b)PILA

Specific Cases – ATF 142 III 239

4A_84/2015 of 18 February 2016

II. Decision

- Appeal is rejected
- Reasons
 1. Lack of agreement to arbitrate?
 - Doctrine of separability – arbitration agreement is independent from the main contract
 - Basic principle: when a party does not consent to the main contract, the lack of consent will in principle also extend to the arbitration agreement contained therein
 - Exceptions (qualified additional circumstances):
 - previous contracts contain the same arbitration clause
 - parties have a recognizable and objective interest in choosing arbitration
 - exchange of drafts reveals the common will of parties to conclude arbitration agreement

Specific Cases – ATF 142 III 239

4A_84/2015 of 18 February 2016

II. Decision

- Reasons (continued)
 2. Lack of form?
 - Framework contract was in writing pursuant to Art. 178(1) PILA
 - Art. 178(1) PILA is mandatory – the parties cannot agree to a less stringent requirement as to form
 - Indication that parties may agree on stricter form requirements – not the case at hand
 3. Lack of representation?
 - Inadmissible as only one of the principles the sole arbitrator relied on was challenged

Specific Cases – ATF 142 III 239

4A_84/2015 of 18 February 2016

II. Decision

- Reasons (continued)
 4. Not within the scope of the arbitration clause?
 - Rejected as framework contract was connected with the previously concluded sales contract
 - Group of contracts theory – it may be presumed that the parties agreed to arbitration where there is a material connection between a group of contracts, even though only one of them contains an arbitration clause

Specific Cases – ATF 142 III 239

4A_84/2015 of 18 February 2016

III. Key Findings

- Liberal and arbitration-friendly approach by Supreme Court when assessing arbitration clauses
- When parties exchange drafts of a contract they agree to arbitrate only in exceptional circumstances. But are these circumstances really that exceptional?
Caveat for practitioners
- International arbitration as default dispute resolution mechanism for international commercial transactions
- Art. 178(1) PILA as mandatory provision setting out minimum requirements. Indication that Supreme Court allows parties to agree on stricter form requirements

Specific Cases – ATF 142 III 296

4A_628/2015 of 16 March 2016

I. Facts

- Parties:
 - Company X active in the field of hydrocarbons
 - Company Y active in the field of hydrocarbons
- Signing of four contracts relating to the search and exploitation of oil deposits
- Identical dispute resolution clauses provide for arbitration according to the UNCITRAL Arbitration Rules with a preliminary, mandatory conciliation attempt according to ICC ADR Rules
- Y starts conciliation proceedings – first discussion according to Art. 5(1) ICC ADR Rules never takes place as parties cannot agree on the setting

Specific Cases – ATF 142 III 296

4A_628/2015 of 16 March 2016

I. Facts (continued)

- Y initiates arbitration proceedings against X
- X contests the initiation of arbitration proceedings
- Conciliator cannot close proceedings without a first discussion; ICC ADR Center finds that Y has withdrawn from the proceedings
- X participates in the composition of the arbitral tribunal but objects to jurisdiction of arbitral tribunal (*ratione temporis*)
- Arbitral tribunal bifurcates proceedings and renders a preliminary award upholding jurisdiction
- Appeal is made by X to Supreme Court – Art. 190(2)(b) PILA

Specific Cases – ATF 142 III 296

4A_628/2015 of 16 March 2016

II. Decision

- Supreme Court upholds the appeal and sets aside jurisdictional award
- Reasons:
 - Parties wanted the recourse to arbitration to be conditional on the proper conduct of conciliation proceedings (mandatory)
 - A conciliation as agreed has not been conducted
 - X's objection to the arbitral tribunal's jurisdiction was not an abuse of right
 - Decision on the consequences of a breach of a compulsory pre-arbitral ADR procedure:
 - breach must be sanctioned (procedural consequences)
 - proper sanction is suspension of the arbitration proceedings until conciliation is conducted

Specific Cases – ATF 142 III 296

4A_628/2015 of 16 March 2016

III. Key Findings

- Clarification regarding sanction of violation of a mandatory pre-arbitration tier: the arbitral tribunal must stay the arbitration until the pre-arbitral dispute resolution mechanism has been complied with
- Dismissal of other potential sanctions (damages, dismissal of claim)

Specific Cases – ATF 142 III 296

4A_628/2015 of 16 March 2016

III. Key Findings (continued)

- Steps to be taken when dealing with multi-tiered dispute resolution clauses:
 - Is the pre-arbitral clause mandatory?
 - If mandatory: has the party seeking to rely on the non-compliance acted in good faith?
 - If the party acted in bad faith: no reliance on non-compliance of the pre-arbitral clause (even if it is mandatory)
 - If the party acted in good faith and the pre-arbitral clause is mandatory: arbitral tribunal must stay the arbitral proceedings until the conciliation proceedings have been conducted

Specific Cases – ATF 142 III 360

4A_342/2015 of 26 April 2016

I. Facts

- Parties:
 - Group of Turkish companies X
 - German company Z
- SPA between X and Z – sale of shares in company X6 from X to Z
- Obligation on Z to ensure that X6 signs a distributorship agreement with A (company of group X)
- DA: concluded in 2003; terminated by X6 in 2008
- Initiation of ICC arbitration proceedings by X against Z – X claims illegal termination of DA triggered rescission of SPA

Specific Cases – ATF 142 III 360

4A_342/2015 of 26 April 2016

I. Facts (continued)

- Proposal by Z for bifurcation (with one round of briefs) to which X agrees
- Documentation of bifurcation: one round of briefs with witness statements and expert reports
- Arbitral tribunal closes first stage of proceedings; X's request for a second round of briefs is denied
- Arbitral tribunal renders partial award – termination of DA did not trigger rescission of SPA
- Appeal is made by X to Supreme Court – Art. 190(2)(d) PILA

Specific Cases – ATF 142 III 360

4A_342/2015 of 26 April 2016

II. Decision

- Appeal is rejected
- Reasons:
 - General remarks
 - Scope of the right to be heard and equal treatment
 - Restrictions in the field of international arbitration
 - Party can partially waive its right to be heard *ex ante* provided (i) party is fully aware of consequences and (ii) very core of the right to be heard is not affected

Specific Cases – ATF 142 III 360

4A_342/2015 of 26 April 2016

II. Decision (continued)

- Reasons
 - Case specific assessment
 - Arbitral tribunal established common subjective intent of the parties regarding limitation – Supreme Court is bound by finding of procedural fact
 - X was aware of the consequences when it agreed on a single exchange of submissions
 - Very core of the right to be heard is not violated – no quasi-absolute right to respond and no quasi-absolute right to a double exchange of briefs in international arbitration
 - Valid waiver of its right to reply by X
 - Violation of the principle of good faith by X

Specific Cases – ATF 142 III 360

4A_342/2015 of 26 April 2016

III. Key Findings

- Key decision with practical implications
- Parties may validly waive certain aspects of the right to be heard in advance as long as (i) they are aware of consequences and (ii) the core of the right remains untouched
- No absolute right to a double (or more) exchange of briefs and no absolute right to reply
- Parties and arbitral tribunals are bound by the procedural agreements made
- Changing the agreed rules of the game during the proceedings is against the principle of good faith
- Guidance for arbitrators and *caveat* for counsel

Closing Remarks

- No “landmark decisions”, but interesting developments and clarification of case law
- Jurisdictional challenges (Art. 190(2)(b) PILA)
 - Arbitration has become the preferred means of dispute resolution in the context of international commerce (4A_136/2015 of 15 September 2015 and ATF 142 III 239)
 - In general, parties do not conclude an arbitration agreement when exchanging drafts. However, this is possible under exceptional circumstances (ATF 142 III 239)
 - Supreme Court intends to apply its arbitration-friendly approach developed regarding commercial arbitration also to investment treaty arbitration (ATF 141 III 495)
 - If a party disregards a mandatory contractual pre-arbitral clause without a valid excuse, the arbitral tribunal must stay the arbitration until the pre-arbitral clause has been complied with (ATF 142 III 296)

Closing Remarks (continued)

- Principle of equal treatment and the right to be heard (Art. 190(2)(d) PILA)
 - Parties may waive certain aspects of their right to be heard as long as they are aware of the respective consequences and as long as the very core of that right remains untouched. Arbitral tribunal and parties are then bound by such procedural agreements made (ATF 142 III 360)
 - Scope of review with regard to the right to be heard remains very narrow and a wider scope of review is not being considered (4A_202/2016 of 3 August 2016)
- Supreme Court continues to reject a large number of appeals, simply applying the well-established principles in its case law
- The standard of review in international arbitration matters remains very strict and arbitration-friendly

Thank you!

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