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Arbitration Newsletter Switzerland

Just write "ARBITRATION" - and you get it in Switzerland!

On October 7, 2015 the Federal Supreme Court made its most recent decision in the field of international arbitration available on its website[1]. The Federal Supreme Court had to deal with a jurisdictional challenge with rather particular underlying facts which therefore need to be reported in detail.

1. Facts

By a tripartite agreement of July 21, 2009 ("the Distribution Agreement" and also "DA"), to be construed under Swiss law, Laboratory A, a French company specialised in the production of medical products ("FP"), having its seat in Lyon (France), committed itself to sell certain of its pharmaceutical products to an English company ("ED"), which would then pass on those products to a Russian company ("RD"). Amongst other matters the Distribution Agreement contained the following clause:

> *"22 ARBITRATION*
> *Any disputes and disagreements that may arise out of or in connection with this Contract have to be settled between the Parties by negotiations. If no Contract can be reached, the Parties shall submit their dispute to the empowered jurisdiction of Geneva, Switzerland."*

On April 1, 2010 the parties of the Distribution Agreement signed an amendment ("the Amendment"), which did, however, not affect the above provision. In accordance with Article 6 of the Amendment FP and RD only entered on June 9 and 24, 2010 respectively in an agreement under the heading "Quality and Safety Data Exchange Agreement" ("the Exchange Agreement"), which was considered to be an annex to the Distribution Agreement. This Exchange Agreement contained, amongst other, the following clause:

> *"7-1) Governing law - Jurisdiction*
> *This Agreement shall be governed by and constructed in accordance with the laws of France. The Parties shall do their utmost to reach an amicable settlement to any dispute arising hereunder. If no agreement can be reached, the Parties shall submit their dispute to the empowered jurisdiction of Lyon, France. This Agreement constitutes the entire agreement of the Parties hereto with respect to its object and supersedes and cancels any prior representation, commitment, undertaking or agreement between the parties, whether oral or written, with respect to or in connection with any of the matters or things to which such Agreement applies or refers. The English version of this Agreement shall prevail."*

By letter of May 26 2011 FP notified RD that it was terminating the Distribution Agreement with immediate effect.

On May 22, 2013 ED filed, based on Art. 22 DA, a request for conciliatory proceedings at the Court of First Instance of the Canton of Geneva ("the Geneva Court"), in order to initiate proceedings for payment of EUR 2,68 Mio. from FP[2]. As to the jurisdiction of the Geneva Court, ED argued that the pure heading of Art. 22 DA ("ARBITRATION") would not turn this provision into an agreement to arbitrate so, therefore, ED and FP had selected the Geneva Court as forum,

[1] 4A_136/2015 of September 15, 2015, in French.

[2] Such step is generally required under Art. 197 et seq. of the Swiss Civil Procedural Code in order to proceed with claims in Swiss courts.

as provided for in Art. 5 PILA. In addition, ED noted that the term "arbitration" in the Russian language simply means "jurisdiction". As to the absence of RD from the proceedings, ED stated that RD would initiate proceedings against FP in the Courts of Lyons in accordance with Art. 7 of the Amendment. FB objected and argued that Art. 22 DA in fact granted the parties the option to arbitrate disputes at the Geneva Chamber of Commerce and Industry ("CCIG"). However, on April 15, 2014 the Geneva Court granted FP leave to commence court proceedings.

On May 23 2014 ED and RD jointly filed a notice of arbitration at CCIG, claiming again the EUR 2,68 Mio. already claimed at the Geneva Court and RD claiming EUR 0,69 Mio. As to the jurisdiction under the CCIG the two claimants stated that they would now accept the interpretation of Art. 22 DA, as presented by FP at the Geneva Court (see above).

In its answer to the request for arbitration, FP then denied the existence of any binding agreement to arbitrate. In its view, the Distribution Agreement and the Exchange Agreement had conflicting provisions as to jurisdiction and priority should be accorded to the younger agreement - the Exchange Agreement - which declared the courts of Lyons to be competent. RD should, therefore, lodge its claim against FP there and the proceedings between ED and FP in the Geneva Court should be stayed meantime. In addition, FP argued that all relevant elements for a binding agreement to arbitrate, such as designation of the institution, number of arbitrators, duration of the arbitration etc., were missing in Art. 22 DA. Instead, this provision should be interpreted as a dual mechanism for an amicable settlement, first in free negotiations between the parties and, second, in negotiations under the auspices of the CCIG. ED had, in its view, by way of an "aveu judicaire"[3], i.e. in accepting the jurisdiction of the Geneva Court in the conciliatory proceedings, therewith renounced arbitration.

On September 23, 2014 a sole arbitrator appointed by CCIG bifurcated the arbitration proceedings and after an exchange of a second round of briefs rendered his partial award and accepted jurisdiction. This partial award was then challenged by FP at the Federal Supreme Court.

[3] procedural acceptance.

2. Considerations

As always, the Federal Supreme Court started with some general remarks, in the present case by recalling that in challenges of jurisdiction pursuant to Art. 190(2)(b) PILA it reviews the legal issues freely. Nevertheless, it continues to be the duty of the challenging party to submit the pertinent arguments and the Federal Supreme Court is also bound to the facts as stated in the challenged award, except if those facts were established in a manifestly inaccurate way. It then concluded that the provision of Art. 22 DA satisfied the requirements, as established under Art. 178(1) PILA, as to the form of an agreement to arbitrate which must meet such requirements, either under the lex causae or under the law at the seat of the arbitration, both of which were Swiss law in the present case.

Agreements to arbitrate have to be interpreted as any other contractual instrument and such interpretation must establish that the parties had a clear and mutual will to exclude state courts from deciding disputes arising under the pertinent agreement. Agreements to arbitrate which are incomplete, unclear or even contradictory are considered to be pathological arbitration agreements. But as long as the minimal requirement for a valid agreement to arbitrate is fulfilled, namely to resolve disputes under exclusion of the state courts by an arbitral tribunal, such pathological arbitration agreements do not result in the invalidity of such agreement.

The sole arbitrator had, in his challenged partial award, been able to establish such mutual will of the parties to resolve their disputes by arbitration. That conclusion had been based both on an interpretation of the wording of Art. 22 DA and also on the procedural steps undertaken by the parties. Such conclusions were factual conclusions which are binding upon the Federal Supreme Court, irrespective of whether they are right or wrong. But, in the view of the Federal Supreme Court, those conclusions had been correct anyway since the title of the jurisdictional clause - "ARBITRATION" (written in capital and bold letters) - carried particular weight in such analysis. In the Federal Supreme Court's view, the general clause contained in the preamble of the DA according to which headings would have no effect on the

interpretation of the DA[4] was of considerably less importance. In addition, the construction contended for by FP, according to which Art. 22 DA contained a double mechanism for amicable settlement, did not convince the Federal Supreme Court. This interpretation was also not supported by the reference to the "empowered jurisdiction of Geneva" as stated in Art. 22 DA which did not establish state court jurisdiction. Moreover, the international character of the DA needed to be considered: the Federal Supreme Court considered it reasonably likely that three commercial companies, having theirs seats in three different countries not even in the same economical and legal area - Russia on the one hand and France and England on the other hand, being members of the EU - would opt for arbitration as their dispute resolution mechanism rather than to submit to the jurisdiction of a state court of an unrelated country, namely Switzerland. Finally, there was, in the Federal Supreme Court's view, a general trend in international commerce that arbitration be the preferred dispute resolution mechanism and Geneva is a well-known place for that purpose. Whilst Art. 22 DA was of a rather summary nature and must therefore qualify as a pathological arbitration clause which calls for interpretation and amendments, the sole arbitrator had still been in a position to have established the mutual will of the parties to submit their disputes to arbitration and not to state courts.

Thereafter, the Federal Supreme Court dealt also with auxiliary arguments raised by FP which were, however, of minor relevance. In doing so, it rejected FP's argument that the jurisdictional clause in the Amendment, being the younger agreement, for Lyon should prevail. The Amendment was an agreement between FP and RD only in which ED played no part. In addition, the Amendment dealt only with a side issue, namely regulatory matters. The sole arbitrator had, according to the Federal Supreme Court, also correctly pointed out that FP had, in the arbitral proceedings, never raised the argument that RD had not followed the double conciliatory mechanism for which FP now contended. Finally, it also rejected the argument that the starting of the conciliatory proceedings at the Geneva Court constituted an implied waiver of the agreement to arbitrate. It had been FP itself which had, in those conciliatory proceedings, raised the defense that the dispute should go to arbitration and it was, therefore, contrary to good faith to take the opposite position now. Consequently, the Federal Supreme Court rejected the challenge.

3. Conclusions

This decision confirms the very arbitration-friendly position of the Federal Supreme Court. Whilst the agreement to arbitrate in Art. 22 DA was anything but clear, it appears that FP's self-contradictory behavior had been an important contributory element in the sole arbitrator's - and thereafter for the Federal Supreme Court's - finding that there had actually been a valid agreement to arbitrate - be it by the mere wording of Art. 22 DA, the subsequent behavior of FP or a combination thereof.

Nevertheless, it indeed appears that in Russian language the term "arbitration" may have a double meaning - either arbitration in the proper sense of the term or then, more general, "jurisdiction" only. If one puts more emphasis on this part of the arbitration agreement the key argument of the Federal Supreme Court, namely that the header "ARBITRATION" was of such relevance that Art. 22 DA can be construed only as a valid agreement to arbitrate, becomes questionable. In this respect it is also a little surprising how the Federal Supreme Court disposed of the argument that the headers are there for convenience only and have no further effect for the interpretation of the DA (see footnote 4). One could well take another position in this respect too - why is this clause here for at all?

The decision of the Federal Supreme Court is therefore certainly not a landmark decision but it underlines the arbitration-friendly position of the Federal Supreme Court and is, in this respect, noteworthy.

October 22, 2015

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Enclosure: 4A_136/2015 of September 15, 2015, in French

[4] "The headings to clauses are inserted for convenience only and shall not affect the construction of this Contract."