

# Kluwer Arbitration Blog

## A complex matter: Bank guarantees and arbitration agreements

Georg von Segesser (von Segesser Law Offices) · Friday, February 13th, 2009

In a recent decision dated 10 October 2008 (4A\_224/2008), the Swiss Federal Supreme Court found an arbitral tribunal competent to decide on a party's request that its contractual partner should refrain from calling a bank guarantee. A Turkish company active in the production of fertilizer (X A.S.) had concluded a construction contract under which its contractual partner Y. GmbH undertook to reconstruct and modernize a plant run by X A.S. As part of the contract, Y. GmbH undertook to provide for a bank guarantee to secure a down-payment of 15% of the overall price. After the plant had been taken into operation, a dispute arose between the Parties whether the works provided by Y. GmbH had been done properly and X A.S. tried to call the bank guarantee. Y. GmbH introduced proceedings before the competent state courts against the bank as the issuer of the bank guarantee and obtained an order prohibiting the bank from making payments under the guarantee. X A.S. on its part managed to receive an attachment order against the bank, which led to the seizure of assets of the bank in an amount equal to the guarantee. Eventually, Y. GmbH introduced arbitration proceedings against X A.S. under the arbitration clause of the construction contract.

Bank guarantees often raise difficult procedural questions. A party that fears that its contractual partner will call the bank guarantee based on unjustified grounds must act quickly and must decide whether it will act against the bank or against its contractual partner. If it acts against the bank and requests an order that the bank be prohibited from issuing payments under the guarantee, it cannot rely on an arbitration clause contained in the main contract with its contractual partner from a Swiss perspective,. Rather, it has to file a request before the competent state courts at the bank's domicile. This is the path that parties would normally choose in Switzerland. However, there is also the option to file a claim against the contractual partner and request that it be ordered not to call the guarantee, as it was done in the case cited above. In that case, the claiming party is bound to the arbitration clause of the main contract, if such clause exists. As one can see from the decision of the Swiss Federal Supreme Court, a party can pursue both ways in parallel in order to avoid payment of the bank guarantee. We would be interested in hearing from our colleagues what, in their views, the most effective way would be, to prevent payment.

*Georg von Segesser / Andrea Meier*

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The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

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