# “Extension” of the Arbitration Agreement, Joinders, Review of Awards Declining Jurisdiction and Public Policy: News from Paris and Lausanne

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These two decisions raise a number of interesting questions.

Firstly, in countries where (as opposed to Switzerland), the law does not provide that the wrongful denial of jurisdiction of arbitral tribunals is a ground for annulment, the question raised is whether awards having declined the tribunal’s jurisdiction over parties bound by the arbitration agreement (even non signatories), can nonetheless be set-aside on other grounds, such as excess of powers or breach of the tribunal’s mandate?

Secondly, should courts entertaining such challenges proceed to a full review of the award or should the control be limited?

The next logical issue is that of the consequences of the annulment of awards on jurisdiction on subsequent awards rendered by the same arbitral tribunal and between the parties. This problem will arise when jurisdiction has been dealt with in a partial award. Does the nullity of the partial award entail the nullity of subsequent awards?

The Swiss Federal Tribunal has amended the award to extend the arbitration agreement included in the employment agreement to the signatories of the sales contract, which had not been included in the arbitration. This is an important step forward towards the admission of joinders in arbitration, an issue that is still debated amongst authors. Two important issues arise here. First, does the Swiss Federal Tribunal decision dispose of the jurisdictional issue? Has it *res judicata* with respect to the joined parties? Or should the jurisdiction issue be re-litigated with respect to such parties, as they did not have an opportunity to defend themselves on whether or not they are bound by the arbitration agreement?

**"Extension" of the Arbitration Agreement, Joinders, Review of Awards Declining Jurisdiction and Public Policy: News from Paris and Lausanne**

The Paris Court of appeal, on 25 September 2008, and the Swiss Federal Tribunal, on 5 December 2008 (*see* on the Swiss case, Georg von Segesser and Philipp Meier, *Arbitration Clauses: Interpretation and Extension to Non-Signatories*, Kluwer arbitration blog), have rendered two interesting decisions. These two decisions address issues of primary importance, such as the "extension" of the arbitration agreement, joinders, and the scope of review by courts of award having declined the tribunal's jurisdiction.

The case leading to the Paris Court of appeal decision (Paris, 25 Sept. 2008, *Joseph Abela Family Foundation*) relates to a dispute between relatives who were shareholders of a Liechtenstein holding company. The bylaws of that holding company included an arbitration agreement providing for ICC arbitration. Years later the constitution of said company, a dispute arose between family members and shareholders of the holding company, with respect to the sale of certain assets. After having rendered a first award deciding that French law was applicable to the arbitration agreement, the arbitral tribunal rendered a second partial award whereby it declined its jurisdiction with respect to three of the respondents on the basis that they were not signatories of the arbitration agreement. A third partial award then decided on certain issues of time-limitation. The second and third partial awards were successively challenged (under French law, a challenge is immediately admissible against a partial award).

While the Court of appeal dismissed the challenge against the third partial award, it upheld the challenge against the second partial award declining jurisdiction. After having proceeded to an in-depth analysis of the circumstances of the case, the Court of appeal concluded that the three excluded respondents, even if non-signatories, were in reality bound by the arbitration agreement, mainly because of their implication in the performance of the contracts which were the subject-matter of the dispute.

Interestingly, the applicable provision of the French Code of civil proceedings does not contemplate the nullity of an award declining the tribunal's jurisdiction. Article 1502-1 of the Code only provides that an award can be set aside if the arbitrators decided "with no arbitration agreement or on the basis of an invalid or expired arbitration agreement". As a consequence, the nullity was decided on the basis of another provision of the Code, namely Article 1502-3, which permits setting aside an award if the arbitrators did not comply with their terms of reference.

The solution is neither original nor new in French law. On several occasions, French courts based the nullity of an award having declined the tribunal's jurisdiction on the violation of the arbitrators' terms of reference (*See* Paris, 16 June 1988, Rev. Arb. 1989, p. 309, note Jarrosson; Paris, 21 June 1990, Rev. Arb. 1991, p. 96, note Delvolvé; Paris, 7 July 1994, Rev. Arb. 1995, p. 108, note Jarvin; Paris, 26 Oct. 1995, Rev. Arb. 1997, p. 553). The ground of violation of the arbitrators' terms of reference, which was used by the Paris court to fill the gap of Article 1502-1° of the Code, can be compared to that of excess of powers in Article 52 of the Washington convention. ("*It is settled that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments*", 3 July 2002 Ah Hoc Committee Decision in *Vivendi v. Argentina*, § 86; for a criticism of that decision, see Suarez Anzorena, in *Annulment of ICSID Awards*, IAI Series on International Arbitration, n°1, p. 149 seq.). In commercial arbitration, the situation is however not as clear as it may be in investment disputes under the ICSID Convention. Both the NY Convention, the Geneva Convention and the Model Law only contemplate, as a ground for annulment, the invalidity of the arbitration agreement, or the fact that the award deals with a dispute not contemplated by or no falling within the terms of the submission to arbitration, or

the fact that the award contains decisions on matters beyond the scope of the submission to arbitration. Literally, those grounds for annulment do not encompass the case in which the arbitral tribunal declines its jurisdiction in breach of a valid arbitration agreement. It can be noted, in this respect, that Article 16-1 of the Model Law also only refers to cases in which the arbitral tribunal retains its jurisdiction, as opposed to cases in which it *declines* jurisdiction over a particular dispute.

Excluding courts' review on decisions of tribunals' declining jurisdiction in breach of an arbitration agreement is of course not satisfactory. A party is either bound by the arbitration agreement or not. In the former case, other parties bound by the arbitration agreement have a right to arbitrate against that party, and any decision denying such right needs to be set aside. It is neither in the power nor in the discretion of an arbitral tribunal to exclude from the arbitration a party to which the arbitration agreement is indeed applicable.

The case leading to the Swiss Federal Tribunal decision of 5 December 2008 (4A_376/2008) relates to a shares purchase agreement. The agreement provided for the transfer of certain shares of company B. Ltd. by a company C. Ltd. (who owned the shares in its capacity of trustee of a beneficiary D) to a purchaser A. Party B was mentioned in the contract as director and creditor. The sales contract provided for arbitration by "the Arbitration Court of the International Chamber of Zürich in Lugano".

On the same date, company B. Ltd. and A entered into an employment agreement, including the same arbitration agreement as in the sales contract. A dispute arose between A and company B. Ltd. under the employment agreement. Company B. Ltd. started ICC arbitration proceedings on the basis of the arbitration agreement contained in the contract.

Respondent A first objected that the arbitration agreement was pathological and did not provide for ICC arbitration, but for the arbitration of the Zürich Chamber of commerce. The Swiss Federal Tribunal, having decided that the arbitration was an international one pursuant to Swiss law, upheld the jurisdiction of the ICC sole arbitrator by holding that in case of doubt, the arbitration agreement has to be construed according to the parties will and that it was in the case beyond doubt that the parties had intended to submit their dispute to an arbitration institution; the question was in fact to interpret the parties will as to which institution they referred to in their agreement. The Swiss Federal Tribunal held on this point that the history of the negotiations between the parties demonstrate their clear intention to refer to ICC arbitration. The arbitration agreement having been concluded in 2006, i.e. two years after the entry into force of the Swiss Rules, the clause could not have been read as a reference to the arbitration of the Zürich Chamber (as the parties would in such a case have referred to the Swiss Rules).

The award was alternatively challenged by A on the ground that the sole arbitrator had declined jurisdiction over the sales contract and its parties (namely, company C. Ltd., B and D). The sole arbitrator had in fact decided that arbitration being based on consent, third party intervention cannot occur without the consent of all interested parties noting that the ICC Rules do not provide for any procedural mechanism for third party intervention. The sole arbitrator as a consequence held that the parties to the arbitration were only company B. Ltd. (claimant) and A (respondent), and that third parties D., company C. Ltd. and B. (signatories to the sales contract) could not be joined thereto.

The Swiss Federal Tribunal, as the French court did, disagreed with the Tribunal's finding on jurisdiction. The Tribunal first stated that when dealing with an issue of jurisdiction it "*freely examines the issues of law, including preliminary issues, that determine the jurisdiction or lack of jurisdiction of the arbitral tribunal*", and by so doing the court does not become, "*an appellate tribunal*" (§ 6). Further, the Swiss Federal Tribunal decides that when the arbitral tribunal deals with issues of jurisdiction, it has the duty "t*o decide who are the parties bound by the arbitration agreement and decide whether the arbitration agreement should be applied to non signatories*" (§ 8.3). The decision

thus clearly confirms, as provided by Article 190-2 (b) of the Swiss Private International Law Act (PILA) that an award declining the arbitral tribunal's jurisdiction can be fully reviewed.

The Swiss Federal Tribunal also recalls that "*Swiss case law* – the law applicable in the present case – *has already acknowledged the possibility of extending the arbitration agreement to non signatories, in spite of the fact that the written form is one of the requirements for the validity of the arbitration agreement pursuant to Article 178 PILA. Such an extension can occur in cases of assignment, or transfer of a debt. It has also been admitted that, in particular cases, the requirement of form can be satisfied by the conduct of the parties involved. For example, when the third party has interfered in the performance of the contract including the arbitration agreement, its conduct allow to conclude, on the basis of conclusive factual evidence, that such party intended to accept the arbitration agreement (DTF 134 III 565, par. 3.2 and quotes)*" (§ 8.4).

The Swiss Federal Tribunal then proceeded to a careful examination of the facts and decided that the two contracts were closely intertwined, and were the expression of a same contractual operation. According to the Swiss Federal Tribunal, the employment agreement (on which basis the arbitration was started was instrumental to the performance of the sales agreement (in that it provided for non competing obligations which had to be enforced until transfer of the shares occurred, as well as for certain provisions relating to the management of company B. Ltd., *see* for more details on this case: Georg von Segesser and Philipp Meier, *Arbitration Clauses: Interpretation and Extension to Non-Signatories*, Kluwer arbitration blog ). The Swiss Federal Tribunal concluded that a breach of the employment agreement had correlative consequences on the performance of the sale agreement.

As a consequence, the Swiss Federal Tribunal decided that "*in view of the intense participation of D, B, and company C. Ltd. in the negotiation of the employment agreement and their role in the performance of said agreement, such parties are bound by the arbitration agreement included in said contract, which content is, besides, identical to that included in the sales contract*".

These two decisions raise a number of interesting questions.

### *Challenge of decisions declining jurisdictions*

In countries where (as opposed to Switzerland), the law does not provide that the wrongful denial of jurisdiction of arbitral tribunals is a ground for annulment, the question raised is whether awards having declined the tribunal's jurisdiction over parties bound by the arbitration agreement (even non signatories), can nonetheless be set-aside on other grounds, such as excess of powers or breach of the tribunal's mandate? The answer should, in our view, be positive. A party trying to enforce an arbitration agreement would otherwise be deprived of any recourse leading to a potential form of denial of justice.

### *The extent of review: minimalist vs. maximalist*

Should courts entertaining such challenges proceed to a full review of the award or should the control be limited? The Paris Court of Appeal decision has been criticised as amounting to a review of the merits (Clay, Dalloz 2008, n°44, pp. 3117-3118). But it is generally accepted that the judge, when reviewing an award having declared its jurisdiction, can proceed to a full review of the award in fact and in law (in France, *see* Civ. 6 January 1987, *Plateau des Pyramides*, Rev. Arb. 1987, p. 469, note Leboulanger; Paris, 23 October 2003, Rev. Arb. 2006, p. 149; Paris, 15 May 2008, Rev. Arb. 2008, p. 344). The reason behind allowing full review on the issue of jurisdiction is that the arbitral tribunal would otherwise have the possibility to create its own jurisdiction ex nihilo, which is unsustainable. Why should the control be more limited when the arbitral tribunal wrongly declines its jurisdiction?

The issue as to the extent of review of courts seized of an annulment action has given rise to an intense debate among French scholars and created a division between those in favour of a minimalist approach, among which the present authors, and those clearly favouring a maximalist approach. The terms of the debate were however substantially different and the reasons militating for or against one conception were concerned with substantive public policy, as opposed to procedural public policy. The precedent is now in French law set up by the much-debated Thales case (see Radicati Di Brozolo, *L'illicéité "qui crêve les yeux": critère du contrôle des sentences au regard de l'ordre public international*, Rev. Arb. 2005, p. 529 *contra* Seraglini, *L'affaire Thalès et le non usage immodéré de l'exception de l'ordre public*, Cahiers de l'arbitrage, Recueil Vol. III, p. 87) and the recent confirmation by the French *Cour de cassation* in the *SNF v. Cytec* case (Civ. 4 June 2008, Rev. Arb. 2008, p. 473, note Fadlallah; JDI. 2008, pp. 1107, note A. Mourre ), which decided that the violation of international public policy should be blatant, effective and concrete. It is however submitted that the terms of this debate cannot be imported to grounds of procedural public policy, including those relating to the Tribunal's jurisdiction. When it comes to ascertaining an arbitral tribunal's jurisdiction, courts have full power to review in fact and in law whether a tribunal rightfully accepted and, for present purpose, wrongfully declined jurisdiction over the subject matter of the dispute and over all the parties deemed to be bound by it, whether original signatories or attracted to the arbitration by extension of the arbitration agreement.

***The effects of the annulment of partial awards on subsequent awards***

The next logical issue is that of the consequences of the annulment of awards on jurisdiction on subsequent awards rendered by the same arbitral tribunal and between the parties. This problem will arise when jurisdiction has been dealt with in a partial award. Does the nullity of the partial award entail the nullity of the subsequent awards? There is probably no general answer to this question (in this respect see A. Pinna, *L'annulation d'une sentence arbitrale partielle*, Rev. Arb. 2008, pp. 615 seq.). If the award is quashed because the arbitration agreement is invalid, all subsequent awards rendered on the basis of such clause will logically be null and void. If, on the contrary the award is partially set aside because the arbitration agreement was not applicable to certain parties, but applicable to others, subsequent awards may stand in respect to such other parties. The situation of an award having wrongfully declined jurisdiction is a bit different. In the Abela case, the Paris Court of appeals rejected the challenge against the third partial award, dealing with issues of time limitation. The question is then: is that third partial award applicable to the parties in respect to which the arbitral tribunal had (wrongfully) declined its jurisdiction? That would certainly be difficult to accept, as those parties did not participate to the phase of the proceedings leading to the third (not quashed) partial award. Should the conclusion not be that the same issues would have to be re-judged with respect to those third parties? But is the arbitral tribunal still impartial to decide the same issues a second time? If not (and assuming another tribunal would have to be appointed), isn't there a risk of conflict of decisions? Certainly, all those issues should be considered with care by arbitral tribunals considering a bifurcation.

***The path towards joinder of third parties in commercial arbitration***

The Swiss Federal Tribunal has amended the award to extend the arbitration agreement included in the employment agreement to the signatories of the sales contract, which had not been included in the arbitration (company C. Ltd., D and B). This is an important step forward towards the admission of joinders in arbitration, an issue that is still debated amongst authors (see Mourre, *L'intervention des tiers à l'arbitrage,* Cahiers de l'arbitrage, Recueil, Vol. I, pp. 100 – 109 and Rev. Brasil. Arb. pp 76 – 97). Two important issues arise here. First, does the Swiss Federal Tribunal decision dispose of the jurisdictional issue? Has it *res judicata* with respect to the joined parties? Or should the jurisdiction issue be re-litigated with respect to such parties, as they did not have an opportunity to defend themselves on whether or not they are bound by the arbitration agreement? The second issue

regards the applicable institutional arbitration rules (in case, the ICC Rules). How can the Swiss Federal tribunal's decision to modify the award and join third parties be conciliated with the Rules? Should the Rules be amended to include a joinder provision? Such a joinder provision exists in the Swiss Rules. In the case of the ICC Rules, it may however have to take into account the role of ICC Court of arbitration in deciding *prima facie* whether the arbitral agreement is applicable. This is indeed the solution adopted in the new ICC model clause for trusts disputes (ICC Bull Vol. 19/No2, 2008). Any joinder provision would also have to take into account the principle of equality of the parties in the constitution of the arbitral tribunal, as established by the French Supreme court in *Dutco* (Civ, 7 January 1992, Rev. Arb. 1989, p. 470, note P. Bellet). It remains to be seen whether or not this path will be followed…

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