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Swiss Federal Supreme Court Denies the Applicability of an Arbitration Clause in the Articles of Association to Liability Claims Against Board of Directors of an Insolvent Company

Georg von Segesser (von Segesser Law Offices) · Wednesday, July 7th, 2010

In a decision dated 8 December 2009, published on 13 June 2010 (case 4A_446/2009, published as 136 III 107), the Swiss Federal Supreme Court held that persons acting as board of directors of a company that subsequently became insolvent cannot rely on an arbitration clause contained in the articles of association of that insolvent company for liability claims filed against them by the insolvent company's creditors.

Background

The articles of association of corporation Y ("Y") contain an arbitration clause which applies in case of a dispute between Y and its members of the board of directors or its shareholders. On 5 January 2004, Y was declared insolvent. In March 2007, Y's shareholder and creditor A ("A") filed a liability claim before the commercial court of canton of Bern requesting that the members of Y's board of directors be ordered to pay CHF 1m. The respondent board member X ("X"), in turn, raised a plea of arbitration based on the arbitration clause contained in Y's articles of association.

On 7 July 2009, the commercial court of canton of Bern decided that the arbitration clause did not include the dispute at hand and that the court had jurisdiction over the matter. Subsequently, X filed an appeal against the commercial court's decision before the Swiss Federal Supreme Court.

Decision

The Federal Supreme Court dismissed X's appeal and confirmed the commercial court's holding that the arbitration clause did not apply. It held that by filing a liability claim against Y's board members, A was not enforcing the rights of Y against its board members, but was enforcing the rights of Y's creditors. For this reason, a board member could not bring forward all defenses it could have brought forward against a claim filed by Y itself. He could only bring forward the defenses he had against Y's creditors.

The Supreme Court held that the plea of arbitration was not a defense X could bring forward against Y's creditors. It was a defense X could only bring forward against a claim filed by Y itself. If such a defense could be brought forward against Y's creditors, there would be a risk that, due to an arbitration clause in the articles of association, the enforcement of liability claims of creditors could be hindered. Since Y's creditors had no influence on the content of the articles of

association, they were not bound by the arbitration clause contained therein.

Comment

Liability claims against members of the board of directors can generally, in domestic and in international cases, be submitted to arbitration. This, however, is only the case where the arbitration clause satisfies the form requirements and where, e.g., the shareholders or board members – later a party to the dispute – validly consent to the respective arbitration clause. The consent requirement can be satisfied if a shareholder, when purchasing the company's shares, or a member of the board, when accepting the appointment, at least by way of referral to the arbitration clause in the articles of arbitration consent to such arbitration clause. On the contrary, an arbitration clause is neither binding on those shareholders who purchased their shares prior to inclusion of the arbitration clause in the articles of association nor is it binding on the company's creditors. With respect to the latter, it is established in legal literature that an arbitration clause is in particular not binding in the case of an insolvent company, where a creditor files a liability claim against the board members on behalf of all creditors of an insolvent company. The present case, published in the official Federal Supreme Court Case Reporter, confirms the existing view.

Georg von Segesser / Petra Rihar

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