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How far does “any dispute related to the […] agreement” go?

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In a decision dated 20 September 2011, the Swiss Federal Supreme Court held that the arbitration clause contained in a License Agreement for boxing equipment, interpreted by the CAS arbitral tribunal as referring to any dispute related to the said agreement, could equally cover disputes arising out of other related contracts, such as the contract for the sale of the same boxing equipment (4A_103/2011).

Facts

In 2005, a boxing association entered into a Licencing Agreement with a manufacturer of sports goods according to which the manufacturer was entitled to manufacture and sell boxing equipment approved by the association against the payment of royalties. The contract contained the following arbitration clause: “Should a disagreement over the interpretation of any terms of this Agreement arise, the Parties agree to submit the dispute to the Court of Arbitration for Sport, Lausanne Switzerland, whose decision shall be final and binding on both parties. […]”. In 2005 and 2006, the association ordered boxing equipment from the manufacturer. In 2007, the association declared that the Licencing Agreement had come to an end in December 2006.

The manufacturer filed a request for arbitration before the Court of Arbitration for Sport (CAS) in January 2009, requesting amongst other claims payment for the sale of the boxing equipment. The association disputed the jurisdiction of the CAS. In its award dated 5 January 2011, the CAS panel determined that the arbitration clause was to be understood as applying to “any dispute related to the Licensing Agreement” and therefore confirmed it had jurisdiction and partially granted the reliefs sought by the manufacturer.

The association appealed against the award to the Swiss Federal Supreme Court. It mainly argued that the CAS panel did not have jurisdiction to rule on the sale of the goods since the sale was not covered by the arbitration agreement contained in the Licencing Agreement.

Decision

The Swiss Federal Supreme Court dismissed the appeal. It declared that the arbitration clause contained in the Licencing Agreement, although its wording could be seen as restrictive, was meant to extend to disputes related to the sale of boxing equipment covered by the Licencing Agreement and therefore that the dispute regarding the payment of the sales price fell under the jurisdiction of the arbitration clause.

Comment

This decision serves as a reminder of the rules applying to the interpretation of an arbitration agreement (notably regarding its scope) under Swiss law and of the Swiss Federal Supreme Court’s power of review when confronted with a jurisdiction objection.

Under Swiss law, when interpreting a contract (including the arbitration clause) a judge or arbitrator must first search the actual and mutual intent of the parties, which prevails over the

wording (“subjective interpretation”). Only where it is not possible to ascertain the parties’ actual intent, a judge or arbitrator must, on the basis of the concrete circumstances of the matter, seek by “objective interpretation” what the parties should be deemed to have intended in good faith.

If an arbitral tribunal has determined its jurisdiction by objective interpretation of the content of the arbitration agreement, it has answered an issue of law which can be examined by the Supreme Court with unfettered power. If, however, the arbitral tribunal has based its decision on the finding of facts, i.e. the parties’ real intention, such finding will not be subject to any review upon appeal to the Supreme Court.

In the case under review, the CAS panel carried out a subjective interpretation when it determined that the wording “disagreement over the interpretation of any terms of this Agreement” contained in the arbitration clause should be understood as meaning “any dispute related to the Licensing Agreement”. As such, the CAS panel’s conclusion was final and not open to review by the Swiss Federal Supreme Court.

The review by the Supreme Court was therefore limited to deciding whether the arbitration clause, as interpreted by the arbitral tribunal, could encompass claims related to the sale of the boxing equipment.

When considering the scope of the arbitration agreement, the Swiss Federal Supreme Court shows flexibility. The Swiss Federal Supreme Court has ruled in previous cases that the wording “any dispute related to the agreement” is not restrictive and includes any dispute regarding the existence, validity and termination of contract as well as matters related indirectly to the dispute submitted to arbitration; such an arbitration clause can also extend to ancillary or accessory contracts except if such contracts contain a specific dispute resolution clause. That being said, no presumption of jurisdiction applies.

According to the Swiss Federal Supreme Court, the wording of the arbitration clause contained in the Licencing Agreement seemed to restrict its scope of application to disputes resulting directly from the Licencing Agreement such as e.g. the supply of approval labels. However, the circumstances surrounding the case and notably the statutes of the association, although the manufacturer was not a member thereof, showed that the association had expressly taken all steps to avoid recourse to ordinary tribunals and referred all matters to the jurisdiction of the CAS, a measure which was deemed to extend to all persons or entities involved in boxing, whether closely or remotely. The Swiss Federal Supreme Court noted a contradiction in the position taken by the association in its own by-laws and that argued in the proceedings. It went on to analyse what justification the association would have to recourse to ordinary courts instead of arbitration in the present case and found none.

What is interesting in the above analysis is that the Swiss Federal Supreme Court reviewed the association’s conduct with its own members, i.e. parties not involved in the arbitration, in order to determine the scope of the arbitration agreement it had entered into with the manufacturer. In doing so, the Swiss Federal Supreme Court reaffirmed its flexibility when considering the scope of the arbitration agreement.

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