

# Kluwer Arbitration Blog

## Swiss court decision denying validity of arbitration agreement overturned for excess of power

Matthias Scherer (Editor in Chief, ASA Bulletin; LALIVE) · Monday, November 5th, 2012

In a recently published decision dated 6 August 2012 (4A\_119/2012), the Swiss Federal Supreme Court confirmed its own jurisprudence according to which state courts facing a jurisdictional defense based on an alleged arbitration agreement must not assess in full the validity of the arbitration agreement. In such cases, the state court must limit itself to a summary examination of whether or not a valid arbitration agreement exists.

The case which gave rise to the Supreme Court's decision dealt with an asset management agreement concluded by a wealthy German businesswoman, Ms. Y, with Asset Manager X. Pursuant to the agreement, Ms Y had transferred a total amount of DM 1.5 million into a bank account opened with Bank A over which the director of X was given a power of attorney.

After four years, Ms. Y and Asset Manager X entered into a trust and mandate agreement with U Inc., Panama, for the setting up of a Panama Foundation. The asset manager was given the role of managing all assets of the newly created Panama Foundation, the beneficiaries of which were Ms. Y and her son. The mandate and trust agreement, signed by U Inc. and Ms. Y, as well as by the Asset Manager X as general proxy holder, was made subject to Swiss Law and contained the following arbitration clause:

“All disputes arising out or in connection with this agreement are to be resolved by a Sole Arbitrator in accordance with the International Arbitration Rules of the Zurich Chamber of Commerce with seat in Zurich, under exclusion of the ordinary state courts.”

Ms. Y transferred an amount of EUR 446,521 to the account of the Panama Foundation. However, the initial amount of DM 1.5 million was not included in the assets of the Foundation.

Dissatisfied by substantial losses suffered by herself and by the Foundation, which Asset Manager X had in the meantime wound up without her knowledge, Ms Y initiated proceedings against Asset Manager X before the Zurich Commercial Court. She sought compensation for damages incurred and a full accounting of all finder's fees and commissions (according to a relatively recent decision of the Swiss Federal Supreme Court, a bank or fund must disclose such commissions to the account holder, who is entitled to be credited the amount of the commissions).

Asset Manager X objected to the jurisdiction of the Commercial Court, taking the position that the dispute fell within the scope of the arbitration agreement in the mandate and trust agreement. The

Commercial Court of Zurich rejected the objection. It found that it had jurisdiction to decide all claims resulting from the management of Ms. Y's and the Foundation's assets unless such claims were directly based on the mandate and trust agreement. This was not the case since Ms Y's claims in the Zurich court were rooted in another (earlier) mandate relationship, an agency of necessity, and an asset management agreement that contained no arbitration clause.

Asset Manager X appealed the Commercial Court's decision on jurisdiction before the Swiss Federal Supreme Court. He took the view that the Commercial Court had exceeded its jurisdiction by performing a full blown analysis of the scope of the arbitration agreement rather than subjecting the clause to a summary review only. As the arbitration agreement in the mandate and trust agreement was valid, a summary review would inevitably have led the Commercial Court to deny its own jurisdiction and to refer the parties to arbitration.

The Supreme Court upheld the appeal and annulled the Commercial Court's decision. It recalled its earlier case law that the state courts' power of review of an arbitration agreement is limited to a summary, *prima facie*, examination (Article 7 PIL Act). The courts can only admit jurisdiction over a party invoking an arbitration agreement if it is manifestly void or inapplicable.

The Swiss Federal Supreme Court added that the prohibition of full review not only applies to the question of the existence of the arbitration agreement, but also to the question of its scope. In the case at hand, the Zurich Commercial Court had exceeded its powers by construing the arbitration clause in full. The Supreme Court found that a proper (summary) review of the clause would have shown that the arbitration agreement was *prima facie* applicable, subject to a later decision by the arbitral tribunal. It was undisputed that there existed a valid arbitration agreement between the parties. In such circumstances, nothing justified a restrictive interpretation of this arbitration clause. To the contrary, the parties' intent to have their disputes decided by an arbitral tribunal must be respected and it must not be presumed that the parties would choose to have one aspect of their relationship decided by a state court and another by an arbitral tribunal. Furthermore, the inclusion of the terms "arising out of or in relation to" the contract in the arbitration clause was *prima facie* evidence of the parties' intent to have all claims arising from or directly related to the subject matter governed by the contract decided by an arbitral tribunal, even if they allegedly concerned another mandate.

The matter recalls an earlier Swiss Federal Supreme Court decision, dated 9 January 2008 (4A\_436/2007, ASA Bull. 2/2008, pp 329-352), dealing with a French couple which had retained a Geneva lawyer to organize the establishment of their domicile in Geneva and to negotiate a tax arrangement with the local authorities. The clients signed a power of attorney which contained an arbitration agreement. Some time thereafter, the French couple asked their lawyer whether the purchase of a house in Geneva would have an impact on their tax arrangement. The lawyer advised that it would not, and the French couple proceeded to buy the house. Contrary to the lawyer's advice, however, the authorities increased the tax payable by the couple. The couple sued their lawyer in the Geneva Court.

The lawyer objected to the Geneva Court's jurisdiction based on the arbitration agreement in the power of attorney, however the Court dismissed the objection and heard the case. The lawyer then appealed to the Supreme Court, arguing that the lower court had exceeded its power by fully examining the applicability of the arbitration agreement, rather than performing only a summary review. The Supreme Court dismissed the argument, ruling that it would have been evident to the lower court, even in a summary review, that the arbitration agreement was not applicable to a new

mandate for which the lawyer had been retained after having completed the previous mandate, which was covered by the power of attorney.


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