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Swiss Supreme Court analyses enforceability of pre-arbitral procedure in multi-tier dispute resolution provision (FIDIC DAB)

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In a judgment dated 7 July 2014, which was made public on 20 August 2014 (case no. 4A_124/2014), the Swiss Federal Supreme Court (the "Supreme Court") addressed the enforceability of a precondition for arbitration in a multi-tier dispute resolution provision, namely the requirement to submit a dispute to a dispute adjudication board ("DAB") under Clause 20 of the FIDIC Conditions of Contract (the "FIDIC Conditions"). The Supreme Court's decision is generally in line with the trend in Swiss jurisprudence to uphold obligations to resort to pre-arbitral procedures if they are unambiguous. However, the decision is important in a number of other respects. In particular, the Court addressed the issue of the law applicable to the interpretation of a multi-tier dispute resolution provision, and made clear that, under Swiss law, the enforceability of a precondition for arbitration must be assessed on a case-by-case basis, even when it is contained in a standard form contract. In addition, the Court's decision shows that even if a pre-arbitral requirement is enforceable, it will usually not be absolute.

The facts of the case and the arbitral tribunal's award

The Supreme Court's decision concerned a challenge of a partial award in which the ICC arbitral tribunal found that it had jurisdiction to hear a dispute under Clause 20 of the FIDIC Conditions despite the fact that DAB proceedings had not taken place. According to the facts set out in the Supreme Court's redacted judgement, the dispute arose under a construction contract between a French road contractor (the "Contractor") and the State-owned highway company of an unnamed country (the "Owner") which incorporated the 1999 FIDIC Conditions (the Supreme Court did not specify which Book), and in particular provided in Clause 20 for an *ad hoc* rather than a standing DAB. In 2011, the Contractor notified the Owner of its intention to refer a dispute to the DAB under Clause 20, and the parties labouriously tried to constitute the DAB over a period of several months. Three members were eventually appointed, but no Dispute Adjudication Agreement was ever executed. Ultimately, in 2013, the Contractor initiated arbitration under the ICC Rules.

The Owner objected to the arbitral tribunal's jurisdiction, arguing that before arbitration could be initiated, the DAB proceedings had to be completed. The arbitral tribunal issued a partial award on the issue, with the majority of its members finding that it had jurisdiction despite the fact that the dispute had not been previously decided by the DAB. In its reasoning, which is summarised in the Supreme Court's judgment (para. 3.1.1), the tribunal appears to have relied mainly on a grammatical

interpretation of the sub-clauses of Clause 20, in particular the use of the term "may" in Sub-Clause 20.4, to conclude that submission of a dispute to the DAB was not a precondition to initiating arbitration proceedings. The arbitral tribunal also noted in an *obiter* statement, relying on a previous decision of the Supreme Court (4A_18/2007 dated 6 June 2007), that the fact that the contract did not set out a time limit for the constitution of the DAB suggested that the DAB procedure was intended to be optional.

The decision of the Supreme Court

The Owner sought to set the partial award aside before the Supreme Court, which has exclusive jurisdiction to handle annulment requests for all international arbitration proceedings in Switzerland. Alternatively, the Owner requested that the arbitration be suspended pending the outcome of the DAB proceedings. While the Supreme Court disagreed with the arbitral tribunal's finding that DAB proceedings were not a prerequisite for the initiation of arbitration under Clause 20, it recognised that there were exceptions which were applicable in the case before it, and therefore rejected the challenge.

In its decision, the Court first addressed the issue of the law applicable to the interpretation of a multi-tier dispute resolution clause. While the law applicable to the contract was not Swiss law, the Court found that, pursuant to Article 178 of the Swiss Private International Law Act ("PILA"), it should conduct its interpretation of Clause 20 under Swiss law, the law of the seat of the arbitration. While Article 178 PILA defines the law applicable to arbitration agreements, the Supreme Court considered that provisions dealing with pre-arbitral procedures should be interpreted under the same law as the arbitration agreement, as doing otherwise would be artificial and could lead to unnecessary complications.

Turning to the text of Clause 20, the Supreme Court paid short shrift to the majority arbitrators' reasoning. According to the Court, the use of the term "shall" in Sub-Clause 20.2 ("disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 …") led to the conclusion that the DAB proceedings were a mandatory precondition for arbitration. The use of the term "may" in Sub-Clause 20.4 ("either Party may refer the dispute in writing to the DAB …") had to be read in the context of Sub-Clause 20.2, and did not qualify the mandatory nature of the precondition. The Court also rejected the arbitral tribunal's *obiter* statement concerning the absence of a contractual time limit for the constitution of the DAB. According to the Court, the absence of such a time limit could not in itself indicate that the pre-arbitral DAB proceedings were intended to be optional. The 2007 Supreme Court decision on which the arbitral tribunal had relied did not support its reasoning, as it dealt with a multi-tiered arbitration clause providing for mediation which was drafted in far more permissive terms than Clause 20.

The Court accepted, however, that there are exceptions to the requirement to submit a dispute to the DAB, and that in the case before it, the fact that no DAB proceedings were initiated was not fatal to the arbitral tribunal's jurisdiction. The Court recalled that the *raison d'être* for the introduction of the DAB in the FIDIC Conditions was to allow for an efficient resolution of disputes arising during the construction works, in a manner that would not put the works into jeopardy. It noted that in the case before it, the constitution of the *ad hoc* DAB had begun after the completion of the works, at a time when the parties' positions were undoubtedly already irreconcilable, and therefore that it was unlikely that DAB proceedings would prevent the dispute from subsequently being submitted to arbitration. It further noted that the DAB was not operational even though 15 months had passed since the Contractor's referral – a period five times longer than the 84-day period contemplated in the FIDIC Conditions for the DAB to render its decision – and that the Owner had dragged its feet in the process of constituting the DAB. In the circumstances, the Court considered that the Contractor could not be

blamed for having lost patience and initiating arbitration.

Conclusion

The Supreme Court's decision provides helpful guidance on the interpretation of multi-tier dispute resolution provisions, in particular those setting out pre-arbitral procedures. As is apparent from the decision, whether pre-arbitral procedures will be found to be mandatory under Swiss law will depend heavily on their specific wording, as well as on their purpose and the circumstances of each particular case. In addition, the Court clarified that the law that is applicable to the interpretation of the arbitration agreement pursuant to Article 178 PILA will also apply to the interpretation of any pre-arbitral procedures.

An English translation of the Supreme Court's decision is available online: https://www.swissarbitrationdecisions.com.

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This entry was posted on Wednesday, October 1st, 2014 at 5:37 pm and is filed under Annulment, Arbitration Agreements, Multi-tiered clauses, Pre-arbitral procedure, Pre-arbitration Dispute Settlement Procedures, Switzerland, Uncategorized
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