

Challenge to formal and substantive validity of arbitration agreement dismissed (Swiss Supreme Court)

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

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In *Decision 4A_174/2021*, the Swiss Supreme Court dismissed a motion to set aside an ICC interim award on jurisdiction and addressed the requirements pertaining to the formal and substantive validity of an arbitration agreement.

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In a recently published French-language decision, the Swiss Supreme Court rejected a motion to set aside an ICC interim award on jurisdiction based on article 190(2)(b) of the Swiss Private International Law Act (PILA).

The underlying dispute related to a helicopter sales agreement. When the parties met to sign the agreement, only B executed it while A chose to sign it at a separate time. Although A failed to return an executed copy of the agreement to B, the parties started performing their obligations under the agreement. A eventually withdrew from the agreement and B initiated arbitration proceedings to recover the amount of the performance bond issued under the agreement. A challenged the tribunal's jurisdiction primarily on the ground that there was no signed arbitration agreement. The tribunal bifurcated the proceedings and affirmed jurisdiction in an interim award on jurisdiction.

Before the Supreme Court, A mainly argued that B had failed to produce any evidence establishing that the agreement was binding on both parties and that the tribunal had erred when holding that both parties had signed the sales agreement.

Regarding formal validity, the court held that article 178(1) of the PILA does not require that an arbitration agreement be signed to be valid (so-called "simplified written form"), meaning that an arbitration agreement exchanged by email is acceptable. Determining the existence of an arbitration agreement also does not require that the parties exchange a written document containing an arbitration clause. The only requirement is that an arbitration agreement be made in writing or in any other manner that can be evidenced by text.

Regarding the substantive validity of the arbitration agreement, the court held that the principles of contract interpretation apply to determine whether an arbitration agreement has been validly concluded pursuant to article 178(2) of the PILA. Where the tribunal establishes the true and common intent of the parties (so-called "subjective interpretation"), the outcome of the interpretation is a factual finding, and, as a result, is binding on the court.

This decision sets out a clear and thorough overview of the conditions of validity of an arbitration clause both from formal and substantive standpoints, thereby providing welcome confirmation of the court's case law in this regard.

Case: *Decision 4A_174/2021 (19 July 2021)* (Swiss Supreme Court).

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