Swiss Supreme Court sets aside award for lack of consent to arbitrate

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In decision 4A_150/2017, the Swiss Supreme Court considered whether to set aside an award based on an arbitral tribunal’s lack of jurisdiction.

Speedread
In a German-language decision dated 4 October 2017, but only recently published, the Swiss Supreme Court set aside an award issued by an ad hoc arbitral tribunal seated in Zurich, finding that the parties did not consent to submit to arbitration.

The court recalled its previous case law distinguishing between the subjective and objective interpretation of arbitration agreements, holding that a finding that the parties actually consented (subjective interpretation) is a finding of fact, which is not subject to review by the court, while constructive consent (objective interpretation) is a finding of law, which the court can review.

In the present case, by analysing the award’s wording, the court found that the arbitral tribunal had relied on an objective interpretation. Therefore, the court proceeded to review the arbitral tribunal’s determination of the parties’ intent. It held that the arbitral tribunal wrongly assumed jurisdiction and set aside the award.

The case marks one of the rare instances in which the court actually set aside an award. The decision is also noteworthy because of its commitment to the principle of consent in arbitration. The Supreme Court held that, contrary to what the arbitral tribunal seemed to assume, the practicability of a contractual regime between the parties providing for arbitration on all levels of the contracts does not, by implication, allow the conclusion that the parties have, in fact, agreed to arbitration. (Decision 4A_150/2017.)

Background
Article 190(2)(b) of the Swiss Private International Law Act (PILA) permits the setting aside of an award where the tribunal has wrongly accepted or declined jurisdiction.

Article 105(1) of the Federal Supreme Court Act (FSCA) provides that the Swiss Supreme Court bases its decision on the facts which the previous instance has established.
Facts
The dispute underlying the present decision arose between two insurance companies in the context of a reinsurance arrangement. The parties are both reinsurers for a third insurance company, which acts as the direct insurer for a mining company. Company B (respondent) acted as the "front" for Company A (petitioner).

Among other contracts, the parties concluded a retrocession agreement, which contained a dispute resolution clause providing for the jurisdiction of state courts. The reinsurance agreement between the respondent and the direct insurer contained an arbitration clause.

Company B initiated arbitration proceedings against Company A before an ad hoc arbitral tribunal seated in Zurich. Company A objected to the jurisdiction of the arbitral tribunal, arguing that the state courts had jurisdiction under the choice of forum clause in the retrocession agreement. The arbitral tribunal bifurcated the proceedings, to deal with the question of jurisdiction as a preliminary issue. In a partial award, the arbitral tribunal found itself competent to hear the dispute.

In accepting jurisdiction, the arbitral tribunal relied mainly on general practice in the international reinsurance business and on an earlier contract offer, originally made to the direct insurer by the petitioner. The petitioner challenged this partial award before the court on the ground that the arbitral tribunal had wrongly accepted jurisdiction.

Decision
The Swiss Supreme Court set aside the award.

The court confirmed that general contractual principles of interpretation also apply to the analysis of an agreement to arbitrate. First, an arbitral tribunal, by way of a subjective interpretation of the arbitration agreement, must seek to establish the parties' true mutual intent. This is based on an evaluation of evidence, which cannot be reviewed by the court (Article 105(1) FSCA). Second, if such true mutual intent cannot be established, the agreement to arbitrate is to be interpreted objectively. This means that the parties' declarations are to be interpreted in the way the addressee could and should, in good faith, have understood them. A finding based on objective interpretation is an issue of law and, as such, subject to review by the court.

Continuing its practice, the court cautioned that the existence of an arbitration agreement cannot be easily inferred, as it involves severe limitations on the possibilities to appeal. Therefore, there must be a clear expression of the parties' intent to exclude certain disputes from state courts. Only once the interpretation of the parties' declarations leads to the determination that they agreed to exclude a dispute from state court jurisdiction, may an arbitral tribunal take considerations of utility into account, choosing the interpretation most favourable to the validity of the agreement to arbitrate.

The court found that the arbitral tribunal had interpreted the parties' declaration objectively. The court determined this by relying, among other things, on the award's wording, which contained phrasing such as "must have taken into account" and "needed and would apply" or "knew or must have known". Therefore, it was able to scrutinise the arbitral tribunal's conclusion with full discretion.

Contrary to the arbitral tribunal's assessment, the court found that, in the present case, a good faith interpretation of the parties' declarations could not result in a finding of objective consent to arbitrate. The court agreed with the
arbitral tribunal that it would have been sensible to provide for the same dispute resolution mechanisms throughout
the different contracts of the reinsurance arrangement. Nevertheless, it held that the practicability of such an
arrangement did not, in and of itself, allow the interpretation that the parties must have come to an agreement in
this sense.

The court held that, even though the dispute resolution clause in the retrocession agreement providing for state
courts did not specifically designate the competent court (and could, therefore, be difficult to implement), it
still objectively demonstrated the parties' intention to have disputes adjudicated by state courts, as opposed to
arbitration.

**Comment**
The present case marks one of the rare instances in which the court actually set aside an award.

The court's reasoning demonstrates its reliance on the precise wording of the award (citing large parts from the award
directly in English) when determining whether the arbitral tribunal found actual or implied consent to arbitrate.
This is consistent with the court's approach in an earlier case, in which it came to the conclusion that the arbitral
tribunal had found subjective consent and refused to hear the merits of the petition (see *Decision 4A_305/2013*,
discussed in *Legal update, Swiss Supreme Court does not consider merits of setting aside petition if tribunal
deprecated jurisdiction based on parties' actual consent to terminate arbitration agreement*).

In the present case, the approach (subjective or objective interpretation) the arbitral tribunal had taken was in
dispute. In light of the potentially severe consequences of this distinction (a finding of actual consent constitutes a
finding of fact, which cannot be reviewed by the court) care must be taken when drafting awards dealing with the
existence or non-existence of an agreement to arbitrate, and by counsel when assessing the chances of a challenge.
Furthermore, in order to save time and costs, tribunals are well advised to be abundantly clear about this in the
award.

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between the parties providing for arbitration on all levels of the contracts does not, by implication, allow the
conclusion that the parties have, in fact, agreed to arbitration.

**Case**
*Decision 4A_150/2017.*
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