



## Arbitration Newsletter Switzerland

# How far has an Arbitral Tribunal to go in motivating its Decision on its Jurisdiction?

After having set a new precedent as to challenges of partial awards (cf. the previous posting of June 14, 2005 on our website) the Swiss Federal Supreme Court ("Supreme Court") has now rendered an award (A vs. B, dated March 9, 2005, handed down in German and to be found under "4P.226 / 2004" on the website of [www.bger.ch](http://www.bger.ch)), which further outlines the criteria to be followed by an arbitral tribunal in deciding on its jurisdiction.

### Facts

The facts of the case, in so far relevant, were the following:

B acquired out of a bankruptcy 100% of the shares of C, which was founded by D, together with an Italian company. A, according to B, is the successor in interest of the Hungarian state-controlled entity D.

The formation document of C ("Syndicate Contract") contained, amongst other, a commitment of the founders not to compete against Hungary and, in case of transfer of the shares in C, to transfer such commitment upon the buyer. The Syndicate Contract provided also for Hungarian law to apply and for arbitration to be held in Geneva under the rules of the Chamber of Commerce and Industry of Geneva ("CCIG").

B filed subsequently for arbitration in Geneva against A, A denied jurisdiction of the arbitral tribunal, amongst other, by arguing that E, a state owned trust company, should be considered as the general successor in interest.

The Arbitral Tribunal then denied such objection and confirmed its jurisdiction. In doing so, it held that "for the present status", without entering into the merits of the case, A was actually the successor in interest of C and, thus, bound to the agreement to arbitrate.

Against this decision, A appealed at the Supreme Court. In doing so, it did also raise an objection against the Chairman, which it had already raised at the CCIG.

The Supreme Court approved of the appeal and, in doing so, did, on various levels, set criteria relevant to practitioners in arbitration in Switzerland. The essence of it can be summarized as follows:

### As a Rule: "No second Exchange of Briefs at the Supreme Court"

A asked for a second exchange of briefs at the Supreme Court since B raised in its answering brief some new arguments.

The Supreme Court had to remind the parties of the restrictions imposed by Article 93 (2) of the Act on the Federal Judiciary ("OG") which clearly states that a second exchange of briefs can be granted as an exception only. Since A did not refer in its pertaining request to arguments which it could not expect B to raise in its answer, such new arguments of B would not justify a second exchange of briefs.

### There is no direct "Second Bite to the Apple" in challenging an Arbitrator at the Supreme Court

In its appeal A complained, amongst other, that the chairlady did not respect A's challenge raised against the chairlady. For that purpose, A submitted also the decision of CCIG, rejecting the challenge of A raised against the chairlady.

The Supreme Court held that the decision of an institutional body, such as CCIG, as to the challenging of an arbitrator, can not be brought further submitted to the Supreme Court by way of an independent appeal. Such a decision is not to be considered as a decision within the limited ambit of



Article 190 (2) of the Private International Law Act ("PILA"; cf. also Art. 180 (3) PILA).

### **Contested Jurisdiction of the Arbitral Tribunal in Front of the Supreme Court**

Dealing with A's arguments brought forward against the jurisdiction of the arbitral tribunal, the Supreme Court argued as follows:

4.1 Arbitration agreements are to be interpreted, as any other agreement, based on the mutual stipulations of the parties; in absence thereof, according to the principle of good faith. In doing so, the Supreme Court reconfirmed its long standing policy to interpret agreements to arbitrate "in favorem arbitri".

4.2 In its jurisdictional test, any arbitral tribunal has to check existence, validity and area of application of an agreement to arbitrate. In doing so, the Supreme Court confirmed that also third parties not being signatories to such an agreement to arbitrate can be bound to such agreement. In so far a transfer of an agreement to arbitrate is in question Article 178 (2) PILA comes into play.

4.3 An award on the jurisdiction of an arbitral tribunal acting under the provisions of the PILA in Switzerland, whether positive or negative, must contain all relevant facts and legal arguments as to the (non-) jurisdiction of the arbitral tribunal.

The Arbitral Tribunal did fundamentally err in the challenged award that the binding of the parties to arbitrate through the agreement to arbitrate is part of its jurisdictional test requiring full cognition, even if such test is depending upon facts which are relevant for the adjudication of the merits of the case.

Since the Arbitral Tribunal in this particular case did render its decision based on a summary and preliminary review of the facts only, it did violate Article 190 (2) b PILA. Consequently, the Supreme Court could not render a decision as to the jurisdiction of the arbitral tribunal and had to return the matter to the Arbitral Tribunal for further evaluation of the facts.

-in general, the Supreme Court does not allow for second briefs;

-a challenge against an arbitrator in institutional arbitration, which has already been reviewed by the institution itself, can not be represented to the Supreme Court by way of an independent appeal;

-an arbitral tribunal deciding on its jurisdiction can only do so based under a full assessment of all relevant facts and not on preliminary assumptions.

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Hansjörg Stutzer

For further information please contact:

Dr. Hansjörg Stutzer ([h.stutzer@thouvenin.com](mailto:h.stutzer@thouvenin.com))