SWITZERLAND: Dealing with an arbitration clause in an unsigned contract

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In a decision dated 18 February – but only made publicly available this month – the Swiss Federal Supreme Court dismissed a motion to set aside an award on jurisdiction that was based on an arbitration clause in an unsigned main contract. **Michael Feit**, of Walder Wyss in Zurich, reports.

The Swiss Federal Supreme Court in Lausanne

The decision dealt with a dispute between Cypriot and Iranian companies. In the context of a recently started business relationship, the Cypriot company sent the Iranian company a draft of a framework agreement that contained an arbitration clause. The Iranian company sent back the draft with proposed modifications and comments including proposals that disputes be submitted to a different institution and have a different arbitral seat.

The Cypriot company sent back a revised version of the framework agreement but said it would not accept a change of seat. Accordingly, the arbitration clause remained the same as in the original draft.

In a further exchange between the parties, the arbitration clause was not changed. The last version of the agreement was compiled by the Cypriot company, which sent it to the Iranian company expressing its hope that this would be the final version. In response to its request for a signed copy, the Iranian company said that the agreement had been submitted to its legal department for approval.

No further versions of the framework agreement were exchanged, and the agreement was never signed.

After a dispute materialised, the Cypriot company initiated arbitration proceedings against the Iranian company on the basis of the arbitration clause in the last version of the framework agreement. The sole arbitrator rendered an initial award in which he accepted jurisdiction over the dispute.

The Iranian company filed a motion to set aside that award, which was dismissed by the Swiss Federal Supreme Court.

Owing to the narrow grounds on which arbitral awards may be set aside in Switzerland, the Federal Supreme Court conducted a restricted examination. Still, the reasoning of its decision makes it clear that, by relying on the doctrine of separability, it would in exceptional circumstances be possible to find that parties had entered into an arbitration agreement irrespective of whether the main contract was concluded.

The Federal Supreme Court also indicated that such a conclusion could be drawn in a case where the parties had exchanged numerous drafts of the main contract that included initial modifications to the arbitration clause but then left the clause unchanged for one or more exchanges.

Thus, should the parties fail to conclude the main contract, a party could initiate arbitration proceedings by relying on the arbitration clause in the last version of the contract and claim damages for breach of pre-contractual duties.

The Federal Supreme Court finally addressed the Iranian party's argument that accepting jurisdiction on the basis of an exchange of drafts would create serious legal uncertainty. The court countered that such risk could be avoided by declaring from the outset that one does not wish to be bound by the arbitration clause until the main contract would be signed by the parties.

In the appeal to the Federal Supreme Court, the Iranian appellant company was represented by **Homayoon Arfazadeh**, partner at Python & Peter in Geneva, while the Cypriot company was represented by **Andrea Molino** and **Geraldine Bronz** of MAG Legis SA (Molino Adami Galante) Studio Legale in Lugano.

The sole arbitrator and counsel in the arbitration are unknown.

The decision 4A_84/2015 (in French only) is available on the website of the Swiss Federal Tribunal here.