

Three Recent Decisions of the Swiss Federal Tribunal Regarding Assignments and Transfer of Arbitration Agreements

Since the decisions of the Swiss Supreme Court (the Federal Tribunal) in *Müller*¹, *Clearstar*², and *Transkei*³ there is no doubt under Swiss law that the assignment of rights under a contract or of the contract as a whole entails the transfer of the arbitration agreement contained in the contract unless the transfer of the agreement to arbitrate is restricted by law, contract or the nature of the contract.⁴ The arbitration agreement is considered an accessory of the contractual rights.⁵ While this principle is well established, open questions remain, as three recent cases decided by the Federal Tribunal demonstrate. The decisions, which are published in this issue of the ASA Bulletin, are summarized hereafter.⁶

Decision of 9 May 2001 ('Nextrom')

1. In *Nextrom Holding S.A. and Nextrom S.A. (Switzerland) ('Nextrom') v. Watkins International S.A. (Panama)*, Watkins had initiated arbitration proceedings against Nextrom based on an arbitration agreement in a share purchase contract whereby Nippur Investissement S.A., a Luxemburg company, sold certain shares to Nextrom. A few weeks after the sale, Nippur was liquidated and its assets and liabilities were transferred to Arodene Ltd, an Isle of Man company. The assets and liabilities of Arodene, on the other hand, were assigned to Watkins.

¹ Federal Tribunal, Decision of 25 January 1977, *Müller v. Bossard*, Published in the Official Court Reporter (ATF) 103 II 75.

² 117 II 94 of 9 April 1991 = Rev. arb. 1991, p. 717, note Pierre-Yves Tschanz = ASA Bull. 1991, p. 160. See also Jacques Werner, *Jurisdiction of Arbitrators in Case of Assignment of an Arbitration Clause: On a recent decision by the Swiss Supreme Court*, Journal of International Arbitration 2/1991, p. 13.

³ *Transkei v. F.J. Berger and Steyr-Daimler-Puch AG*, Decision of 13 October 1992 = ASA Bull. 1993, p. 68; Rivista dell' Arbitrato 1995, p. 475, note Di Blase.

⁴ See also Federal Tribunal, Decision of 18 December 2001, section 2 e) bb), unpublished; Award in ICC Case N° 6363, Collection of ICC Awards III, p. 108: because no valid assignment of contract had occurred the putative assignor remained entitled to bring a claim under the arbitration clause in the contract.

⁵ Federal Tribunal, Decision of 7 August 2001, ASA Bulletin 1/2002, p. 88, section 2c; See also Final Award in ICC Case N°10574, *Deutz AG v. General Electric Company*, of 16 November 2000, published in Mealey's International Arbitration Report, February 2001, Doc-B.

⁶ For a comprehensive overview in comparative law (in 1992) see Daniel Girsberger / Christian Hausmaninger, *Assignment of Rights and Agreement to Arbitrate*, Arb. Int. 1992, p. 121 ff.; See also Werner Wenger, Basler Kommentar, ad Art. 178 IPRG, p. 1461 f.

⁷ Federal Tribunal, Decision of 9 May 2001, published in ASA Bull. 1/2002, p. 80.

In the arbitration, held under the auspices of the ICC, Watkins claimed the outstanding share purchase price from Nextrom. Nextrom objected to the jurisdiction of the arbitral tribunal contesting Watkins' standing in the arbitration. The arbitrators dismissed Nextrom's challenge in a preliminary award which Nextrom appealed to the Federal Tribunal under Article 190 par. 2 (b) of the PIL Act (lack of jurisdiction). Before the Federal Tribunal Nextrom argued that Arodene could not have acquired the assets of Nippur because the liquidation of Nippur was illegal or inexistent. Nextrom was not informed of the assignment and Nippur continued to act after its purported liquidation.

1.1 The Federal Tribunal recalled that the jurisdiction of an arbitral tribunal sitting in Switzerland, i.e., the question which parties are entitled to rely on an arbitration agreement is governed exclusively by Swiss international arbitration law (which is embodied in Chapter 12, Art. 176 ff. PIL Act). According to Article 178 par. 2 PIL Act, which implements the *favor validitatis* rule, the arbitration agreement is valid if it is in conformity with (i) Swiss law, (ii) the law governing the subject-matter of the dispute or (iii) the law chosen by the parties.⁸

The Federal Tribunal remarked that it was unclear whether Nextrom, in its appeal, challenged the validity of the assignment, i.e., Watkins' standing, or Watkins' right to rely on the arbitration agreement. The issue of entitlement to claim, which pertains to the merits, should not be confused with the question of whether there is a valid arbitration agreement between the parties, which is an issue of jurisdiction. In fact, according to Article 190 par. 3 PIL Act, the lack of jurisdiction is the only ground for an appeal against a preliminary award. In an earlier case the Federal Tribunal had refused to entertain an appeal where only a party's standing was challenged.⁹

The Federal Tribunal observed that the arbitrators had been satisfied that all assets and liabilities of Nippur, the original seller and co-contracting party of Nextrom, had been transferred first to Arodene and subsequently to Watkins. These assets included the claim against Nextrom under the share purchase agreement. Therefore, the arbitral tribunal recognized that Watkins had standing to claim ('Aktivlegitimation', 'légitimation active'). The

⁸ See also the Decisions of 7 August 2001, section 2b, and of 16 October 2001, section 3a.

⁹ Decision of 16 May 1995, published in ASA Bull. 1996, p. 667. In its decision of 16 October 2001 (above), the Federal Tribunal relativized the relevance of the distinction. The jurisdiction of an arbitral tribunal hinges exclusively on the validity of the arbitration agreement. Whether there is such an agreement depends on the validity of the assignment of the contract wherein it is contained. To this extent, the right to arbitrate and the right to the claim overlap.

Federal Tribunal confirmed that a valid assignment automatically transfers the arbitration agreement: ‘the assignment of the contractual position of the selling company, *comprising the transfer of the agreement to arbitrate*, has been established in a persuasive manner by the arbitral tribunal.’ (emphasis added)

1.2 The Federal Tribunal fully confirmed the arbitrators’ reasoning that Nextrom could not in good faith argue that the liquidation of Nippur or the assignment of Nippur’s assets to Arodene were invalid because when the share purchase agreement between Nippur and Nextrom was concluded Nextrom knew that Nippur was going to be liquidated and had thereafter accepted without objection that Arodene became the beneficiary of all payments made by Nextrom. For the same reason, the arbitral tribunal had also dismissed Nextrom’s defense that the assignment did not comply with form requirements stipulated in the share purchase agreement.

1.3 A final, somewhat absurd, argument of Nextrom was dismissed without much ado: Nextrom had pointed out that Watkins, in the Request for Arbitration, relied on an ‘assignment of all rights under the Agreement’. Nextrom argued that such ‘assignment’ had its equivalent in Article 466 CO and attempted to demonstrate that the transaction through which Watkins had acquired the rights of Arodene did not comply with the requirements of Article 466 CO. However, this provision has nothing to do with the assignment of a contract or a right. The French term ‘*assignation*’¹⁰ pursuant to Art. 466 CO is best translated as ‘direction’ or ‘order’. Indeed, ‘*l’assignation*’ is a contract through which one party orders another party to deliver money, securities or other property to a third party. Not surprisingly, the Federal Tribunal found this argument ‘incomprehensible’, and affirmed that the ‘*assignation*’ defined in Article 466 CO had nothing to do with assignment which was properly translated with ‘*cession*’.

Decision of 7 August 2001

2. In a second decision, rendered on 7 August 2001, upon appeal against an award rendered under the aegis of the Geneva Chamber of Industry and Commerce (CCIG), the Federal Tribunal had to examine the validity of the assignment of a distribution agreement containing an arbitration clause.¹¹

¹⁰ ‘*Anweisung*’ in German.

¹¹ Federal Tribunal, decision of 7 August 2001, published in ASA Bull. 1/2002, p. 88.

A Swiss company, Z. S.A. was the manufacturer and worldwide distributor of cosmetics of a brand owned by a third company. Z. S.A. entered into two agreements with a Hong Kong company, Y & Company, whereby the latter became the exclusive distributor of the products in Hong Kong and in China. Subsequently, Z. S.A. acquired the brand from the third company and started negotiations with X. SpA (Italy) which was interested in purchasing the brand itself. At the end of the negotiations, it was agreed that a Liechtenstein company which X. SpA. would establish should purchase the brand. The Liechtenstein company never was in contact with Y & Company. X. SpA. had been provided with a copy of Z's contracts with its suppliers and clients and Z informed its distributors, including Y & Company, that X SpA was its successor. Y & Company acknowledged the assignment in writing in a letter to X. SpA. and X. SpA. supplied Y & Company on numerous occasions with cosmetics and was paid by Y & Company. Thereafter, X. SpA. breached its obligations under the distribution agreement and Y & Company initiated arbitration in conformity with the arbitration agreement in the distribution agreement.

X. SpA. objected to the jurisdiction of the arbitral tribunal on the ground that it had not signed the distribution agreement and that the Liechtenstein company and not X. SpA was the owner of the brand. The Federal Tribunal dismissed both arguments. With respect to the latter, it observed that the issue of whether there was a distribution contract between X. SpA and Y & Company was irrelevant to the question of who owned the brand. X. SpA. had succeeded Z. S.A. not only as the world-wide distributor of the brand products but also in the sub-distribution contract which Z. S.A. had concluded with Y & Company. Whether X. SpA was also the brand owner was not decisive.

2.1 Regarding the absence of signature on the distribution contract embodying the arbitration clause, the Federal Tribunal held that the validity of the arbitration agreement had to be assessed in light of Art. 178 PIL Act. Under Article 178 par. 1 PIL Act, the signature is not a validity requirement¹² and in case of a transfer of a contractual relationship, the arbitration agreement, due to its accessory nature ('en tant que clause accessoire de nature procédurale'), is also transferred. Consequently, the Federal Tribunal merely had to analyse whether X. SpA. had validly assumed the role of Z. S.A. in the distribution agreements with Y & Company. For this, it had to determine the law applicable to the assignment. This question must not be

¹² Federal Tribunal, Decision of 19 April 1994, *UAE et al. v. Westland Helicopters Ltd*, ATF 120 II 155, 163 = ASA Bull. 1994, 404, 411.

confused with the question of the law applicable to the arbitration agreement, the validity of the latter being governed exclusively by Art. 178 PIL Act (see above, 1.1).¹³ The Federal judges pointed out that there was some controversy among legal authorities as to which law governs the assignment under Swiss private international law. In the absence of a choice of law, a part of the doctrine considers that the law with the closest links with the transaction was the law of the assignor's domicile. Another strand of doctrine maintains that one should instead apply the law governing the assigned contract. The arbitral tribunal had opted for the first choice and in the Federal Tribunal decision the issue was left open as in both cases, the result was Swiss law.

To the extent that the validity of the assignment is a prerequisite for the applicability of the arbitration agreement to the assignee, the Federal Tribunal has a full scope of review.¹⁴ The Tribunal recalled that the assignment of an entire contract (as opposed to the assignment of an individual claim or debt) was not a type of contract specifically addressed in the Swiss Code of Obligations, but a contract *sui generis* and therefore not subject to any form requirements. The arbitral tribunal had found sufficient evidence to be persuaded that the parties agreed that the distribution contracts were transferred to X. SpA. and that nothing indicated that the arbitration agreements would be excluded from this transfer. The Federal Tribunal held that this assessment of evidence by the arbitrators was not subject to appeal.

2.2 Regarding the question of the applicable law to the assignment and the question what claims have been assigned, the *Transkei* case merits mention. The defendant in that case, the Republic of Transkei, argued that the assignment of the claim by the claimant to an insurance company had an effect on the claimant's standing. The Federal Tribunal pointed out that this argument addressed the effect of the assignment on the internal relationship between the claimant and the insurance company. It then determined that the law applicable to this relationship was to be decided in light of Art. 187 PIL Act.¹⁵ The Federal Tribunal added that the same result would be obtained if Art. 145 PIL Act were applied.

It is interesting to note that the Federal Tribunal did not directly apply the PIL Act's specific conflict of law rule for assignments (Art. 145) but

¹³ Wenger, *loc.cit.*, n 64 ad Art. 178, p. 1462.

¹⁴ See the recent article by Federal Judge Bernard Corboz, *Le recours au Tribunal fédéral en matière d'arbitrage international*, *Semaine Judiciaire*, 2002 II 1 ff., 19.

¹⁵ Art. 187: 'The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.'

rather Art. 187, i.e., the general provision dealing with the applicable law in the field of international arbitration. In fact, chapter 12 of the PIL Act, although a part of the PIL Act, constitutes an autonomous set of rules, independent from the rest of the PIL Act. The conflict of law rules and other provisions do not apply to international arbitrations in Switzerland. This does not mean, however, that the principles which underlie these rules may not inspire arbitrators, even if they are not binding.

Decision of 16 October 2001

3. The third case decided by the Federal Tribunal opposed a Yugoslavian claimant, O., and a French defendant, P.¹⁶ P. had entered into a long term production and supply contract for automotive parts with a Yugoslavian company X. When the UN declared an embargo against Yugoslavia, the French company decided it could no longer perform the contract. The Yugoslavian party brought arbitration proceedings against P. under the ICC arbitration clause in the contract. P. contested the jurisdiction of the arbitral tribunal because the UN embargo prohibited any court from ordering the performance of a contract in favor of a Yugoslavian party. In the course of the proceedings, O. informed the ICC that it had been assigned the rights of X. and substituted itself for X. as the claimant. P. denied O's right to take the place of X. and also claimed that the assignment was ineffective. The arbitral tribunal rendered an interim award ordering 'that the arbitration shall proceed between O. and P.

P. challenged the award. It submitted that the arbitral tribunal had failed to take into account a clause in the contract that prohibited any assignment. Furthermore, P. criticised the arbitral tribunal for limiting itself to summarily assessing its jurisdiction instead of fully examining all facts and arguments which were relevant for the issue. The arbitral tribunal, in its observations to the Federal Tribunal, submitted that its award was not a final award on jurisdiction.

The Federal Tribunal upheld the appeal and set the award aside.

3.1 The Tribunal noted that parties which opted for arbitration waived the right to bring their disputes to the courts of law. The existence of an arbitration agreement cannot be lightly assumed and it should not be imposed on a party if that party is not bound by the contract containing the agreement

¹⁶ Federal Tribunal, Decision of 16 October 2001, published in ASA Bull. 1/2002, p. 97.

to arbitrate. If the arbitral tribunal decides on its jurisdiction in an interim decision then it must fully examine all relevant facts. In case of an assignment, the arbitrators were therefore obliged to verify the validity of the assignment. This analysis can not be postponed and joined with the merits. According to the Federal judges, by ordering that the arbitration shall proceed, the arbitrators had rendered an award on their jurisdiction. Consequently, the arbitral tribunal should have completely resolved all matters which may have an influence on its jurisdiction.

The Federal Tribunal explicitly confirmed its 1995 precedent¹⁷ in which it had rejected the rule called the doctrine ‘of double relevant facts’ (‘Doppelrelevante Tatsachen’) in the field of arbitration. This rule had been developed by courts to deal with situations where an alleged fact is relevant for the merits as well as for the competence of the court, e.g., the existence of a tort for an action brought at the place the tort occurred, a valid patent or other IP right for an action initiated at the place it was breached. The doctrine of double relevant facts authorises a court to determine facts temporarily in order to assess its jurisdiction without being bound by its original assessment when subsequently deciding on the merits. The Federal Tribunal rejects this doctrine in the ambit of arbitration and requires that all facts relevant to the arbitral tribunal’s jurisdiction be resolved initially because it cannot reasonably be expected from a party that it participate in an arbitration if it is not bound by an arbitration agreement.

3.2 The Federal Tribunal referred to its earlier decision 117 II 94 where the transfer of an arbitration agreement to the assignee was denied to the extent that the contract restricts assignments (Article 164 CO).¹⁸ In general, such a restriction also applies to the arbitration clause.¹⁹ It then pointed to the unambiguous prohibition of assignment in the production and supply contract according to which ‘X. ne pourra en aucun cas céder à titre gratuit ou onéreux les droits que lui sont conférés dans le présent contrat, qui lui est strictement personnel’.

¹⁷ Federal Tribunal, Decision of 20 December 1995, ATF 121 III 495 = ASA Bull. 1996, p. 508.

¹⁸ ATF 117 II 94 = ASA Bull. 1991, p. 160. The contract contained a clause providing that ‘neither party shall assign or subcontract this Agreement without prior written permission of the other party’.

¹⁹ Wenger, loc.cit., n 65 ad Art. 178, p. 1462, points out that if the arbitration agreement was made with strict regard to the other contracting party (intuitu personae), the agreement will be extinguished, even if the assignment of the rights under the contract containing the agreement to arbitrate may be valid. Of course, the arbitration agreement would remain applicable to the assignor, if the latter remains bound to the other original party, for instance as a guarantor or in case of a partial assignment (see *Transkei* case).

In light of this clause, the Federal Tribunal considered incomprehensible that the arbitrators, after relying on Article 164 CO and a similar provision in Yugoslavian law (Art. Yug-436 CO) providing that an assignment was not valid if the law or the contract prohibited an assignment had stated, in an obiter dicta, that ‘it was evident that in the present case this was not the case’.

3.3 It should be duly noted that in the (public) deliberations, two of the five federal judges nevertheless agreed with the view of the arbitral tribunal and would have rejected the appeal because the defendant had not raised an unambiguous challenge to the arbitral tribunal’s jurisdiction. In their opinion, by objecting to the validity of the assignment, rather than to the application of the arbitration clause to the claimant, the defendant had raised arguments on the merits, and therefore proceeded on the merits and thus waived its right to challenge the arbitral tribunal’s jurisdiction. The majority of the Federal Tribunal considered, however, that the defendant’s statements could in good faith have been understood as jurisdictional defense. The majority further argued that the challenge of the assignment implied a challenge of jurisdiction because, in the absence of a valid assignment of the contract comprising the arbitration agreement, the arbitrators had no jurisdiction over the assignee. In conclusion, parties that intend to challenge the jurisdiction of the arbitrators are well advised to leave no doubt as to their intentions.

Indeed, as we have seen above, contractual provisions stipulating form requirements (*Nextrom* case) can be waived not only by proceeding on the merits, but also by a party’s conduct during the performance of the contract. To the extent, however, that no waiver occurred, arbitral tribunals sitting in Switzerland and the Federal Tribunal will fully enforce such restrictions. Apart from the *Nextrom* and the *Clearstar* cases²⁰, one might mention the decision of the Federal Tribunal in *Thomson C.S.F. c/ Frontier AG and Brunner Sociedade* of 28 February 1997.²¹ Frontier had assigned a contract that it had concluded with Thomson to an affiliate, Brunner. The contract stipulated that the contract could not be assigned to any third party (‘à quelque tiers que ce soit’) without prior and explicit authorisation by Thomson. The arbitral tribunal refused to entertain (‘déclare irrécévable’) a claim brought by Brunner. On the other hand, it considered that the assignment was not a breach of the confidentiality obligations under the contract because Brunner and Frontier were controlled by the same individuals.

²⁰ See above.

²¹ Unpublished; Reported in ASA Bull. 1/1998, p. 118.

4. P. also challenged O's ability to substitute itself for the original Claimant in the ICC arbitration. The Federal Tribunal did not reach this argument because the appeal was upheld.

5. Another issue which appears undecided by the Federal Tribunal is whether an assignor remains bound to the arbitration clause in the contract which it has assigned.

5.1 In the *Transkei* case²² the defendant (the Republic of Transkei) had raised this issue, but in light of the particular circumstances of the case, the Federal Tribunal did not need to decide it. Transkei had argued that the claimants had lost their right to rely on the arbitration agreement and their right to the claim because they had assigned their claims to an insurance company and to a bank acting as reinsurer. The general conditions of the insurance policy provided that the damage claim was assigned to the insurer. But they also obliged the insured party to seek compensation for damages in its own name if instructed to do so by the insurer. According to the arbitral tribunal, this provision entitled the claimant to act in the arbitration. Moreover, the arbitral tribunal found that the insurer had reassigned the claim to the claimants.

The Federal Tribunal admitted that the claimants were entitled, and even obliged, by the general conditions to bring the claim in their own name. Therefore, the assignment of the claim to the insurer did not remove the claimants' standing. The decision somewhat ambiguously states that 'there was no valid assignment which would cancel the claimants' rights' ('Toutefois, même suite à la cession les intimés restaient tenues au recouvrement de la créance, et ce selon, d'après les instructions de l'Etat fédéral (autrichien) et de (le réassureur). En conséquence, il ne saurait exister de cession valable de la créance qui aurait eu pour effet de supprimer les droits des intimés.'). This is a somewhat circular argument because the validity of the assignment was not at issue but precisely its effect on the claimants' standing. No doubt aware of this, the Federal Tribunal adds that in any event the claimants were entitled to bring the arbitration because they had only partially assigned their rights to the insurer and, moreover, these rights were reassigned to them subsequently.²³

²² See above.

²³ Decision, Section 6.

5.2 In ICC Case N° 7181,²⁴ defendant 1 argued that following the assignment of the contract on which the arbitration was based to defendant 2, an affiliate, it was no longer bound by the contract. It appears from the published excerpts of the award in that case, that the arbitrators do not seem to have examined whether the assignment had an effect on their jurisdiction over defendant 1, but merely whether it had an impact on the merits of the case. This was not so, since under the applicable (Belgian) law, the assignor of a contract remained liable to the creditor.

6. Yet another question which may arise in the context of an assignment, assuming that it is valid,²⁵ is whether the remaining party, i.e., the original counterparty of the assignor remains bound to the arbitration agreement. If the arbitration agreement²⁶ was made *intuitu personae*, the assignment of the contract may be valid, but the arbitration agreement will nevertheless be void.²⁷

The question has been discussed in a recent Swedish case.²⁸

The Swedish Supreme Court noted that certain authorities were concerned that the contractual rights of the remaining party might be weakened if the assignee were unable to pay the costs of the arbitration. The Supreme Court denied, however, that the remaining party should be given a choice between arbitration and the courts, except for ‘particular circumstances’ (upon which the decision does not elaborate).

²⁴ Yearbook Comm. Arb. 1996, 99

²⁵ If it is not valid, the assignor remains bound to the other original party.

²⁶ As opposed to the contract which incorporates the latter – if the contract itself is *intuitu personae*, the assignment would not be valid at all (see above 3.2).

²⁷ See Wenger, above

²⁸ Swedish Supreme Court, *MS Emja Braack Schiffahrts KG v. Wärsilä Diesel Aktiebolag*, 15 October 1997, note Sigvard Jarvin and Anne-Cécile Hansson Lecoanet, Rev. arb. 1998, p. 431; Sigvard Jarvin, *La nouvelle loi suédoise sur l'arbitrage*, Rev. arb. 2000, p. 43.

Conclusions

7. In light of the case law of the Federal Tribunal a number of conclusions relevant for arbitrators and parties involved in arbitration proceedings in Switzerland can be drawn:

7.1 The validity and scope of application of an arbitration agreement are governed exclusively by Article 178 PIL Act (which in turn gives an option of three different laws).

7.2 In case of an assignment of rights or an entire contract, the arbitration agreement in the assigned contract or applicable to the assigned rights is transferred to the assignee, unless the arbitration agreement was made *intuitu personae*.

7.3 It is not a prerequisite for the transfer of the arbitration agreement that the assignee has signed the contract or the arbitration agreement.

7.4 No transfer of the arbitration assignment occurs if the assignment is at variance with restrictions or with form requirements stipulated in the contract.

7.5 A party can be estopped from relying on such restrictions or requirements if in light of its conduct it can be concluded that it waived its right to rely on the latter.

7.6 A party which intends to challenge the jurisdiction of the arbitral tribunal should do so unambiguously and at the earliest possible moment.

7.7 An arbitral tribunal sitting in Switzerland which intends to render an interim award on jurisdiction must fully examine all facts relevant to the issue. As a consequence of this decision, it will in many instances not be appropriate to render a preliminary award on jurisdiction if facts and arguments which are also relevant to the merits have a bearing on issues of jurisdiction.

M. Scherer