A party acting as a representative once, may not be a representative twice.

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In the absence of a validly conferred power of attorney, the principal shall only be bound if the third party can rely on its own legitimate representation of the situation.

Judgment of the Federal Supreme Court of February 2020
Case Reference : 4A_341/2021

Facts

On September 2, 2014, two companies had entered into a real estate sale agreement ("the Sale Agreement"), whereby under the terms of the Sale Agreement, the Seller had agreed to transfer the ownership of two parcels of land to the Buyer in exchange for the payment of the sale price. In addition, the Seller would undertake to pay all costs of soil decontamination, if any such practice were to be ordered by the competent authorities in subsequent years.

When concluding the Sale Agreement, the Seller was represented by C., who was given an *ad hoc* power of attorney for this purpose. In fact, C. was not registered in the commercial register as having signatory power on behalf of the Seller.

As early as October 2016, the presence of soil contaminants was detected in the two parcels of land. Upon receiving confirmation by a testing laboratory that the soil in the parcels contained arsenic, a meeting was held on January 19, 2017 between C., the architectural firm overseeing the site, the testing laboratory, and representatives of the Buyer. Following this meeting, one of the architect representatives appointed by the Buyer ("the Architect") sent a letter to C. asking him to return it after having signed it. This letter stipulated that the Seller had agreed not to intervene in the decontamination process, but accepted to cover the costs of the whole operation. On January 30, 2017, C. signed the letter and returned it to the Architect.

Subsequently, a specialized company proceeded to decontaminate the site. As the work progressed, the company sent its invoices to the Seller. After receiving the first invoice, the Seller argued that it had never ordered the decontamination work and refused to pay said invoice.

In order to discuss the emerging dispute, a meeting was held on May 2, 2017 in the presence of the Architect, C. and I., the latter being a development manager in a company related to the Seller.

After receiving further invoices and reminders from the Architect, the Seller argued that neither C. nor I. had made any commitment in its name to pay for the decontamination costs. According to the Seller, the commitment it had made in the context of the Sale Agreement was only valid in the event of remediation of the site ("*assainissement*") and not in the event of a simple decontamination procedure ("*dépollution*"). Furthermore, the work undertaken did not constitute a remediation. The Seller also added that it could only validly commit itself via the collective signature of two persons duly authorized according to the commercial register and that no specific power of attorney had been established to authorize C. to individually represent the Seller in relation to the costs of the decontamination process.

In view of the Seller's refusal to pay the invoices related to the decontamination of the site, the Buyer initiated civil proceedings. The claim was rejected by the First and Second Instance Courts. The Buyer, therefore, lodged an appeal with the Federal Supreme Court.

Issue

The main issue to be decided by the Federal Supreme Court was whether the Seller had validly agreed – through its representatives – to bear the costs of the decontamination process.

Decision

The Federal Supreme Court recalled the conditions under which an agent can conclude a contract in the name of a principal.

Under Swiss law, when an agent who enters into a contract claims to act on behalf of a principal, the principal is bound in three cases: *i)* if the principal has conferred the necessary power on the agent (internal power of attorney, Art. 32 para. 1 of the Swiss Code of Obligations [SCO]); *ii)* in the absence of an internal power of attorney conferred on the agent by the principal, where the third party could infer the existence of such power from the behavior of the principal (apparent power of attorney, Art. 33 para. 3 SCO); and *iii)* also in the absence of an internal power of attorney conferred on the agent by the principal, where the latter has ratified the contract (Art. 38 para. 1 CO).

The principal is normally bound – in the first scenario, governed by Art. 32 para. 1 SCO – when the agent has declared that he or she is acting on behalf of the principal and has the internal power of representation. Art. 32 para. 1 SCO thus essentially protects the interests of the principal. However – in the second scenario, governed by Art. 33 para. 3 SCO – in the absence of an internal power of attorney, the contracting third party is exceptionally protected when the principal has (expressly or tacitly) brought to his or her attention an (external) power of attorney which goes beyond the power which he or she has actually conferred on the agent (internal power of attorney) and, relying on this communication, the third party has believed in good faith in the existence of the agent's power. It is no longer a question of protecting the interests of the principal, but of protecting the interests of the third party contracting with him or her, and hence the security of the transaction. In this case, representation is subject to two conditions: *i)* the principal must have informed the third party of an external power of attorney that goes beyond the internal power of attorney (this communication may be tacit) and *ii)* the third party must be acting in good faith (according to Art. 3 para. 2 of the Swiss Civil Code (SCC), the third party cannot rely on his/her own good faith if he or she has failed to exercise the diligence required by the circumstances).

In the present case, it was not disputed that no internal power of attorney had been granted to C. to agree that the Buyer shall bear the decontamination costs. Therefore, the Seller could not be validly bound under the rule of Art. 32 para. 1 SCO (first scenario). The Federal Supreme Court had therefore to determine whether the Seller could nevertheless be bound by an external power of attorney and the good faith of the Buyer (second scenario). However, as the previous courts had also observed, the good faith of the Buyer was clearly lacking here, for the following reasons:

1) the Buyer, who was a real estate professional, knew that C.'s power of attorney was limited in time and that it was also limited to the conclusion of the Sale Agreement; 2) according to the commercial register C. was not authorized to represent the Seller; 3) if the Buyer wanted to change the remediation costs-clause of the Sale Agreement, it had to ensure that C. had a special power of attorney to do so; and 4) that the Sale Agreement stipulated that the coverage of the remediation costs by the Seller based on a decision of a competent authority, and that such a decision had not been undertaken in this case.

Thus, since the Buyer could not rely on its good faith, it could not be admitted that the Seller had been validly represented by C.

Key takeaway

This decision adds to Federal Supreme Court's case law rendered in representation matters. It once again highlights the risks for parties who do not pay (enough) attention to the circumstances in ensuring that a business party is duly bound by the actions of third parties. It would be wise for parties who interact with corporations to bear in mind the following lesson: always check the powers of attorney of the people you are dealing with, and, when in doubt, carry out a thorough investigation.

Comments

The conclusion reached by the Federal Supreme Court (and the First and Second Instance Courts before it) is convincing. The general rule of representation is that the principal is only bound by the acts of an agent if he or she has validly conferred an (internal) power of attorney on the agent. In the absence of such an internal power of attorney, the principal shall only exceptionally be bound by an external power of attorney (*i.e.* the appearance of a power of attorney), which he or she contributed to creating by their actions or inactivity.

In the present case, however, no action or inaction can be reproached to the principal: indeed, the Seller had never communicated to the Buyer special powers of attorney in favor of C., neither expressly nor tacitly by way of an

(hypothetical) ambiguous behavior. A diligent person cannot be bound by the acts of a purported agent who has no power of attorney.

The initial reaction of the Buyer may be understandable: upon discovering the pollution of the site, it naturally wanted to contact the Seller through its main contact person, C. This first instinctive reaction, as natural as it may be, is however not entirely excusable. The rules of corporate representation in Switzerland are well known, especially by parties acting in a professional capacity. The commercial register, with the list of authorized representatives of a company, is easily accessible online. If there were any doubts about C.'s powers of representation it would have been easy for the Buyer to obtain clarification directly from the Seller. One can only conclude that the Buyer had shown a certain amount of carelessness in relying solely on the impression created by an outdated power of attorney.

In the absence of a contractual claim against the Seller, one might wonder whether the Buyer could not try to sue C. for wrongfully acting as a representative under Art. 39 SCO. Indeed, this provision gives to the third party a claim for damages against the person who pretended to act as an agent, *i.e*. the *falsus procurator*. However, this claim is subject to a good faith test: if the third party knew or should have known that the *falsus procurator* lacked the proper authority, then the third party will not be able to claim damages. Alas, in the present case it would be difficult for the Buyer to rely on its good faith, as it would have been easy for it to verify C.'s powers of representation by consulting the commercial register or to confirm a possible *ad hoc* power of attorney. Even if case law has considerably limited the scope of the good faith requirement, recognizing that it is only a factor in reducing – and not excluding – compensation (ATF 116 II 689), it is likely that the Buyer's conduct would be assessed severely by a judge and would lead to a significant reduction of potential damages.

A second option would be for the Buyer to sue the Seller on the basis of pre-contractual liability for associates (so called *culpa in contrahendo* in connection with Art. 101 SCO, cf. Chappuis Christine, *in* Thévenoz Luc/Werro Franz, Commentaire romand du Code des obligations I, Art. 39 SCO N 2). However, since the judgment did not provide sufficient information about C.'s relationship with the Seller, it's very hard to assess the outcome of this approach.

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