The limits of unilateral choice of forum clauses

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A forum selection clause unilaterally inserted by a party into an email or invoice is ineffective if there is no express acceptance by the other party.

Judgement of the Federal Supreme Court of 2 June 2022

Case reference 4A_507/2021

Facts

A pharmaceutical company (hereafter: the "Client") requested, via emails sent on June 1, 2018, that a transport and logistics company located in Switzerland (hereafter: the "Forwarder") organize two deliveries: one concerning the transport of drug consignments to Jordan and the other concerning the shipment of narcotics to Turkey. The orders were received by an office of the Forwarder located in Lugano, Switzerland.

By reply of the same day, the Forwarder accepted the orders and, through subsequent email exchanges, the Parties finalized their operational details.

In the footer signature of each of its emails addressed to the Client, the Forwarder inserted an exclusive choice of forum clause in favor of the courts located in Bülach, in the Swiss Canton of Zürich. This signature was set out in the following terms (emphasis added):

"Wir arbeiten ausschliesslich aufgrund der Allgemeinen Bedingungen des Verbandes schweizerischer Speditions- und Logistikunternehmen (AB SPEDLOGSWISS), neueste Fassung – Gerichtsstand ist Bülach. / We work exclusively according to the General Terms and Conditions of the Swiss Freight Forwarders and Logistics Association (CG SPEDLOGSWISS), most recent edition – Jurisdiction is Bülach.

> *Die E-mail und ihre allfälligen Anhänge sind vertraulich und/oder enthalten rechtlich geschützte Informationen. Nur der beabsichtigte Adressat darf sie lesen, kopieren oder gebrauchen. Wenn Sie nicht der richtige Adressat sind oder dieses E-Mail irrtümlich erhalten haben, benachrichtigen Sie uns bitte unverzüglich und löschen Sie die Mail und ihre Anhänge von Ihrem System. Besten Dank. / This email and any attachments contain confidential and/or privileged information. Only the intended recipient may read, copy or use it. If you are not the intended recipient or have received this email in error, please notify the sender immediately and delete this email and any attachments from your system. Thank you."*

Due to a mix-up by the transport carriers, both orders were performed incorrectly: the first shipment arrived in Turkey instead of Jordan, and the second shipment arrived in Jordan instead of Turkey. This led the Client to sue its counterparty before the courts of Lugano, the place of the defendant's establishment (Art. 12 of the Swiss Civil Procedure Code [SCPC]).

Before the courts, the Forwarder moved to dismiss the claim for lack of jurisdiction, on the basis of the exclusive forum selection clause in favor of the courts located in Bülach. *Inter alia*, the Forwarder argued that, in the realm of commercial correspondence and especially for freight forwarder contracts, the integration of such contractual clauses is habitually expressed through 'half-writing' ("*halbe Schriftlichkeit*"), *i.e.*, a written proposal, printed on a bill or an invoice, which is implicitly accepted by its recipient when not contested. Since the Client did not object to the forum selection clause set out in the Forwarder's emails, it was deemed to have accepted the clause when it confirmed its orders. Consequently, the clause was effective and binding upon the parties.

Issue

When a party to a B2B contract unilaterally inserts a forum selection clause in a document such as an email or invoice, and

the other party does not object to it, is the clause validly part of their agreement?

Decision

Under Swiss law, a forum selection clause must be made in writing or in any other form allowing it to be evidenced by text (Art. 17 para. 1 SCPC). This includes written means of communication such as telex, fax and email.

Though there is no requirement that the parties formally put their signature on forum selection clauses, their consent must be clearly and unambiguously expressed and recorded. Notably, if one party requests in writing that its counterparty agree to such a clause, the other party's acceptance must be unequivocal and also in the written form. The mere silence from said party is insufficient in that regard.

Applying the above principles, the Federal Supreme Court found that the forum selection clause at hand was not validly inserted into the parties' contract since there was no evidence in writing of the Client's acceptance to it. The fact that the Client confirmed its orders without objecting to the contents of the clause was insufficient to constitute such acceptance.

In passing, the Federal Supreme Court also noted that, even if one were to consider that the Client could validly accept the clause implicitly, rather than explicitly, no such agreement could be deduced from the facts of the case. Since the Forwarder inserted the clause in small characters into its email signature, and since it did not specifically mention nor highlight the clause in its communications with the Client, the latter could not in good faith be assumed to have been made aware of it. Consequently, its confirmation of the orders could not be deemed to also cover the clause.

The Federal Supreme Court thus reached the conclusion that the forum selection clause was invalid. In turn, the courts in Lugano had jurisdiction over the dispute (Art. 12 SCPC).

Key takeaway

The unilateral insertion of a forum selection clause in an email signature, an invoice or a receipt is ineffective except if its recipient expressly accepts to be bound by it.

Comments

The judgment was rendered in the context of a domestic Swiss dispute subject to the SCPC. However, as the Federal Supreme Court itself notes, it is also applicable in the context of international disputes, including under the 2007 Lugano Convention and the Brussels I (recast) Regulation.

One should, however, not read this judgment too broadly. In its considerations, the Federal Supreme Court explained that its rather restrictive approach to consent is due to the central role played by forum selection clauses in shaping contractual relationships. Indeed, such a clause can significantly restrict a party's legal options in case of a dispute – and even force it to litigate in a far-off jurisdiction. The Court's holding in the commented case is thus limited to these particular clauses.

Finally, the facts of the case raised an interesting issue regarding the applicability of the general terms and conditions of the Swiss Freight Forwarders and Logistics Association, which the Forwarder also sought to integrate into the contract through its email signature. The Federal Supreme Court unfortunately declined to rule on this question. For more on the relationship between general terms and conditions and forum selection clauses, see the judgment commented here: https://new.swisscontract.law/7/.

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