Conflicting choice of forum clauses contained in a contract and its general terms and conditions: which clause prevails?

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A choice of forum clause contained in the contract itself prevails over conflicting clauses contained in the parties' general terms and conditions.

Judgment of the Federal Supreme Court of 19 January 2021
Case Reference : 4A_503/2020

Facts

By agreement dated 27 July 2017, two Swiss companies undertook to work together on an IT project, whereby one of the contractual partners had to carry out work for the Swiss government.

According to Article 9, paragraph 5 of the agreement, any dispute arising from the contract shall be settled through negotiations. If such dispute cannot be settled, it may be submitted before the Commercial Court of the canton of Zurich ("*Bei Meinungs verschiedenheiten ist vor Anrufung des Richters eine gütliche Einigung anzustreben. Sollte sich dennoch eine gerichtliche Beurteilung nicht vermeiden lassen, gilt als Gerichtsstand: das Handelsgericht Zürich[.]*").

Under Article 2 of the agreement, the parties attached a binding specification sheet for the IT project and further specified that the latter would prevail in case of conflict with the main contract. The specification sheet itself referred to two different sets of general terms and conditions: those of one of the parties, i.e. the defendant (hereafter: the "Defendant's Terms"), and those of the Swiss Federal government (hereafter: the "Federal Terms").

The two sets of terms and conditions differed from the main contract regarding the forum clause: the Defendant's terms set out the jurisdiction of the general courts of the canton of Zurich, rather than that of its Commercial Court ("*Gerichtsstand: das Handelsgericht Zürich*", original emphasis), while the Federal Terms had set out the jurisdiction of the courts of the canton of Bern ("*Ausschliesslicher Gerichtsstand ist Bern*"). Both sets of terms, however, also stipulated that negotiated contractual documents shall prevail over their own provisions.

On 8 April 2020, one of the parties sued its counterpart before the Commercial Court in Zurich, claiming damages on the grounds of an alleged breach of contract. The defendant challenged the jurisdiction of the Commercial Court, and argued *inter alia* that since the agreement was subject to three contradictory choice of forum clauses, the clauses were void and the competent jurisdiction should be determined in light of the default rule of Article 31 of the Swiss Civil Procedure Code (SCPC), which sets out the jurisdiction of the courts of the canton of either the defendant's registered office or the place where any of the contractual obligations are to be performed.

Given that the Commercial Court ultimately confirmed its jurisdiction to hear the case on the grounds of the choice of forum clause contained in the main cooperation agreement, the defendant appealed the case before the Federal Supreme Court (FSC), which gave rise to the judgment presented hereunder.

Issues at stake

When several contractual documents, i.e. the main contract and general terms and conditions, contain conflicting choice of forum clauses, which one should prevail?

Judgment

Under Swiss law, the substantive validity of a choice of forum clause rests upon whether the involved parties consented to the jurisdiction of the selected court; in this regard, their choice must be precisely and clearly demonstrated so as to allow

said court to establish its competence beyond a reasonable doubt (Art. 17 para. 1 SCPC, see also ATF 132 III 268).

Through the application of this principle, the FSC found that the parties had validly selected the Commercial Court of the canton of Zurich through Article 9 paragraph 5 of the cooperation agreement, which prevailed over the other choice of forum clauses. The Federal Supreme Court held, *inter alia,* that:

- Article 9 paragraph 5 could be reasonably understood by both parties as selecting the Commercial Court of the canton of Zurich;
- The provision in question had been individually negotiated, whereas the other clauses were set out in pre-formulated general terms and conditions, and were therefore not indicative of the parties' common intent; and
- Both the Defendant's Terms and Federal Terms recognized the above principle of interpretation by stating that individually negotiated terms prevailed over them; furthermore, the cooperation agreement only referred to the IT specification sheet itself and not directly to either of the Terms.

The FSC thus concluded that the Commercial Court in Zurich had rightly confirmed its jurisdiction over the case matter and upheld its decision to let the court hear the case.

Key take-away

This case provides helpful guidance for cases where conflicting choice of forum clauses are contained in a contract and its annexes. The FSC will primarily resolve such conflicts by referring to the parties' common will as expressed in their negotiated contract but also through their other communications and statements of intent. Pre-formulated documents – such as general terms of conditions – shall on the other hand not be considered as an indication of the parties' common will, and are thus unlikely to prevail over the former.

Comment

The judgment handed down by the FSC, which was rendered in the context of an internal (intra-Switzerland) dispute subject to the SCPC, is in line with the principles applicable to choice of forum clauses in international disputes, including under the Brussels I (recast) Regulation. In its judgment of 8 March 2018 (Case C-64/17, Saey Home & Garden v Lusavouga-Máquinas e Acessórios Industriais), the Court of Justice of the European Union (CJEU) similarly stated that the parties' consent to a choice of forum clause must be clearly established, e.g. through an express reference made thereto in the main contract. Accordingly, the CJEU voided a choice of forum clause which was contained in a seller's general terms and conditions since it was only referred to by said seller in its invoices to its counterparty.

As a result, parties to a contract should be aware that choice of forum clauses contained in their general terms and conditions will generally not be enforced by courts in the absence of an express agreement made with their contractual partner(s).

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