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Presumption Of Broad Subject-Matter Scope Of Swiss International Arbitration Agreements In A Swiss Court's Summary Assessment Of Its Jurisdiction

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Commentary

Presumption Of Broad Subject-Matter Scope Of Swiss International Arbitration Agreements In A Swiss Court's Summary Assessment Of Its Jurisdiction

By Phillip Landolt

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Introduction

No arbitration law system confers limitless power to arbitral tribunals to determine their own jurisdiction. Even the most pro-arbitration stalwarts concede that that would be a sort of Midas touch. One can indeed readily see the dangers inherent in having everything private individuals touch turn to arbitration.

Rather, while striving to grant arbitral tribunals extensive powers to determine their own jurisdiction, arbitration law systems unfailingly ensure that their courts always retain jurisdiction, in some degree, to contradict what the arbitral tribunal determines, or may determine.

Concerning the empowerment of arbitral tribunals to determine their own jurisdiction, the UNCITRAL Model Law sets the modern pace, not unadmirably. Not only does this widely-adopted arbitration law system permit arbitral tribunals to assess their own jurisdiction, but it permits the arbitral tribunal to proceed with the arbitration while the latter is assessing its own jurisdiction.¹

As for courts' powers to determine arbitral jurisdiction, Article II(3) of the 1958 *New York Convention* limits

the scope of courts' review of arbitral agreements providing for arbitration with a foreign seat. In such cases, courts may only oppose an arbitral tribunal's jurisdiction where the arbitration clause is "null and void, inoperative, or incapable of being performed".² Moreover, leaving aside actions to set aside arbitration awards before the courts of the seat and matters of recognition and enforcement, most arbitration law systems confine their courts' jurisdiction to pronounce upon arbitral jurisdiction to the situation where the potential jurisdiction of the court itself is at issue.³

Some arbitral law systems, such as Switzerland's, however, go further in favour of arbitral tribunals. Switzerland extends the *New York Convention's* limitation of the scope of review of arbitral agreements to international arbitrations seated in Switzerland.⁴ Furthermore, in a series of decisions in 1996, which split legal commentators, the Swiss Supreme Court held that *the intensity* of Swiss courts' treatment of arbitration agreements in assessing their own jurisdiction is limited to a summary enquiry as to their validity, operability and performability where the arbitral seat is in Switzerland. Swiss courts may decline to give effect to only an obviously doubtful or problematic arbitration agreement.

Now, in a decision of 6 August 2012 (issued on 12 October 2012), the Swiss Supreme Court has vigorously confirmed this position. It has also decisively held that Swiss courts must generally presume that arbitration agreements provide for dispute resolution of comprehensive scope, and for the first time articulated its reasons for this position.

Facts

In 1996 and 1997, a German woman entrusted a Swiss company with the investment and management of the equivalent of what is today about €1,000,000. Nothing was said about jurisdiction and applicable law.

In 2000, this same woman entered into a “mandate and trust contract” with this same Swiss company, and several parties associated with the latter, to invest and manage (or set up the management of⁵) a further sum of money, around €500,000. This contract was subject to Swiss law, and arbitration in Zurich under the rules of the Zurich Chamber of Commerce.

As part of this arrangement, a foundation under the law of Panama was created, and this money was placed with the foundation, with this woman as sole primary beneficiary, and her son as sole secondary beneficiary.

Losses were incurred in both her direct investment and her indirect investment, that through the foundation. She thereupon instructed that all remaining moneys be transferred to a bank in Austria. After the transfer, the foundation was dissolved without the woman's instruction.

The woman brought an action before the Zurich Commercial Court against the Swiss investment company and others in connection with losses on both her direct investment and that made through the foundation. She sought compensation for losses on the basis of breach of duty of care and breach of fiduciary duty. She also sought production of documents and a rendering of accounts (“Herausgabe und Rechenschaftsablage”).

As regards the second investment, the principal basis of her action seeking compensation was not a straightforward claim based on the “mandate and trust contract”. Rather, she asserted that the natural claimant was the foundation, but since it no longer existed and therefore could not claim, she based her action on the unauthorised dissolution of the foundation.

The Swiss investment company requested that the claims concerning the money in the foundation be sent to arbitration. Applying Swiss law, the Zurich Commercial Court held that only claims that were based on the mandate and trust contract were within

the material scope of the arbitration clause. It noted that the principal bases of the claim proceeded from another contract or upon the non-contractual basis of “unauthorised management” (“Geschäftsführung ohne Auftrag”, “gestion d'affaires sans mandate”, “gestione d'affari senza mandato”, governed by Arts. 419 *et seq.* of the Swiss Code of Obligations (“CO”)). It therefore dismissed this plea of lack of jurisdiction as regards non-contractual claims.

The Swiss investment company appealed to the Swiss Supreme Court requesting that the claims relating to the money in the foundation be sent to arbitration.

Swiss courts' deferential assessment of arbitration agreements

The Swiss Supreme Court first dismissed criticism among certain legal commentators concerning its acceptance that Swiss courts' scrutiny of arbitral agreements is limited to a summary one. These commentators had pointed out that there was nothing in the text of the statutory provision on review by Swiss courts of arbitration clauses which would suggest such a limitation.⁶ Moreover, at this stage, when a Swiss court reviews an arbitration clause it is in fact primarily assessing its own jurisdiction. There is no reason to suppose, in such a situation, that its review of its own jurisdiction should be restricted.

But the Swiss Supreme Court confirmed the position it has repeatedly expressed since 1996.⁷ It noted in support of this position that where the seat of the arbitration is in Switzerland, once the arbitral tribunal has decided on its jurisdiction, a challenge lies before the Swiss Supreme Court, and the latter assesses the arbitral tribunal's jurisdiction fully. Moreover, the Swiss Supreme Court observed that under the Swiss *Civil Procedure Code*, which came into force on 1 January 2011, and which applies to domestic arbitrations in Switzerland, there is an express designation that Swiss courts are to review arbitral agreements deferentially.⁸ The Supreme Court stated that many believe that for domestic arbitration this is a “codification” of its practice.

The Supreme Court then formulated just how deferential Swiss courts are to be: they must decline their jurisdiction where “at the first glance” it appears that there has been a derogation in favour of international arbitration with a Swiss seat.

Presumed substantive comprehensiveness of arbitration agreements

The Supreme Court went on to declare decisively that, where Swiss courts are requested to take jurisdiction of a matter in the presence of an agreement providing for international arbitration in Switzerland, they are to presume that such arbitration is to encompass all disputes between the parties in respect of their relationship founded upon the contract in which the arbitration agreement is situated.

It reasoned that the arbitral tribunal's determination on this matter is also subject to full review by the Supreme Court. In an unreported 2008 decision, it had already come to this conclusion, somewhat tentatively.⁹ As a sign that with this later decision the position is now established, the Supreme Court has designated this decision for publication in its official law reports.

Guidance as to operation of the presumption of subject-matter comprehensiveness of arbitration agreements

In this case both parties accepted that the law applying to determining the scope of the arbitration agreement was Swiss law. The Supreme Court therefore proceeded to the classic two-step interpretation of contractual provisions under Article 18 CO. Inasmuch as is possible, contractual terms are given the meaning the parties actually agreed on. Where, however, no such agreement is disclosed, one interprets them in accordance with how the good faith recipient of the contractual provision would objectively have understood them at the time the contract was entered into.

In this case the Supreme Court agreed with the court below that the contractual wording "all disputes arising out of or in connection with the present contract" ("alle sich aus oder im Zusammenhang mit dem vorliegenden Vertrag ergebenden Streitigkeiten") did not evidence actual agreement between the parties over the scope of the arbitration agreement. It therefore turned to an objective assessment of the scope of the arbitration agreement.

The Court stated that, where, as in this case, it is clear that there is an arbitration agreement, one should give account to the fact that the parties would seek comprehensive jurisdiction for their arbitral tribunal.

Moreover, the Court observed that, where the arbitration agreement, as here, is widely formulated to include

all disputes "in connection with" the contract, a good faith interpretation of the parties' supposed intentions is that all disputes ensuing from their contractually determined relationship or directly founded upon it are to be submitted to the exclusive jurisdiction of the arbitral tribunal.

The claims founded upon the unauthorised dissolution of the foundation, thereby incapacitating the latter from introducing claims based on violations of duty of care and seeking production and a rendering of accounts, concern this contractually-founded three-person relationship and therewith are in connection with the mandate and trust contract, without regard to whether they are based on this contract, another, or unauthorised management.

This is especially the case since there is no suggestion of any explicitly agreed other jurisdiction.

Commentary

Deferential review of arbitration agreements

With this case it has been securely established that Swiss courts assessing their own jurisdiction will only decline to defer to an international arbitration agreement providing for Swiss-seated arbitration where the agreement is *obviously* null and void, inoperative, or incapable of being performed.

Where the seat is in Switzerland, once the arbitral tribunal has decided on its jurisdiction a full challenge is available, to the Swiss Supreme Court. Having another full challenge to jurisdiction is duplicative. It also opens a breach against the policy of the Swiss legislature to have any such challenges heard by a single instance, since the rival for arbitral jurisdiction in these scenarios is a Swiss court of first instance, whose decisions are generally subject to two levels of appeal.

The Supreme Court is right to invoke the expressly limited review of domestic arbitration agreements in the Swiss *Civil Procedure Code* as legislative approval of its position relating to international arbitration agreements. Since for domestic Swiss arbitration there is always a challenge to the arbitral tribunal's assessment of its jurisdiction,¹⁰ there is no reason to think that the Swiss legislature would treat international arbitration any differently, where the seat is in Switzerland.

On the other hand, the limited review of arbitration agreements when Swiss courts are assessing their own jurisdiction suffices to protect parties from having to await the arbitral tribunal's determination on jurisdiction, and perhaps incurring costs in defending themselves in the arbitration, in cases where the arbitration agreement is clearly doubtful or ineffective.

Presumption of subject-matter comprehensiveness of arbitration agreements

The Swiss Supreme Court also rightly decided that Swiss courts should generally treat arbitration agreements validated upon their *prima facie* review to be of broad material scope. Arbitration as a jurisdiction of exception is a great deal less attractive if it only covers a subsection of matters in dispute between parties, and they need to go to the duplicative expense of litigating the others elsewhere, with the risk of inconsistent outcomes and even over-compensation.

The presumption is a valid one insofar as the parties intended arbitration in principle. In such a situation, the parties will ordinarily also have intended to subject to arbitration all possible future disputes arising between them as regards the relationship initiated by that contract, and to avoid these inconveniences which would otherwise be occasioned.

Similarity of treatment when the Supreme Court definitively assesses subject-matter scope of arbitration agreements

It should next be noted that this presumption of comprehensive scope of arbitration agreements to be applied when Swiss courts assess their own jurisdiction mirrors the Supreme Court's treatment of scope of arbitration agreements when it is dealing with challenges to jurisdiction determinations made by arbitrators.

There, once it is decisively determined by the Supreme Court that an arbitral agreement exists, other things being equal, it is presumed that the subject-matter scope is a broad one.¹¹

For assessments of Swiss courts' jurisdiction, though, the logical movement is in the conditional: *if* there is an arbitration agreement (and provisionally it is found there is), then the parties must have intended a broad substantive scope.

Rationale for the presumption of comprehensive subject-matter scope

It is important to note that the facts of this case demonstrate a limitation in interpretation of arbitration agreements under Swiss law in that such interpretation focuses exclusively on the intention or the imputed intention of the parties *at the time the arbitration agreement was entered into* and is not concerned with the actual situation obtaining when the dispute has arisen.

In the present case the prior contractual arrangement concerning the direct investments, will be decided by the same court which decided whatever was outside of the scope of the arbitration agreement under the second contractual arrangement, that involving the foundation. So concretely, there was not going to be avoidance of two legal proceedings in this case anyway. Looked at from the practical perspective of costs-efficiency, Swiss law interpretation of arbitration agreements will only *tend to* achieve the right result. But on certain occasions such as in the present case, there will be no costs advantage in practice, and one can conceive of situations where in fact costs disadvantages will occur.

On the other hand, this presumption under Swiss law of interpreting arbitration agreements will in practice almost always serve the goals of avoiding the risks of inconsistent outcomes and over-compensation. The Swiss court was anxious to articulate in this decision that all bases of claim arising between the same parties in respect of a relationship founded upon the contract in which the arbitration agreement is found are presumed to be intended for submission to the arbitral tribunal. There may indeed be many bases of right for a particular remedy, but all such rights will be derived from the same factual matrix. For Swiss courts assessing their own jurisdiction, it is the factual matrix which delimits the material scope of arbitration clauses under the Supreme Court's test.

Other factors relevant to the assessment of the subject-matter scope of arbitration clauses

In this case the Swiss Supreme Court treated the broad language of the arbitration agreement and the absence of any other choice of jurisdiction clause as corroborative of the result it had come to in operation of the one-stop shop presumption. The latter appears to have been sufficient in and of itself, on the facts of this case, to conclude that the arbitration agreement contemplated

the entirety of the possible claims between the parties upon the relationship originating with the contract.

On the other hand, the Supreme Court's adverting to the wording of the arbitration agreement and the absence of any rival forum selection clause is some indication that these two factors, i.e. narrow wording and an express choice of another forum for certain other matters, are among those that may be relevant in reversing the general presumption of comprehensiveness.

Law applicable to assessing the subject-matter scope of arbitral agreements

In this case the Supreme Court interpreted the scope of the arbitration agreement in accordance with Swiss law. The law applicable to the arbitration agreement is a much vexed set of questions, but it is the better view that Art. 178(2) of the Swiss *Private International Law Act* applies to the material scope of international arbitration agreements foreseeing a Swiss seat. That provision determines that the broadest scope under the application of the *lex causae*, the *lex arbitrii* and Swiss law is to be applied. Insofar as Art. 178(2) of the Swiss *Private International Law Act* applies to the material scope of arbitration agreements, this presumption under Swiss law of comprehensive material scope of arbitration agreements will always apply.

Even if Art. 178(2) of the Swiss *Private International Law Act* does not govern, it may be noted that contractual interpretation in most other legal systems concerns itself with party intentions and putative party intentions (and most other legal systems apply general principles of contractual interpretation to arbitration agreements). In such cases, Swiss courts would seem authorised to employ this pro-arbitration presumption to arbitration agreements governed by other laws. Indeed, Swiss courts might even take notice that other legal systems interpreting arbitration agreements according to their own laws have relied upon the very same presumption.¹²

Endnotes

1. Art. 8 of the UNCITRAL Model Law, 2006, unchanged from its 1985 original edition.

2. For a comprehensive commentary on Article II(3) of the New York Convention, see S. Wilske/T. J. Fox, in: R. Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Commentary*, C.H. Beck/Hart Publishing/Nomos, 2012, pp. 152 *et seq.*
3. On the other hand, an exception to this principle, anti-suit injunctions, tend in practice to favour arbitral jurisdiction on the merits.
4. Article 7(b) of the Swiss *Private International Law Act*.
5. There was a dispute between the parties on this matter. The woman affirmed that actual management was contemplated in the mandate and trust contract while the Swiss investment company affirmed that this contract only provided for the setting up of the management of the investment.
6. Article 7 of the Swiss *Private International Law Act* provides as follows:

"If the parties have entered into an arbitration agreement concerning a dispute which is arbitrable, Swiss courts shall deny their jurisdiction unless:

 - a. *the defendant defended itself on the substance without reservation;*
 - b. *the court determines that the arbitration agreement is null and void, inoperative, or incapable of being performed, or that*
 - c. *the arbitral tribunal cannot be constituted for reasons which are manifestly due to the respondent in the arbitration."*
7. ATF 122 III 139, consid. 2b; 4A_436/2007, consid. 3; 4C.44/1996, consid. 2.
8. Article 61 of the Swiss *Civil Procedure Code* directs courts to uphold arbitration agreements unless they are "manifestly" invalid or not susceptible of performance.
9. Decision 4A_210/2008 of 9 January 2008, consid. 3: "This [treatment] also extends, it would appear, to the determination of whether the particular dispute between the parties is contemplated." ("Cela concerne aussi, semble-t-il, le point de vérifier si la convention vise le différend des parties.")
10. Article 393(b) of the Swiss *Civil Procedure Code*.

11. ATF 116 Ia 56, consid. 3b; ATF 129 III 675, consid. 2.3; 4C.40/2003 of 19 May 2003, consid. 5.3.
12. See for example, *Premium Nafta Products Limited (20th Defendant) and others (Respondents) v. Fili Shipping Company Limited (14th Claimant) and others (Appellants)*, [2007] UKHL 40, per Lord Hoffmann at para. 13: "In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain

questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so." See also the decision of 27 February 1970 of the Federal Supreme Court of the Federal Republic of Germany (Bundesgerichtshof), BGHZ 53, 315, reported in translation in (1990) 6(1) *Arbitration International*, pp. 79 – 88, and cited by Lord Hoffman at para. 14: "There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising therefrom, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals." ■

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