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Scope and Interpretation of Arbitration Agreements under Swiss Law

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When considering whether it has jurisdiction to decide the dispute submitted to it, an arbitral tribunal must determine which disputes are covered by the agreement and which parties are bound by it. This paper discusses how an arbitral tribunal seated in Switzerland must interpret the objective and subjective scope of an arbitration agreement, taking into consideration the latest decisions of the Swiss Federal Supreme Court.

1. Introduction

This article addresses the objective (*ratione materiae*) and subjective (*ratione personae*) scope of the arbitration agreement and its interpretation under the Swiss *lex arbitri*. It is based on an analysis of the most recent case law of the Swiss Federal Supreme Court ('Supreme Court') on Article 178 of the Swiss Federal Private International Law Act ('PILA').

The Swiss international arbitration law, contained at Chapter 12 PILA, was recently revised. The revision, which came into force on 1 January 2021, clarified and modernized certain aspects of the law without changing its essential features. Revised Article 176(1) of PILA clarifies that the PILA applies to arbitrations seated in Switzerland if at least one party to the agreement (not just to the arbitration proceedings) was domiciled outside of Switzerland at the time of the conclusion of the arbitration agreement.[1]

As far as the question of the formal validity of an arbitration agreement is concerned,[2] the revision of Article 178 PILA has brought welcome clarifications.[3] Arbitration agreements are valid if they are made in written form or by any other means that can be proven by a text, including, as was already the case before, by email. New Article 178(4) specifies that arbitration clauses contained in unilateral legal acts, such as wills, and in articles of association of partnerships and of stock (and other) corporations are possible (and valid).[4] Paragraphs 2 and 3 of Article 178 (dealing with the substantive validity of the arbitration agreement and the principle of separability) were left untouched.

With regard to the interpretation of the arbitration agreement, it is useful to keep in mind that the Supreme Court consistently applies two sets of interpretation principles in its decisions.

> **'Actual' vs 'normative' consent (general principle of contract interpretation)**. The interpretation of an arbitration agreement follows the general principles of contract interpretation. As a starting point, the decisive factor is the concurrent 'actual' will of the parties.[5] Where no such 'actual' consent exists, the Court must examine whether a 'normative' consent exists. A 'normative' consent is established through an objective interpretation according to the principle of good faith. An objective interpretation answers the question of how a so-called reasonable recipient – in the

1 Art. 176(1) PILA provides: "The provisions of this Chapter shall apply to arbitrations with their seat in Switzerland if at least one of the parties to the arbitration agreement, at the time of its conclusion, did not have its domicile, habitual residence or seat in Switzerland." All quotations in English of the PILA are taken from the translation available on the website of the Swiss Arbitration Association (ASA), available at https://www.arbitration-ch.org/en/asa/asa-news/details/1087.english-translations-of-the-revised-swiss-arbitration-act-and-associated-provisions-of-the-code-of-civil-procedure-in-force-on-1-january-2021.html.

2 If the formal requirements of Art. 178 PILA are not satisfied, the arbitration agreement is not valid and has no legal effects.

3 Art. 178 PILA provides: '(1) The arbitration agreement shall be valid if made in writing or in any other manner that can be evidenced by text. (2) As regards its substance, the arbitration agreement shall be valid if it conforms to the law chosen by the parties, or to the law applicable to the dispute, in particular the law governing the main contract, or to Swiss law. (3) The validity of an arbitration agreement cannot be contested on the grounds that the main contract may not be valid or that the arbitration agreement relates to a dispute that has not yet arisen. (4) The provisions of this Chapter shall apply by analogy to an arbitration clause set out in a unilateral legal act or in articles of association.'

4 Botschaft zur Änderung des Bundesgesetzes über das Internationale Privatrecht (12. Kapitel: Internationale Schiedsgerichtsbarkeit) / Federal Council Dispatch on the Amendment of the Federal Act on Private International Law (Chapter 12: International Arbitration), pp. 7188 et seqq.

5 Dec. 4A_342/2019, 6 Jan. 2020.

exercise of her good faith – would understand the other party's declaration of intent.[6] The Supreme Court has recently confirmed that where the 'actual' concurring will of the parties can be established, there is no room for a 'normative' interpretation of the parties' will.[7]

- **Derogation from state courts (restrictive interpretation) *vs* assumption of comprehensive jurisdiction of the arbitral tribunal (extensive interpretation).** When deciding on the validity and the scope of an arbitration clause, the Supreme Court takes a two-step approach: (a) When determining whether a valid arbitration agreement exists, the Supreme Court follows a restrictive interpretation. A derogation from the jurisdiction of a state court requires a clear expression of the parties' will, as the waiver of a state court severely restricts the possibilities of appeal.[8] (b) If the Supreme Court concludes that the parties intended to exclude the dispute from the state court's jurisdiction and to submit it to a decision by an arbitral tribunal, the Court interprets the scope of the arbitration agreement extensively, i.e. it tends to assume that the arbitral tribunal has comprehensive, all-encompassing jurisdiction over the dispute.[9]

This article will discuss how these established principles of interpretation have been further clarified and refined by recent case law of the Swiss Federal Supreme Court.

2. Subjective scope of an arbitration agreement

With respect to the subjective scope (*ratione personae*) of an arbitration agreement, the arbitral tribunal must examine *which parties* are bound by the agreement. It may also need to determine whether a third party, who is not a signatory and/or is not named in the agreement, nevertheless falls within its scope.

Under Swiss *lex arbitri*, an arbitration agreement can be binding on persons who did not sign it in the following constellations:

1. In cases of assignment of a claim, assumption of a debt (simple or cumulative), or transfer of a contractual relationship.
2. In cases of contractual interference. The term 'contractual interference' is used when a third party who continuously and repeatedly interferes with the performance of a contract containing an arbitration clause is treated as if she had acceded to the contract and submitted to the arbitration clause. In such cases, the third party either expressly indicates her intention to accede to the contract, or the interpretation of her conduct in accordance with the principle of good faith leads to this result.
3. In cases of piercing the (corporate) veil ('*Durchgriff*', '*La responsabilité découlant du principe de la transparence*'). This term describes the situation in which reliance on the independence of a separate legal entity or person would constitute an abuse of rights and thus the conditions for piercing the corporate veil are met. The consequence is that the arbitration clause becomes binding for the third party who forms an economic unit with the person who concluded the arbitration agreement.
4. On the basis of a contract concluded by two parties (the promisor and the promisee) for the benefit of a third party (the beneficiary).[10]

A. Non-signatories and contractual interference

In a recent case,[11] an extension to a non-signatory based on contractual interference was denied in a case where the supplier B and several buyers entered into supply contracts concerning the construction of diesel power plants ('Contracts'), all of which contained identical arbitration clauses:

> Any disputes arising out of this Contract should be settled through friendly negotiation between both Parties. If the Parties cannot reach an agreement by negotiation, the dispute shall be finally settled, to the exclusion of legal proceedings, under the Rules of Arbitration of the International Chamber of Commerce in Paris by an arbitral tribunal composed of three arbitrators, appointed under such rules.
>
> The venue of the arbitration shall be Geneva, Switzerland. The arbitration proceedings and the award shall be in English. During the arbitration proceedings, both Parties shall continue to execute their obligations under the Contract except in respect of the matter under arbitration.

6 Dec. 4A_583/2017, 1 May 2018; 4A_150/2017, 4 Oct. 2017.

7 Dec. 4A_418/2019, 18 May 2020.

8 Dec. 4A_342/2019, 6 Jan. 2020; Dec. 4A_150/2017, 4 Oct. 2017; Dec. 4A_432/2017, 22 Jan. 2018.

9 Dec. 4A_342/2019, 6 Jan. 2020. Dec. 4A_583/2017, 1 May 2018.

10 Dec. 4A_528/2019, 7 Dec. 2020; Dec. 4A_636/2018, 24 Sept. 2019.

11 Dec. 4A_124/2020, 13 Nov. 2020.

B engaged subcontractor A to supply diesel engines for the power plants. After installation of the engines, technical problems occurred. After unsuccessful attempts to remedy these problems, the buyers refused to fulfill their payment obligations under the Contracts. When B initiated arbitration proceedings against the buyers, the buyers requested that A be made a party to the arbitration proceedings. A disputed the jurisdiction of the arbitral tribunal. However, in a partial award, the tribunal affirmed its jurisdiction over A based on a normative interpretation of A's conduct according to the principle of good faith.

The Supreme Court vacated the partial award, noting that A was expressly listed in Annex I to one of the Contracts as B's subcontractor and as the supplier of diesel engines. Despite A's presence at the conclusion of one Contract, A's participation in several meetings with the buyers, and A's various communications with the buyers, the Supreme Court concluded that A's involvement in the Contracts did not go beyond fulfilling A's obligations as defined in A's supply contract entered into with B. Given A's involvement as a subcontractor under the supply contract entered into with B, the buyers were also not entitled to construe in good faith a letter written on behalf of both, A and B, as an expression of A's intent to agree to the arbitration clause in the Contract(s) and thereby waive state jurisdiction. Rather, in view of the agreed contractual provisions, the buyers should have been aware that A was not a party to the Contract(s) and was not bound by the arbitration clause(s) contained therein.

In contrast, in an earlier case,[12] an arbitration clause was extended to a non-party due to contractual interference in the case of a Slovenian company A, a Swiss company BAG and BAG's sister company BSA. In 2009, BAG and A entered into a distribution agreement ('Agreement'). The Agreement contained an arbitration clause providing for arbitration in Ljubljana and Slovenian laws applicable to the resolution of the dispute:

> Any controversy or claim arising out of or relating to this 'Agreement' or the breach thereof shall be settled by arbitration. The number of arbitrators shall be 3 (three), One appointed by the 'Distributor', One appointed by the 'Company' and the Third being an independent body. The jurisdiction for arbitration shall be Ljubljana, the permanent arbitration of the Slovenian Chamber of Commerce, and Slovenian laws shall be used with regard to the resolution of the dispute. The language to be used in the arbitration proceeding shall be English. In the event that the 'Parties' are unable to agree on the acceptability of the Third arbitrator or in case agreed arbitration at relevant point of time shall not exist or be in function, the dispute shall be settled by the Competent Court in Ljubljana, Republic of Slovenia.

With the consent of all parties involved, the Agreement was being performed by BSA until the end of 2015. Thereafter, A filed a claim for payments against BSA before the competent state court. BSA objected the claim stating that the court lacked jurisdiction due to the arbitration clause contained in the Agreement. The state court found A's claim against BSA inadmissible and referred the parties to arbitration. A appealed to the Supreme Court to vacate the lower court's decision. The Supreme Court dismissed the appeal, clarifying that the binding of third parties is governed by the applicable substantive law and is to be assessed according to the applicable principles of contract interpretation.

These two cases differ in one important aspect:

- in the first case, A's interference with B's Contract(s) with the buyers had its basis in a separate contract entered into by A and B; A fulfilled its own obligations under this contract.
- In the second case, BSA did not fulfill its own obligations but those of its sister company under a contract between the sister company and the Slovenian company.

The same principles apply where a party to a contract containing an arbitration clause is a state-owned entity. Under the Swiss law, entities established under public law and founded by the state are considered to be legally independent, and arbitration agreements concluded by such entities cannot be extended to the states that control them, if they did not sign the respective agreement. This issue was dealt with in the case of a Turkish joint-venture (company A – consisting of two Turkish companies B and C) who had entered into an agreement with a state-owned Libyan (entity D) for the construction of an infrastructure project aimed at transporting fresh water, from Libya's south to the more densely populated areas of the north.[13] The agreement contained an ICC arbitration clause, with a three-member-tribunal, English as the language and Geneva as the seat of the proceedings. In 2011, when 70% of the project had been completed, A, B and C suspended their work due to riots. Subsequently, they filed an arbitration claim against D, as well as against the state of Libya. In a partial award, the tribunal denied

12 Dec. 4A_646/2018 / 145 III 199, 17 April 2019.

13 Dec. 4A_636/2018, 24 Sept. 2019.

its jurisdiction with respect to the state of Libya. A, B and C appealed against this decision, and the Supreme Court dismissed the appeal holding that the appellants had failed to show that the state of Libya had interfered with the agreement entered into by D.

B. Claims under contracts for the benefit of a third party

Normally, a contract entitles and obligates the parties who entered into it. However, it is possible for the two contracting parties to agree that a third party shall benefit from the contract. These two parties (the promisor and the promisee) conclude the contract in their own name; the beneficiary third party is not a party to it. Under Swiss law, claims arising from a contract for the benefit of a third party may be asserted by the person concluding the contract. In some (but not all) cases, the beneficiary third party may also independently demand performance of such a contract pursuant to Article 112 of the Swiss Code of Obligations ('CO').[14]

The question of whether a claimant or a respondent is a party to an arbitration agreement concerns the jurisdiction of an arbitral tribunal. The question of whether a contract contains an agreed obligation for the benefit of a third party and whether the party to the arbitration may request relief in lieu of that third party is a substantive question; it concerns a party's standing to sue or to be sued. In arbitration, these two issues may overlap because arbitrators, unlike judges, derive their jurisdiction from the parties' agreement; to the extent that this procedural agreement is incorporated into a contract, it may share its fate. Tribunals have jurisdiction over claims based on contracts for the benefit of a third party provided that the parties to the arbitration are the signatories to the contract in question, and the contract contains a clause submitting to arbitration any controversy relating to the contract, or any claim relating to the contract or its breach. Further, tribunals have jurisdiction over claims brought by third-party beneficiaries if the contract gives them actionable rights to demand performance from the debtor.[15]

These issues became relevant in a dispute arising out of a license agreement, between A (licensor) and Z (licensee).[16] The license agreement, whereby A granted Z the exclusive right to promote, establish and operate seafood bars in airports and train stations around the world – including the right to grant sub-licenses to its subsidiaries – contained the following arbitration clause:

> Any dispute, controversy or claim arising out of or in relation to this Agreement, including the validity, invalidity, breach or termination thereof, shall be resolved by arbitration in accordance with the Swiss rules of international arbitration of the Swiss Chamber of Commerce (hereafter: the Rules) in force on the date when the notice of arbitration is submitted in accordance with these Rules. (...)
>
> The arbitration award shall be final and binding upon the Parties, the Parties renouncing to appeal against the arbitration award by any ordinary or extraordinary means, whatever the subject of the arbitration award is.

The license agreement between A and Z further contained a clause conferring rights to sub-licensees under Article 112 CO. Z sub-licensed certain rights to its subsidiary in accordance with the license agreement. In a subsequent tender process, A was awarded the concession to operate the seafood bar and Z's offers were declined. After that, Z terminated the license agreement and started arbitration proceedings alleging that A infringed Z's exclusivity rights. Among others, Z claimed compensation for the lost profits of its subsidiary.

Since the arbitration clause in the license agreement between A and Z covered any dispute, controversy or claim arising out of or relating to the license agreement, including the validity, invalidity, breach or termination thereof, the Supreme Court dismissed A's appeal to vacate the award and confirmed the tribunal's jurisdiction. It held that where an arbitration clause covers disputes relating to damages resulting from a breach of contract, it does not matter whether the claimant asserts his own damage or that of a third party. In either case, the dispute falls within the scope of such an arbitration clause.

14 See Art. 112 CO '(1) A person who, acting in his own name, has entered into a contract whereby performance is due to a third party is entitled to compel performance for the benefit of said third party. (2) The third party or his legal successors have the right to compel performance where that was the intention of the contracting parties or is the customary practice.' An *imperfect* stipulation for the benefit of a third party (Art. 112 para. 1 CO) does not confer any right of claim on the third party; only the stipulator may demand performance from the debtor, the third party having only the right to receive it from the latter. Under a *perfect* stipulation for the benefit of a third party (Art. 112 para. 2 CO), the third party has the right to demand performance directly from the promisor and, if necessary, to take legal action against him. See further, Gauch/Schluep/Emmenegger, *OR AT Schweizerisches Obligationenrecht Allgemeiner Teil*, Schulthess Verlag,11th ed. 2020, para. 3873 et seqq.

15 Dec. 4A_528/2019, 7 Dec. 2020; Dec. 4A_12/2019, 17 April 2020.

16 Dec. 4A_12/2019, 17 April 2020.

With regard to a party's standing to be sued under a contract for the benefit of a third party, the Supreme Court recently clarified that only debtors who have signed such contract are bound by the arbitration clause contained therein, i.e. the tribunal does not have jurisdiction to hear claims brought by a third-party beneficiary against a respondent debtor who is not a signatory to such contract.[17]

3. Objective scope of an arbitration agreement

With respect to the objective scope (*ratione materiae*) of an arbitration agreement, the arbitral tribunal must examine *which disputes* are covered by the agreement. If the parties decide that only some issues are to be submitted to arbitration and others to the state courts, they must specify which particular issues should not be heard by the arbitral tribunal. If the arbitration agreement does not contain such restrictions, the tribunal's jurisdiction is assumed to be all-encompassing.

In 2018, the Supreme Court found that there was no indication in the arbitration agreement that the parties intended to agree on a restrictive jurisdiction of the arbitral tribunal.[18] In that case, a foundation and its attorney had several agreements in place, one of them being a mandate agreement ('Mandate') containing the arbitration agreement. The foundation requested the return of a share certificate from the attorney, which the attorney refused to hand over, invoking a right of retention and arguing that he had claims under the Mandate and under other agreements, amounting to several million Swiss francs, that entitled him to withhold the share certificate. By an interim decision (on certain preliminary issues and jurisdiction), the tribunal affirmed its jurisdiction and declared itself competent to hear all claims for outstanding payments as well as the request for return of the share certificate. The attorney appealed against this decision, arguing that the court had jurisdiction to assess his claim for outstanding payments under the Mandate, but not his other claims, which did not have their basis in the Mandate.

Rather, the actual concurring will of the parties on the scope of the arbitration agreement had not been established. As a result, the arbitration agreement had to be interpreted in accordance with the principle of good faith, under the assumption that the parties did not want a division of legal process, but rather wanted the arbitral tribunal to have comprehensive jurisdiction. Although the parties had formulated the arbitration agreement narrowly in the sense that they expressly submitted only 'disputes which should arise from this contract' to the arbitral tribunal, the Supreme Court ruled that the arbitration agreement should be understood in good faith to cover disputes in connection with the conclusion of the Mandate and, in particular, disputes regarding its termination or claims in connection with the settlement of its termination. Insofar as the attorney made claims in connection with the settlement of the termination of the Mandate, the arbitral tribunal had rightly affirmed its jurisdiction.

The Supreme Court clarified that for a claim to be related to the subject matter of the retention, it does not need to be based on the same legal ground. It is sufficient, but also necessary, for both relationships to be connected by the same purpose or otherwise have a natural connection. In other words, since the tribunal had jurisdiction over disputes arising out of the Mandate, it was also competent to assess the attorney's claims, as these claims had a sufficiently close connection with the object of retention, i.e. the share certificate.

The same principles applied to a dispute arising from a business relationship that had its basis in a bidding process.[19] B (a German company) chose to award a procurement contract for the supply of thin-film transistor displays for the period 2017-2021 to A (a South Korean company). During the course of the negotiations, the parties discussed several documents, namely the Terms of Purchase, the Corporate Agreement (CA) and the Quality Assurance Agreement (QAA), and finally signed only the QAA. Section 9(3) QAA contained the following arbitration clause:

> If all parties in a dispute have their headquarters in Germany, the sole place of jurisdiction for any contract dispute is Stuttgart. For processes in front of district courts, Stuttgart District Court (70190 Stuttgart) is the responsible court in this case. In all other cases, contract disputes shall be settled definitively in accordance with the Rules of Arbitration of the International Chamber of Commerce by one or several arbitrators appointed in accordance with this ordinance. The place of arbitration is Zurich, Switzerland, unless the parties in dispute agree a different location. The language for the arbitral proceedings is English. The parties in dispute shall handle all information that they receive in respect of arbitral proceedings

17 Dec. 4A_528/2019, 7 Dec. 2020.

18 Dec. 4A_583/2017, 1 May 2018.

19 Dec. 4A_342/2019, 6 Jan. 2020.

> in accordance with this provision with the utmost confidence, including the existence of arbitral proceedings. In a court and/or arbitral proceeding, they shall only disclose such information as is required to exercise their rights. The chairman or arbitrator must be a different nationality to the parties in dispute. The parties in dispute shall continue to meet their agreements affected by the dispute subject to a different decision by the arbitral court.

Subsequently, A informed B of its decision to abandon the project and asked B to find another supplier. B refused to accept the suspension of deliveries and initiated arbitration proceedings, in which B brought forward claims that did not arise from the QAA. In a partial award, the tribunal found that it had jurisdiction over such claims, whereupon A appealed to the Supreme Court to vacate the award.

The Supreme Court dismissed the appeal, holding that, where it is established that the parties agreed on the jurisdiction of an arbitral tribunal, there is no reason for a narrow interpretation of the arbitration agreement. Rather, the arbitration agreement should be interpreted extensively. In view of the declarations of intent exchanged between the parties, A could not in good faith interpret the arbitration clause in the QAA to cover only specific aspects of the commercial relationship with B, while other courts would retain jurisdiction for other disputes arising from the same relationship. The fact that, in addition to section 9(3) QAA, the other – unsigned – contractual documents also each contained an arbitration clause did not mean that independent dispute resolution mechanisms for individual claims were to be provided for within the same supply relationship. Interpreted in accordance with the principle of good faith, the arbitration agreement at section 9(3) QAA should be understood to apply to the entire business relationship. The Supreme Court clarified that this was not a question of extending the arbitration clause to other independent contracts, but rather a question of how the arbitration clause was to be understood according to an objective interpretation.

4. The Swiss courts' restrictive interpretation of the consent to arbitrate

As mentioned above, when considering whether a party has agreed to arbitrate a dispute, Swiss courts apply a strict approach. The parties' consent to resort to arbitration and to deviate from state jurisdiction cannot be assumed without further ado and must be clearly expressed by the parties. The Supreme Court frequently deals with disputes over the parties' consent to arbitrate. In the two cases briefly presented here, the Supreme Court set aside awards that wrongly affirmed the tribunal's jurisdiction.[20]

The first case concerned a dispute that arose between two insurance companies who, in the context of a reinsurance arrangement, had entered into several agreements.[21] While the other agreements contained an arbitration clause, the retrocession agreement on which the claim was based provided for the jurisdiction of state courts. It is worth noting that it was undisputed between the parties that they were bound by the retrocession agreement and by its addendum, and that there was no arbitration clause in either of these two documents. Despite this fact, the tribunal affirmed its jurisdiction based on the fact that all other agreements contained an arbitration clause. In doing so, it interpreted the intentions and conduct of the parties according to the *principle of objective interpretation*. Among others, it held:

> By signing and returning the amended slip to D.__ Respondent ... *must have taken into account* ... and that therefore the E.__ Conditions *needed to and would apply* to both the direct reinsurance contract and the retrocession contract, between the parties. [__] the Arbitral Tribunal is of the opinion that Respondent *knew or must have known* that the E.__ Conditions were a constituent part of the reinsurance agreement between the fronter and E.__ and that consequently, following the back-to-back practice, the retrocession agreement between the fronter

20 Under Art. 190(2) PILA, an award may be set aside: (a) if the sole arbitrator was designated or the arbitral tribunal was constituted in an irregular way; (b) if the arbitral tribunal wrongfully accepted or declined jurisdiction; (c) if the arbitral tribunal decided on points of dispute which were not submitted to it or if it left undecided prayers for relief which were submitted; (d) if the principle of equal treatment of the parties of the right to be heard was violated; (e) if the award is incompatible with public policy.

21 Dec. 4A_150/2017, 4 Oct. 2017.

> and Respondent *needed to reflect* the same E.__ conditions and the arbitration clause. [Emphasis added]

The Supreme Court found that the different insurance agreements concluded in the context of a reinsurance arrangement had to be considered as separate legal documents. The mere fact that other agreements contained an arbitration clause did not indicate an intention of the parties to the retrocession agreement to likewise waive state jurisdiction in the event of disputes arising from their contractual relationship. Even if the jurisdiction clause contained in the retrocession agreement was unclear with regard to the competent court, it contained an expression of the parties' intent to have any disputes judged by state courts and not to waive state jurisdiction. Accordingly, the arbitral tribunal should have assumed all the more that, interpreted in accordance with the *principle of good faith*, the retrocession agreement did not express a sufficiently clear intention of the parties to exclude disputes arising from the retrocession agreement from state jurisdiction in favor of resolution by an arbitral tribunal.

The second case, where the Supreme Court set aside a CAS award,[22] follows the same interpretation principles. The dispute arose from an exclusive brokerage agreement between a footballer and his agent, who sued the footballer for payment of brokerage compensation. Whilst the dispute resolution clause in the brokerage agreement contained a reference to AFA and FIFA as 'national and international bodies', it contained no mention of an arbitral tribunal, but rather submitted the parties to the jurisdiction of the commercial state courts of the Federal Capital of Argentina. The arbitral tribunal affirmed the jurisdiction of the FIFA Players' Status Committee – and from this indirectly its own jurisdiction – based on Clause 6 of the brokerage agreement.[23]

The Supreme Court held that the award showed no finding of an actual consent of the parties as to the method of dispute settlement and that, therefore, Clause 6 of the brokerage agreement should be interpreted according to the principle of good faith.

While Clause 6 did not mention any arbitral tribunal – let alone the CAS – the parties, according to its wording, expressly submitted to the jurisdiction of the commercial courts of the capital of Argentina. The references to 'AFA' and 'FIFA' were insufficient to derive a clear presumed intention of the parties to exclude disputes arising from the brokerage agreement from the state jurisdiction and to submit them to a decision by an arbitral tribunal, since the two instances are not courts of arbitration, but mere internal bodies of the association. Apart from the fact that the jurisdiction of an arbitral tribunal was not mentioned in Clause 6 of the brokerage agreement, there was also no clear order of precedence between the jurisdiction of the association bodies on the one hand and that of the state commercial courts on the other. Therefore, the dispute resolution mechanism in Clause 6 of the brokerage agreement did not contain a sufficiently clear and concurring declaration of the parties' intent to derogate from the jurisdiction of state courts.

5. Conclusion

The relatively large number of cases brought before the Swiss Federal Supreme Court in the recent years shows that the interpretation of the objective and subjective scope of an arbitration agreement is an 'evergreen' topic in arbitration proceedings. Although the principles of interpretation discussed here are well established in the longstanding jurisprudence of the Swiss Federal Supreme Court, the recent decisions discussed in this article provide further welcome clarifications and refinements to this established jurisprudence.

22 Dec. 4A_432/2017, 22 Jan. 2018.

23 Clause 6 of the brokerage agreement read as follows: 'Para la tramitación y dilucidación de cualquier conflicto que pudiere suscitarse con motivo de la celebración, interpretación, ejecución y extinción de este contrato y sin perjuicio que podrán ocurrir por ante las instancias federativas nacionales e internaciones que correspondan (Órgano de Resolución de Litigios AFA y Comisión del Estatuto del Jugador FIFA en el orden internacional), con fundamento en la garantía constitucional del juez natural (Art. 18 C.N. [Constitución Nacional]) las partes se someten a la jurisdicción y decisión de los tribunales ordinarios en lo Comercial de Capital Federal, República Argentina'.