Decision of the Swiss Federal Tribunal on the *exceptio arbitri* in state court proceedings: comments on the prima facie review and its scope of application

SWITZERLAND

Dr Urs Weber-Stecher
Wenger & Vieli Ltd, Zurich
u.weber@wengervieli.ch

Flavio Peter
Wenger & Vieli Ltd, Zurich
f.peter@wengervieli.ch

In a decision of 6 August 2012, the Swiss Federal Tribunal confirmed its case law that where the seat of an arbitration is in Switzerland, a Swiss state court that is asked to decline jurisdiction based on the existence of a valid arbitration clause (the so-called arbitration defence or arbitration exception to jurisdiction, or *exceptio arbitri*) may only conduct a prima facie review of the *exceptio arbitri*.[1]

The decision, including the references to its earlier case law, suggests moreover that the Federal Tribunal is unlikely to change its position in relation to arbitrations seated outside of Switzerland. In those cases, a Swiss state court must decide whether to accept or decline jurisdiction on the basis of art. II(3) New York Convention (NYC) and is under an 'obligation to decide without any limitations on the arbitration defence'.[2] In other words, where the arbitration defense is based on an arbitration agreement providing for arbitration outside of Switzerland, the Swiss national court will have an unlimited power of review.

Two aspects of the Federal Tribunal's reasoning are of general interest and will thus be discussed below, after a brief summary of the decision: (i) the standard of review (prima facie or full review) and (ii) the question whether a different standard of review is justified merely as a consequence of the fact that the designated seat of arbitration is in Switzerland or abroad.

While we do not dispute the accuracy of the Federal Tribunal's decision in the case at hand, and agree with the concept of *prima facie* review, we disagree that the standard of review should depend on the seat of arbitration.

Summary of decision of the Federal Tribunal of 6 August 2012 (4A_119/2012)

Factual background: a party filed a claim with a Swiss court, notwithstanding an arbitration clause

On 17 June 2011, Y (a German national domiciled in Munich) filed a claim with the Commercial Court of the Canton of Zurich against the Zurich-based X Ltd, seeking damages for breach of the duty of care and loyalty under an escrow and mandate agreement (the 'Agreement').

X Ltd challenged the jurisdiction of the Zurich Commercial Court on the basis of the arbitration clause contained in the Agreement. The arbitration clause provided that 'all disputes arising out of or in connection with the present agreement shall' be settled by a sole arbitrator in Zurich, in accordance with the international arbitration rules of the Zurich Chamber of Commerce.

By decision of 23 January 2012, the Zurich Commercial Court dismissed some of the claims raised by Y on the ground that they did arise out of the Agreement. The court dismissed X's arbitration defence, however, and decided to continue the proceedings in relation to other claims, which it found fell outside the scope of the arbitration agreement.

X appealed the Zurich Commercial Court's (partial) dismissal of the arbitration defence up to the Swiss Federal Tribunal, which upheld the arbitration defence on the grounds that where a Swiss state court is called upon to decide on a defence of lack of jurisdiction based on an arbitration agreement providing for a seat in Switzerland, it shall render its decision based on a prima facie review of the *exceptio arbitri*.

In reaching its conclusion, the Federal Tribunal confirmed its well-settled case law[3] that a Swiss state court shall only decline jurisdiction based on an arbitration agreement providing for arbitration in Switzerland within the boundaries of Article 7 of the Swiss Private International Law Act (SPILA), Article 7(b) of which requires that a 'Swiss court before which the action is brought shall decline its jurisdiction unless […] b. The court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; […]'. While, as mentioned, the Federal Tribunal held that a Swiss state court called upon to decide on an *exception arbitri* shall render its decision based on a limited, prima facie review only (consideration 3.2), it held that such review is not restricted to an examination of the validity of the arbitration agreement, but also includes its scope of application (consideration 3.3).

The Federal Tribunal considered that the state court's prima facie review of the arbitration agreement under Article 7 SPILA aims at preventing the arbitral tribunal's decision on its own jurisdiction (as per Article 186(1) and (1-bis) SPILA) from being prejudiced by the decision of the state court (consideration 3.2). Moreover, it held that a limited review is justified due to the fact that a full review of the arbitration agreement (and more generally of the arbitral tribunal's jurisdiction) remains possible in the context of setting aside proceedings against the award (consideration 3.2).

The Federal Tribunal further justified the confirmation of its case law by referring to Article 61 of the Swiss Code of Civil Procedure (CCP), which entered into force on 1 January 2011. According to said provision, which applies to domestic arbitration proceedings, a state court shall decline jurisdiction if it finds that 'the arbitration agreement is manifestly invalid or unenforceable'.[4] The Federal Tribunal added that Article 61(1)(b) CCP in fact embodied the Federal Tribunal's case law on Article 7 SPILA and the state court's scrutiny was explicitly limited by law in domestic arbitration as well.

On that basis, the Federal Tribunal decided to confirm its case law and held that the Zurich Commercial Court of Zurich had violated Article 7(b) SPILA when it elected to examine unduly closely the arbitration defence raised by X.

Comments

The prima facie review by state courts is justified

In the light of Article 7 SPILA, and with reference to Article 186(1) and (1-bis) SPILA, the Federal Tribunal considered that the prima facie review of the arbitration defence guarantees that the arbitral tribunal's decision on its own jurisdiction is not prejudiced by the decision of the state courts.[5] Accordingly, the Federal Tribunal recognised, at least with regard to Article 7 SPILA, the '*effet négatif*' of the competence-competence principle;[6] adding that a full review of the arbitration defence would mean 'turn[ing] art. 7 SPILA into an instrument to paralyse arbitral proceedings'.[7]

The objective of Article 7 SPILA is to prevent dilatory tactics or 'maneuvers destabilising the arbitration procedure'.[8] If the state court were to perform a full examination of the arbitration defence, this could encourage parties to resort to such dilatory tactics.[9]

Moreover, scholars have correctly pointed out that the '*effet négatif*', and therewith the prima facie review by state courts, is more favourable to a proper functioning of arbitration, since it avoids parallel proceedings and limits the risk of conflicting decisions.[10]

According to other scholars, however, Article 7 SPILA does not literally grant any priority to the arbitral tribunal in determining its jurisdiction and, therefore, it is the state court's task to 'examine its jurisdiction, not its lack of jurisdiction' with unlimited powers.[11]

This approach is not convincing for the following reasons:

- First, it refers to the notorious decision of the Federal Tribunal in the *Fomento* case,[12] according to which an arbitral tribunal has no priority in ruling on its jurisdiction based on the principle of international *lis pendens*.[13] However, precisely in reaction to this unsatisfactory decision, the Swiss legislature in March 2007 implemented Article 186(1-bis) SPILA, which ensures for arbitrations seated in Switzerland that the competence-competence principle takes precedence over *lis pendens*, thereby preventing parties from resorting to dilatory tactics under the title of the latter.[14] Hence, an unlimited review under Article 7 SPILA by state courts would contradict the very purpose of Article 186(1-bis) SPILA and be contrary to the above-mentioned efficiency considerations.[15]
- Likewise, the argument that the state courts only decide on their own jurisdiction,

and not on their lack of jurisdiction, also insufficiently assesses the competence-competence principle stipulated in Article 186(1) and (1-bis) SPILA. If the competence-competence principle is to be given full meaning, the arbitral tribunal's decision on its own jurisdiction ought not to be anticipated by a state court before an award has been rendered.[16] Therefore, whenever there is an arbitration agreement that is not manifestly invalid or unenforceable, a state court's power of review should be limited to avoid the risk of paralysing arbitration proceedings.[17]

- Finally, the implementation of Article 186(1-bis) SPILA and Article 61 CCP shows that not only the case law of the Federal Tribunal, but also the legislative developments of the last six years,[18] all point in the same direction: an arbitral tribunal seated in Switzerland shall have priority in ruling on its own jurisdiction and, conversely, a state court seized in a pre-award stage shall only be entitled to a prima facie review of a defence of lack of jurisdiction.

The prima facie review must apply irrespective of the seat of arbitration

In contrast to its convincing reasoning with respect to Article 7 SPILA in the decision discussed above, the Federal Tribunal has constantly held that if the seat of arbitration is abroad, the state court seized in Switzerland in application of Article II (3) NYC 'has the obligation to decide without any limitations on the arbitration defence'.[19]

First and foremost, it should be noted that Article II(3) NYC does not define the standard of review that the court shall apply.[20]

Secondly, the legislative history of Article 7 SPILA shows that its wording is based on the text of Article II (3) NYC.[21] Hence, the distinction made by the Federal Tribunal, that is, its conclusion that Article II(3) NYC obliges the state courts to perform a full review while Article 7 SPILA only allows a prima facie review of the arbitration defence, appears to be artificial from a historical perspective.[22]

In our view, Article II(3) NYC and the extent to which the '*effet négatif*' of the competence-competence principle is recognised in the respective forum state should determine the applicable standard of review.[23]

Not only has the Federal Tribunal recognised the '*effet négatif*' under Article 7 SPILA, but it has also held that the New York Convention could and should be interpreted in light of more recent provisions with the same content, such as those of the SPILA.[24] Given the similarities of the statutory texts, the reason for the different standards of review is not evident.[25]

Moreover, considering that both Article 7 SPILA and Article II(3) NYC are aimed at preventing parties from using dilatory tactics, an interpretation in line with Article 7 SPILA is all the more justified: a party resorting to 'maneuvers destabilising the arbitration procedure' does not deserve any support, irrespective of the seat of arbitration.[26] Thus, Article II(3) NYC should be interpreted against the background of Article 7 SPILA and, consequently, state courts should apply a prima facie review in these cases as well.

In its constant case law, the Federal Tribunal justifies applying different standards of review depending on the seat of arbitration by the fact that the decision on jurisdiction of an arbitral tribunal seated in Switzerland is subject to a subsequent full review by the Federal Tribunal in setting aside proceedings against such decision.[27]

This approach bears an inherent element of mistrust vis-à-vis foreign jurisdictions, which is not appropriate any more, assuming it ever was.[28] After all, the vast majority of legal systems not only provide for setting aside procedures and, hence, for a post-award control, but have also ratified the New York Convention, thereby ensuring a certain standard of judicial control.[29] Thus, a post-award control by a judicial authority will be available in the vast majority of cases, both at the stage of setting aside proceedings and at the stage of the recognition and enforcement of the award under the NYC. There is no apparent interest for Swiss state courts to claim for themselves the right to examine the issue of an arbitral tribunal's jurisdiction with unlimited powers in arbitrations seated outside Switzerland. On the contrary, Swiss state courts can and should be expected to place confidence in other jurisdictions and to respect the parties' will to have their seat of arbitration abroad.

The system of the NYC is built on the inherent notion of mutual confidence between and among the Convention's signatories. For that very reason, the NYC does not allow for the application of double standards, discriminating against international arbitration agreements.[30]

In our view, the Swiss Federal Tribunal should reconsider what can only be termed its discriminatory approach under Article II(3) NYC. It should uphold the principle of the prima facie review of the arbitration defence in all cases, irrespective of the seat of the arbitration.

Notes

1 DFT 4A_119/2012, cons 3.2, with further references: DFT 122 III 139, cons 2b; DFT 4A_279/2010, cons 2; DFT 4A_436/2007, cons 3; DFT of 16 January 1995, 121 III 38, cons 3b; also DFT of 13 September 2004, 4P.114/2004, cons 7.3.

2 DFT 121 III 38, cons 3b; cfr. 4A_279/2010, cons 2.

3 In particular to DFT of 29 April 1996, 122 III 139, cons 2b; and unpublished decisions: DFT of 9 January 2008, 4A_436/2007, cons 3; DFT of 31 October 1996, 4C.44/1996, cons 2; DFT of 25 October 2010, 4A_279/2010, cons 2.

4 Article 61 paragraph 1 lit b CCP; unofficial translation of Swiss Confederation, available at: **www.admin.ch**.

5 DFT 4A_119/2012, cons 3.2; DFT 122 III 142; DFT 121 III 41.

6 For an explanation of the different notions of the competence-competence principle, see, for example, Reetz, 'The Limits of the Competence-Competence Doctrine in United States Courts' (May 2011) Dispute Resolution International, Vol 5 No 1, 5–19.

7 DFT 122 III 144.

8 Kaufmann-Kohler and Rigozzi, *Arbitrage international – Droit et pratique à la lumière de la LDIP, 2nd ed* (Berne, 2010) paragraph 442; Gaillard, 'La reconnaissance, en droit suisse, de la seconde moitié du principe d'effet négatif de la compétence-compétence', in *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC, 2005) 311–326, 322; Schramm, Geisinger and Pinsolle, 'Article II', in: *Recognition and Enforcement of Foreign Arbitral Awards: a Global Commentary on the New York Convention* (the Netherlands, 2010) 38–114, 95.

9 Mayer,'Die Überprüfung internationaler Schiedsvereinbarungen durch staatliche Gerichte' (1996) ASA Bulletin 3, 361–411, 363.

10 Schramm, Geisinger and Pinsolle, 110; Kaufmann-Kohler and Rigozzi, paragraph 442 et seq; Gaillard, p 312 et seq.; see also Besson, 'Réflexion sur le projet de modification de l'article 7 LDIP (initiative Lüscher)' (2011) ASA Bulletin 3, 574–584, 576.

11 Poudret and Besson, *Comparative Law of International Arbitration, 2nd ed* (2007) paragraph 501; Berger and Kellerhals, *International and Domestic Arbitration in Switzerland, 2nd ed* (2010), paragraphs 316, 613; Berti, note 8 above, at Article 7, in *Commentary on SPILA, 2nd ed* (Basle, 2007); Poudret, *Le tribunal fédéral Suisse opte pour le régime de la litispendence entre le juge et l'arbitre […], Revue de l'Arbitrage* (2001) Issue 4, 842–854, [hereinafter 'Litispendence'], paragraph 1.2; however, see Besson, 577, acknowledging the arbitral tribunal's priority in ruling on its jurisdiction under Article 7 SPILA; equating the review standard with the '*effet négatif*', Gaillard and Banifatemi, 'Negative Effect of Competence-Competence: The Rule of Priority in Favour of Arbitrators' in *Enforcement of Arbitration Agreements and International Arbitral Awards* (2008) 259.

12 DFT of 14 May 2001, 127 III 279.

13 Poudret and Besson, paragraph 512.

14 Wenger and Schott, Article 186, in *Commentary on SPILA, 2nd ed* (Basle, 2007); Tschanz and Gazzini, 'Chronique de jurisprudence étrangère: Suisse' in *Revue de l'Arbitrage* (2009) Issue 4, 827–837, 836; Waincymer, *Procedure and Evidence in International Arbitration*, 691.

15 Wenger and Schott, notes 2, 7b, 14 et seq, Article 186; Tschanz and Gazzini, 836; Kaufmann-Kohler and Rigozzi, paragraph 443a; already advocating the arbitral tribunal's priority in ruling on its jurisdiction under Article 186(1) SPILA: Bucher and Tschanz, *International Arbitration in Switzerland* (1988) paragraphs 140 et seq; Heini, notes 1 and 19, Article 186, in *Commentary on SPILA* (Zurich, 2004).

16 Gaillard and Banifatemi, 272; Heini, note 19 et seq, Article 186; Tschanz, 'De l'opportunité de modifier l'art 7 LDIP' (2010) ASA Bulletin 3, 478–484, 479 et seq; Kaufmann-Kohler and Rigozzi, paragraph 449a et seq; Besson, 575.

17 DFT 122 III 144; DFT 4A_119/2012, cons 3.2.

18 Most recently, for example, the so-called 'Luescher initiative' which aims at setting forth a prima facie review by state courts in the pre-award stage independent of the seat of arbitration.

19 DFT 121 III 38, cons 3b; cfr 4A_279/2010, cons 2.

20 Haas, 'Part 3: The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958' in: *Practitioner's Handbook on International Arbitration* (Munich, 2002) paragraph 108; Schramm, Geisinger and Pinsolle, 109; Besson, 575; Mayer, 375.

21 Dispatch of the Federal Council of 10 November 1982 on the Swiss Private International Law Act, BBl 1983 I 303; Berti, notes 2 and 13, Article 7; Schramm, Geisinger and Pinsolle, 97 et seq; Bucher and Tschanz, paragraph 151.

22 See Poudret, Litispendence, paragraph 3.1; Gaillard, p 320 et seq, 322.

23 Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (2003) paragraph 14–54; Schramm, Geisinger and Pinsolle, 95 et seq, 109; Bucher and Tschanz, paragraph 143; in the result, also Besson, 575.

24 DFT 121 III 43 et seq, where it held that Article II(2) NYC should be understood in the meaning of Article 178 SPILA; cfr Poudret, 'Discrepancies Between the New York Convention and Chapter 12 of the Swiss PIL' in: *The New York Convention of 1958, ASA Special Series No. 9* (1996) 238–244, 240; Volken, notes 19 and 25, Article 7.

25 Dispatch of the Federal Council of 10 November 1982, BBl 1983 I 303; Gaillard, p 320 et seq; also acknowledged by Volken, note 18 et seq, Article 7; Poudret and Besson, paragraph 502; Berti, note 2, Article 7; Tschanz, 483.

26 Mayer, 363; Kaufmann-Kohler and Rigozzi, paragraph 443.

27 DFT 4A_119/2012, cons 3.2; DFT 122 III 142 et seq.

28 Impliedly also Besson, 579.

29 Kaufmann-Kohler and Rigozzi, paragraph 442; Poudret and Besson, paragraphs 478, 767 et seq; Waincymer, p 611; of different opinion Besson, 579, who refers to foreign arbitrators hostile to arbitration and interfering state courts of foreign jurisdictions

30 Born and Koepp, 'Towards a Uniform Standard of Validity of International Arbitration Agreements' in: *Grenzüberschreitungen* (2005) 69; Mayer, 363, referring to (the violation of) the principle of equal treatment.