

ONE FIRM, MULTIPLE TALENTS

ASA below 40
Swiss Case Law Series:

Jurisdiction over set-off defenses arising out of contracts that are
subject to another arbitration clause
(cf. 4A_482/2010)

Practical Application and Solutions

Bern, 14 September 2018

Introduction: Case 4A_482/2010 dated 7 February 2011

In the case at stake:

“It is appropriate here to recall that an arbitral tribunal is authorized to decide preliminary issues that are not within the scope of the arbitration clause”.

Introduction: Case 4A_482/2010 dated 7 February 2011

Unexpected statement:

“Along the same lines and with regard to the set-off, the tendency is to generalize the principle of “the judge of the action is the judge of the objection,” which suggests, as stated in the text of art. 21 (5) of the Swiss Rules of International Arbitration, that the arbitral tribunal has jurisdiction to hear a set-off defense even when the relationship out of which this defense is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause. In Switzerland, this principle was given force by the law with regard to domestic arbitration (art. 377 (1) CPC)”.

Introduction: Case 4A_482/2010 dated 7 February 2011

Unexpected statement:

“Along the same lines and with regard to the set-off, the tendency is to generalize the principle of “the judge of the action is the judge of the objection,” which suggests, as stated in the text of art. 21 (5) of the Swiss Rules of International Arbitration, that the arbitral tribunal has jurisdiction to hear a set-off defense even when the relationship out of which this defense is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause. In Switzerland, this principle was given force by the law with regard to domestic arbitration (art. 377 (1) CPC)”.

Introduction: Case 4A_482/2010 dated 7 February 2011

Procedural admissibility of set-off

Principle: Arbitral Tribunal seated in Switzerland has jurisdiction over set-off defense

No stay of the procedure or suspension of the award (ATF 116 Ia 154)

Exceptions: Arbitration Agreement
 Arbitration Rules

Revision of Chapter 12, PILA?

Introduction: Case 4A_482/2010 dated 7 February 2011

Practical application and solutions in particular:

1. Advance on costs
2. Procedural formalities
3. Counterclaim *versus* Set-off defense
4. Discussions

Practical application and solutions

1. Advance on costs

Does the filing of a set-off defense claim imply an increase of the advance on costs requested to the parties?

How the advance on costs is shared and what happens if Respondent does not pay its share?

Practical application and solutions

1. Advance on costs

Art. 37(7) ICC Rules: *“If one of the parties claims a right to a set-off with regard to any claim, such set-off shall be taken into account in determining the advance to cover the costs of the arbitration in the same way as a separate claim insofar as it may require the arbitral tribunal to consider additional matters”*.

Clause 2.4, Appendix B, SRIA: *“Claims and set-off defences are added for the determination of the amount in dispute, unless the arbitral tribunal, after consulting with the parties, concludes that such set-off defences will not require significant additional work”*.

Practical application and solutions

2. Procedural formalities

When the set-off defence shall be raised?

How the set-off defence shall be raised?

Practical application and solutions

2. Procedural formalities

Art. 3 (10) SIAR: *“Any counterclaim or set-off defences shall in principle be raised with the Answer to the Notice of Arbitration”*.

Art. 21 (3) UNCITRAL Rules: *“In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it”* (see Art 4(2)(e) UNCITRAL Rules).

ICCR?

Practical application and solutions

2. Procedural formalities

Set-off

Gestaltungsrecht / droit formateur

versus

Procedural set-off

Federal Tribunal decision 4A_290/2007/4A_292/2007, dated 10 December 2007, para. 8.3.1

Practical application and solutions

3. Counterclaim *versus* Set-off defense

Which factors should be taken into consideration in order to choose whether to make a counterclaim or to rely on a claim for the purpose of a set-off ?



ONE FIRM, MULTIPLE TALENTS

Mathieu Granges

PYTHON
3, rue François-Bellot
1206 Genève

Phone: +41 22 702 15 15

Fax: +41 22 702 14 43

mgranges@pplex.ch