ASA BULLETIN

Founder: Prof. Pierre LALIVE
Editors: Matthias SCHERER and Catherine A. KUNZ

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
e-mail: lrs-sales@wolterskluwer.com

Aims & Scope

Switzerland is generally regarded as one of the world's leading places for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland among the top three for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

- Articles
- Leading cases of the Swiss Federal Supreme Court
- Leading cases of other Swiss Courts
- Selected landmark cases from foreign jurisdictions worldwide
- Arbitral awards and orders under various auspices including ICC, ICSID and the Swiss Chambers of Commerce ("Swiss Rules")
- Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

Books and journals for Review

Books related to the topics discussed in the Bulletin may be sent for review to the Editors (Matthias Scherer and Catherine A. Kunz, LALIVE, P.O.Box 6569, 1211 Geneva 6, Switzerland).

ASA Secretariat

4, Boulevard du Théâtre, CH-1204 Geneva, Switzerland
Tel.: +41 22 310 74 30
asa@swissarbitration.org – www.swissarbitration.org

CORRESPONDENCE

ASA Bulletin
Matthias SCHERER and Catherine A. KUNZ
Rue de la Mairie 35, CP 6569, CH-1211 Genève 6
mscherer@lalive.law
ckunz@lalive.law

(For address changes please contact
membership@swissarbitration.org/tel +41 22 310 74 30)

Published by Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed by:
Wolters Kluwer Legal & Regulatory US
920 Links Avenue
Landisville, PA 17538
United States of America

ISSN 1010-9153

This journal should be cited as ASA Bull. 1/2024

The ASA Bulletin is published four times per year.

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at
www.wolterskluwer.com/en/solutions/kluwerlawinternational

For further information please contact our sales department
at +31 (0) 172 641562 or at lrs-sales@wolterskluwer.com.

For marketing opportunities please contact lrs-sales@wolterskluwer.com.

Printed on acid-free paper

Autonomy of Arbitration Agreements and Capacity of Judgement

Swiss Federal Tribunal Decision 4A_148/2023*

DANIELA FRENKEL**

Autonomy/separability of arbitration agreements – Setting-aside proceedings – Power of Swiss Federal Tribunal – Jurisdiction – Arbitrability – Capability of judgement – Substantive public policy – Confidentiality of arbitral proceedings

Summary

In its decision 4A_148/2023, the Swiss Federal Tribunal confirmed the principle of Article 178.3 PILA pursuant to which the validity of an arbitration agreement may not be contested on the grounds that the main contract is invalid (autonomy/separability of arbitration agreement). While incapacity to contract due to a party's minority has an impact both on the validity of the main contract and arbitration agreement, such a conclusion is not mandatory in other situations. Under Swiss law, for instance the capacity to act is a relative concept that must be assessed individually in relation to a specific act at a specific point in time. It is therefore possible that a party may have the required discernment to grasp the meaning and scope of a main contract, but not those of an arbitration agreement, and *vice versa*. Although the protection of a civilly incapable person is part of the public policy, a setting-aside of an arbitral award based on a violation of public policy is extremely rare.

* 4A_148/2023 dated 4 September 2023 (to be published in the official court reporter). The challenged arbitral award was also subject of the Swiss Federal Tribunal's decisions 4A_144/2023 and 4A_146/2023 of the same date (cf. ASA Bull. 4/2023).

** Dr. iur., LL.M., Attorney at law (Switzerland) at GABRIEL Arbitration AG.

I. Concept of Autonomy of Arbitration Agreements under Swiss law

Pursuant to Article 178.3 of the Swiss Private International Law Act (« **PILA** »), it cannot be objected to an arbitration agreement that the main contract is invalid or that the arbitration agreement relates to a dispute that has not yet arisen.

The principle of the autonomy of the arbitration agreement has been undisputed in Swiss case law and doctrine for decades: Regardless of whether the two contracts are governed by different laws or the same law, as a rule, the main contract does not have the same fate as the arbitration agreement in terms of its existence, invalidity, illegality or termination.[1]

Of course, this does not exclude the possibility that identical reasons (for instance the inability to act, lack of good faith and lack of representation) affect the validity of both the main contract and the arbitration agreement (so called « identity of defect »).[2]

However, as the decision 4A_148/2023 dated 4 September 2023 of the Swiss Federal Tribunal makes clear, the rule remains that the main contract and the arbitration agreement are separate, and an arbitral tribunal has to individually check whether a defect affects the validity of only the arbitration agreement, only the main contract or both of them.[3]

---

1 Decision of the Swiss Federal Tribunal 142 III 239, sec. 3.2.1 with further references; *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland, 4th ed., Bern 2021, n 679 et seq; *Gabriel/Landbrecht*, in: Aebi-Müller/Müller (eds.), Berner Kommentar Bundesgesetz über das Internationale Privatrecht (IPRG) – Internationale Schiedsgerichtsbarkeit, Bern 2023, Article 178 n 544; *Girsberger/Ambauen/Furrer*, in: Furrer/ Girsberger/ Rodriguez (eds.), Handkommentar zum Schweizer Privatrecht, 4th ed., Zurich 2024, Article 178 n 24; *Gränicher*, in: Grolimund/ Loacker/Schnyder (eds.), Basler Kommentar Internationales Privatrecht, 4th ed., Basel 2021, Article 178 n 164; *Oetiker*, in: Müller-Chen/Widmer Lüchinger (eds.), Zürcher Kommentar zum IPRG, 3rd ed., Zurich 2018, Article 178 n 186 et seq.

2 Decision of the Swiss Federal Tribunal 142 III 239, sec. 3.2.1; *Berger/Kellerhals*, Op. cit., n 683; *Gabriel/Landbrecht*, Op. cit., Article 178 n 546; *Girsberger/Ambauen/Furrer*, Op. cit., Article 178 n 24; Gränicher, Op. cit., Article 178 n 164; *Oetiker*, Op. cit., Article 178 n 189.

3 Cf. also *Gabriel/Landbrecht*, Op. cit., Article 178 n 547; *Girsberger/Ambauen/Furrer*, Op. cit., Article 178 n 24; *Gränicher*, Op. cit., Article 178 n 164; *Oetiker*, Op. cit., Article 178 n 186.

II. Swiss Federal Tribunal Decision 4A_148/2023 dated 4 September 2023

A. Background

The relevant background of the complex dispute between multiple parties can be summarized as follows:

A.a., resident in Switzerland with two sets of male twins (A.b., A.c., A.d., A.e.), founded a group of companies (« **Group** ») under the flag of the French company X. to provide oil exploration and drilling services (sec. A.a. and A.b.). Part of the Group is the Dutch company H. which holds the entire share capital of the Dutch-registered subsidiary F. (sec. A.c.). Further, Y. SA and Z. SA, two companies incorporated in Panama, belong to the Group (sec. A.d.). In 2005 and 2010, A.a. sold its shareholdings in X. and these proceeds were transferred to F. and H. (sec. A.e.).

In 2010 and 2011, five loan agreements between various Group companies were concluded which were all governed by Swiss law and which contained an identical arbitration agreement, providing for a seat in Geneva and the application of the Swiss Rules of International Arbitration (« **Swiss Rules** ») (sec. A.g.).

On 14 January 2021, A.a. signed a debt assumption agreement which was also governed by Swiss law and contained an arbitration agreement identical to those in the above-mentioned loan agreements (« **Debt Assumption Agreement** ») (sec. A.j.).

Since a long time, A.a.'s health status has been an issue. For instance, in April 2019, A.e. requested the Monegasque authorities to institute a protection measure in favor of A.a. because the latter had allegedly suffered from memory loss and a deterioration of his physical and mental abilities since 2013. In September 2019, a Swiss Justice of the Peace indicated that she had heard A.a. who seemed to her to have retained his capacity of judgement. Several certificates and medical reports were subsequently drawn up. In September 2021, a general deputyship for A.a. was installed, in particular due to a medical certificate of January 2020 (whereas A.a. suffered from some forgetfulness despite coherent speech, and needed help with most of the basic activities of daily life), and a letter of A.a.'s wife of April 2021 whereas A.a. could not remember signing transactions worth tens of millions of euros in January 2021 (sec. A.k.).

In February 2021, F. and H. initiated arbitration proceedings against A.a., A.b., A.c., A.d., A.e., Y. SA and Z. SA. On 31 January 2023, the appointed arbitral tribunal (« **Arbitral Tribunal** ») issued an award on

jurisdiction (« **Arbitral Award** »), in which it declared itself competent (sec. B.a.). The Arbitral Tribunal decided that the arbitral agreements were valid, and in particular dismissed the objection of lack of jurisdiction based on A.a.'s alleged incapacity of judgement at the time of signing the Debt Assumption Agreement (sec. B.b.).

On 6 March 2023, Y. SA and Z. SA (« **Appellants** ») requested the Swiss Federal Tribunal to set aside the Arbitral Award and to determine that the Arbitral Tribunal is not competent to hear the claims brought against them (sec. C.). The setting-aside request was based on Article 190.2 lit. b and e PILA (sec. 2). More specifically, the Appellants complained

- based on Article 190.2 lit. b PILA that the Arbitral Tribunal had wrongly accepted its jurisdiction since A.a. was incapable of discernment when he signed the Debt Assumption Agreement (sec. 7).
- based on Article 190.2 lit. e PILA that the substantive public order which guarantees the protection of civilly incapable people had been violated (sec. 8).

A.d. and A.e. requested the dismissal of the appeal. A.a. agreed with the conclusions of the appeal. A.b. and A.c. deferred to the courts as to the outcome of the appeal.

B. Decision

With its decision dated 4 September 2023, the Swiss Federal Tribunal entirely dismissed the appeal (sec. 10).

First, the Swiss Federal Tribunal examined whether the Arbitral Tribunal violated **Article 190.2 lit. b PILA** since the latter accepted its jurisdiction although the Appellants alleged that A.a. was incapable of judgement when signing the Debt Assumption Agreement, and could thus not bind the Appellants (sec. 7).

The Swiss Federal Tribunal is free to examine legal issues, including preliminary issues which determine the jurisdiction or lack of jurisdiction of an arbitral tribunal. However, it will only review the facts if one of the objections provided in Article 190.2 PILA is raised against the said facts, or if the decision of the lower court gave reason to plead such new facts (Article 99.1 of the Swiss Federal Tribunal Act [« **FTA** »]) (sec. 7.1).

An arbitral tribunal has jurisdiction if the case is arbitrable under Article 177 PILA, the arbitration agreement is valid in form and substance under Article 178 PILA, and the case in dispute is covered by this agreement (sec. 7.2).

Arbitrability is a condition for the validity of the arbitration agreement, and hence for the competence of the arbitrators. In its objective sense, this term refers to cases that can be settled by arbitration. In its subjective sense, it refers to the capacity of the parties to enter into an arbitration agreement. The civil capacity of a party to an international arbitration is assessed in the light of the law applicable under Article 33 et seq. PILA for natural persons and Article 154 PILA for companies (sec. 7.2.1).

From a formal point of view, an arbitration agreement is valid if it is made in writing or by any other means that can be evidenced by a text. The text must contain the essential elements of the arbitration agreement (sec. 7.2.2).

The arbitral tribunal must also check the objective and subjective scope of the arbitration agreement. It must determine which disputes are covered by the agreement and which parties are bound by it (Article 178.2 PILA) (sec. 7.2.3).

The arbitration agreement is a contract in its own right, the fate of which is independent of that of the main contract, unless the parties have agreed otherwise (Article 178.3 PILA). It follows that the invalidity of the main contract does not necessarily imply the invalidity of the arbitration agreement. There are, however, a number of situations in which the arbitration agreement shares the fate of the main contract (sec. 7.2.4).

Pursuant to Article 35 PILA, the exercise of civil rights is governed by the law of the domicile. Under Swiss law, a person who is of age and is capable of judgement has the capacity to act (Article 13 of the Swiss Civil Code [« **CC** »]). The capacity of judgement is relative and must thus be assessed in concrete terms, in relation to a given act, depending on its nature and importance, and at the time of the act. The capacity of judgement is presumed and it is up to the person claiming lack of capacity to prove one of the states of weakness described in Article 16 CC and the resulting alteration of the capacity to act rationally (sec. 7.3).

In the Arbitral Award, the Arbitral Tribunal stressed that the question of whether A.a. could validly sign the Debt Assumption Agreement on 14 January 2021 depended on whether he was capable of judgement at that time. In its view, A.a.'s memory problems did not constitute sufficient circumstances to justify a reversal of the presumption of discernment. Further, the submitted medical reports did not establish that A.a. was incapable of judgement. Emphasizing that the capacity of judgement is a relative concept that must be assessed in relation to a specific act, namely the signing of an arbitration agreement, the Arbitral Tribunal noted that A.a. had the habit and preference of settling any property disputes within the Group through arbitration. Further,

the Arbitral Tribunal took a lawyers' testimony into account pursuant to which, at the relevant time, A.a. seemed capable of understanding what he was signing. The Arbitral Tribunal concluded that A.a. was capable of judgment at the time of signing the Debt Assumption Contract, at least with regard to the arbitration agreement contained therein (sec. 7.4).

The Appellants accused the Arbitral Tribunal of having disregarded the exceptions to the autonomy of the arbitration agreement, and of having examined A.a.'s capacity for judgement not in relation to the entire Debt Assumption Agreement, but only to the arbitration agreement. They also criticized the Arbitral Tribunal for having disregarded the law in considering that A.a. was capable of judgement. They argued that A.a. was rather in a permanent state of mental deterioration and his incapacity of judgement should have been presumed. In the alternative, the Appellants claimed that the established facts should in any event had led the Arbitral Tribunal to rule that A.a. did not have the capacity of discernment required to enter into the Debt Assumption Agreement (sec. 7.5).

In its decision BGE 142 III 239, sec 3.2.1, the Swiss Federal Tribunal emphasized that the principle of the autonomy of arbitration agreements is not absolute, and that it is sometimes subject to exceptions. For example, the arbitration agreement may share the fate of the main contract where one party lacks the capacity to contract or the power to represent the party intending to contract, or where the party has entered into the main contract under a well-founded fear. It is one thing for an incapacity to contract to affect not only the validity of a contract, but also that of the arbitration agreement it contains. It is quite another that the nullity of the main contract on this ground mandatorily affects the arbitration agreement. However, it cannot be accepted that a defect relating to the capacity to contract, whatever its origin, would always result in the nullity of both the main contract and the arbitration agreement. The principle of the autonomy of the arbitration agreement remains the rule (Article 178.3 PILA). It follows that an arbitration agreement may be valid even if the main contract was not finalized or is null and void (sec. 7.6.1).

It is wrong to assume that an incapacity mandatorily has an impact on both the validity of the main contract and the arbitration agreement. Insofar as capacity of judgement is a relative concept that must be assessed in relation to a specific act, depending on its nature and importance, it is indeed conceivable that a person may have the necessary discernment to grasp the meaning and scope of a main contract, but not those of an arbitration agreement, and *vice versa*. Under these conditions, the approach taken in the Arbitral Award to assess A.a.'s capacity of judgement in relation to the arbitration agreement inserted in the Debt Assumption Agreement does not appear to be contrary to

federal case law. It is therefore not up to the Swiss Federal Tribunal to determine whether A.a. had the necessary discernment to sign the entire Debt Assumption Agreement, but only to examine whether the Arbitral Tribunal correctly assessed the capacity of judgement of the interested party in relation to the arbitration agreement contained in the said contract (sec. 7.6.1).

The Arbitral Tribunal considered that the evidence on the record did not allow the conclusion that there was a lasting state of deterioration of mental capacity due to illness or age. The Swiss Federal Tribunal cannot review this fact. The Appellants had to prove A.a.'s incapacity of judgement at the time of signing the disputed arbitration agreement in January 2021 but failed to do so. The Arbitral Tribunal did not overlook any relevant circumstances when assessing A.a.'s capacity of judgement, and Article 190.2 lit. b PILA was thus not violated (sec. 7.6.2).

Second, the Swiss Federal Tribunal examined whether the Arbitral Tribunal violated **Article 190.2. lit. e PILA** (sec. 8). An award is contrary to substantive public policy when it violates fundamental principles of substantive law to such an extent that it can no longer be reconciled with the relevant legal order and system of values. These principles include the protection of civilly incapacitated persons. It is not sufficient for an arbitral tribunal to find that a particular ground infringes public policy; it is the result of the award that must be incompatible with public policy. The annulment of an international arbitral award on this ground is extremely rare (sec. 8.1).

The Appellants maintained that the Arbitral Award is incompatible with substantive public policy, as it « *protects a manoeuvre by which interested parties made an old man suffering from Alzheimer's disease sign a contract, with the aim of generating a debt of almost EUR 80 million to the detriment of his companies, and creating arbitral jurisdiction over them to recover these amounts* ». However, this argumentation could not be successful since it was based on the wrong assumption that A.a. was not capable of assessing the scope of the disputed arbitration agreement he signed in January 2021. Further, the Swiss Federal Tribunal held that it is not its task to rule on the validity of the underlying contracts, but only to assess whether the Arbitral Tribunal wrongly declared itself competent to hear the present dispute, which is not the case.

The Swiss Federal Tribunal concluded that the appeal must be dismissed insofar as it is admissible. The Appellants were therefore ordered to pay the costs of the federal proceedings and pay an indemnity for costs to A.d. and A.e.

C. Comments

The following aspects of the Swiss Federal Tribunal's decision may be worth highlighting:

First, although the Swiss Federal Tribunal has the final decision on the question of jurisdiction,[4] it should be noted that there is an important limitation to the examination of the jurisdiction with unrestricted power.[5] In principle, the Swiss Federal Tribunal must base its decision on the **facts of the case** as determined by the arbitral tribunal. Only in exceptional cases, where another ground for challenge based on Article 190.2 PILA (for instance, if the factual findings of the arbitral tribunal were made in breach of the right to be heard) or *nova* within the meaning of Article 99.1 FTA exist, another factual basis might be considered in the federal court proceedings. A party challenging an award on jurisdiction should thus carefully check whether it should additionally attack the factual basis which is relevant for the jurisdiction, or whether *nova* exist. Otherwise, the Swiss Federal Tribunal only assesses the correct application of the law.

Second, the decision of the Swiss Federal Tribunal presents a good **checklist** for arbitrators when deciding about the jurisdiction (sec. 7.2). In particular, jurisdiction is given when

- the case is arbitrable in an objective and subjective sense under Article 177 PILA (sec. 7.2.1 and 7.2.3),
- the arbitration agreement is valid in form and substance under Article 178 PILA (sec. 7.2.2),
- the case is covered by the arbitration agreement (sec. 7.2.3).

Third, Swiss arbitration practitioners should keep in mind the principle of Article 178.3 PILA pursuant to which the validity of an arbitration agreement may not be contested on the grounds that the main contract is invalid (**autonomy/separability of arbitration agreement**).

In its previous decision BGE 142 III 239, sec. 3.2.1, the Swiss Federal Tribunal explained that in a number of situations the arbitration agreement shares the fate of the main contract and that situations of this kind (« identity of defect »), arise, for example, when a party lacks the capacity to contract. In the present case, the Federal Tribunal now took the opportunity to clarify its jurisprudence. If someone lacks the capacity to act rationally by virtue of being under age, this will likely affect both the arbitration agreement and the main contract. However, if the in capacity results from a mental disability or disorder

4 Cf. Decision of the Swiss Federal Tribunal 120 II 155, sec. 3.b/bb.

5 Cf. *Berger/Kellerhals*, Op. cit., n 1723.

where the capacity of judgement has to be assessed in relation to a specific act and depends on its nature and importance, one has to separately evaluate the validity of the arbitration agreement and the main contract.

In particular for a business person who has regularly included arbitration agreements in its contracts or might even previously dealt with arbitration proceedings, it might still be possible to grasp the meaning and consequences of an arbitration agreement while it would then be the task of the competent arbitral tribunal to decide whether the business person also had the capacity to conclude the main contract. As the Swiss Federal Tribunal held, the opposite scenario might also be possible where a person might have the capacity to conclude the main contract but not the arbitration agreement. This scenario is likely more unusual. However, for instance if a person had never dealt with arbitration before but the main contract is very simple (for instance sale of an item), it might be possible that an arbitration agreement was not validly concluded but the competent state court then decides that the main contract was validly agreed.

The take-away for parties is clear: When attacking the capacity of a person, one should on the one hand set out why this person was no capable of concluding the arbitration agreement. On the other hand, in a separate step, the reasons why the main contract was not validly concluded should be presented.

Fourth, the Swiss Federal Tribunal correctly confirmed that the protection of civilly incapable persons should be part of the **substantive public policy**. However, with its emphasis that the annulment of an international arbitral award based on Article 190.2 lit. e PILA « *is extremely rare* », the Swiss Federal Tribunal might have indicated that even if an incapable person signed an arbitration agreement, the result of an arbitration award holding that the arbitral tribunal is competent to hear the case might not have violated public policy. In the present case, the Swiss Federal Tribunal could leave the question open since the relevant person was capable to sign and sufficiently understand the arbitration agreement.

Fifth, it is remarkable in which detail the Swiss Federal Tribunal presented the factual background of the case (sec. A., B., and C.). Not only did the Swiss Federal Tribunal reveal many commercial details of the transactions (which were not relevant for the outcome of the present appeal) and details about A.a.'s personal health status, it also noted that A.a. had two male sets of twins. This is extremely rare and might give, together with the other details about A.a. and his business activities, at least for business insiders a clue about the identity of that person.

Pursuant to Article 44.1 of the Swiss Rules, as a principle, the parties undertake to keep **confidential** all awards and orders as well as all materials

submitted by another party in the framework of the arbitration proceedings. Further, Article 44.3 Swiss Rules ensures that no award or decision of the arbitral tribunal may be published, whether in its entirety or in the form of excerpts or a summary, unless all parties agree. In particular in light of the low success rate of appeals to the Swiss Federal Tribunal, a party assessing whether it should file an appeal against an arbitral award should also consider whether it wants to leave the previous confidential framework of the arbitral proceedings and allow the public to gain access to the commercial details of a dispute, personal health details and the course and outcome of the arbitral proceedings by filing an appeal to the Swiss Federal Tribunal.

Submission of Manuscripts
Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editors **(mscherer@lalive.law)** and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope

The ASA Bulletin is the official quarterly journal of the Swiss Arbitration Association (ASA). Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

– Articles
– Leading cases of the Swiss Federal Supreme Court
– Leading cases of other Swiss Courts
– Selected landmark cases from foreign jurisdictions worldwide
– Arbitral awards and orders

Each case is usually published in its original language with a head note in English, French and German. All articles include an English abstract.

Books and journals for Review
Books related to the topics discussed in the Bulletin may be sent for review to the Editors (**Matthias Scherer and Catherine A. Kunz LALIVE, P.O. Box 6569, 1211 Geneva 6, Switzerland).**