

# Jurisdiction over Set-off Defenses subject to another Arbitration Clause

BÄR  
& KARRER

## Case Law and Approaches in Doctrine

ASA Below 40 – Swiss Case Law Series

Andrea Roth

Bern, 14 September 2018

# Introduction

## Various possible scenarios

**Share Purchase Agreement**  
dated 3 September 2010  
between **Model Ltd**  
Weingasse 20  
Zürich, Switzerland  
hereinafter: "Seller"  
and **Example Ltd**  
Orchard Rd.  
Singapore  
hereinafter: "Buyer"  
concerning The sale and purchase of all shares in **Sample Ltd**  
hereinafter: "Company"

A  $\longleftrightarrow$  B  
main claim  
set-off claim

**Share Purchase Agreement**  
dated 3 September 2010  
**Sales Contract**  
dated 4 August 2010  
between **Model Ltd**  
Weingasse 20  
Zürich, Switzerland  
hereinafter: "Seller"  
and **Example Ltd**  
Orchard Rd.  
Singapore  
hereinafter: "Buyer"  
concerning The sale of eye laser machine

A  $\longleftrightarrow$  B  
main claim  
set-off claim

- identical arbitration clause in SPA and Sales Contract
- same rules
- same seat (same *lex arbitri*)
- same language

**Share Purchase Agreement**  
dated 3 September 2010  
**Sales Contract**  
dated 4 August 2010  
between **Model Ltd**  
Weingasse 20  
Zürich, Switzerland  
hereinafter: "Seller"  
and **Example Ltd**  
Orchard Rd.  
Singapore  
hereinafter: "Buyer"  
concerning The sale of eye laser machine

A  $\longleftrightarrow$  B  
main claim  
set-off claim

- arbitration clause in SPA
- neither arbitration clause nor forum selection clause in Sales Contract

**Share Purchase Agreement**  
dated 3 September 2010  
between **Model Ltd**  
Weingasse 20  
Zürich, Switzerland  
hereinafter: "Seller"  
and **Example Ltd**  
Orchard Rd.  
Singapore  
hereinafter: "Buyer"  
concerning The sale and purchase of all shares in **Sample Ltd**  
hereinafter: "Company"

A  $\longleftrightarrow$  B  
main claim  
set-off claim

**Sales Contract**  
dated 4 August 2010  
between **Model Ltd**  
Weingasse 20  
Zürich, Switzerland  
hereinafter: "Seller"  
and **Example Ltd**  
Orchard Rd.  
Singapore  
hereinafter: "Buyer"  
concerning The sale of eye laser machine

- different arbitration clauses in SPA and Sales Contract
- different rules?
- different seat (different *lex arbitri*)?
- different language?

**Share Purchase Agreement**  
dated 3 September 2010  
**Sales Contract**  
dated 4 August 2010  
between **Model Ltd**  
Weingasse 20  
Zürich, Switzerland  
hereinafter: "Seller"  
and **Example Ltd**  
Orchard Rd.  
Singapore  
hereinafter: "Buyer"  
concerning The sale of eye laser machine

A  $\longleftrightarrow$  B  
main claim  
set-off claim

- arbitration clause in SPA
- forum selection clause in Sales Contract

# Nature of set-off defense

- Procedural or substantive defense?
- Article 120(1) CO:

*"Where two parties **owe each other** sums of money or performance of identical obligations, and provided that both claims have fallen **due**, each party may set off its debt against the other party's claim."*

- Differences to counterclaim:
  - Counterclaim is an independent claim
  - Set-off defense is a dependent remedy and can only be affirmed at the most in the amount of the main claim
  - Admissibility of counterclaim: generally only if under the same arbitration agreement as main claim

- Provision in the PILA?
- Article 377(1) CPC:

*"The arbitral tribunal **has jurisdiction** to decide the set-off defence, **even if the claim to be set off does not fall within the scope of the arbitration agreement** or is subject to another arbitration agreement or an agreement on jurisdiction."*

- Article 21(5) Swiss Rules of International Arbitration:

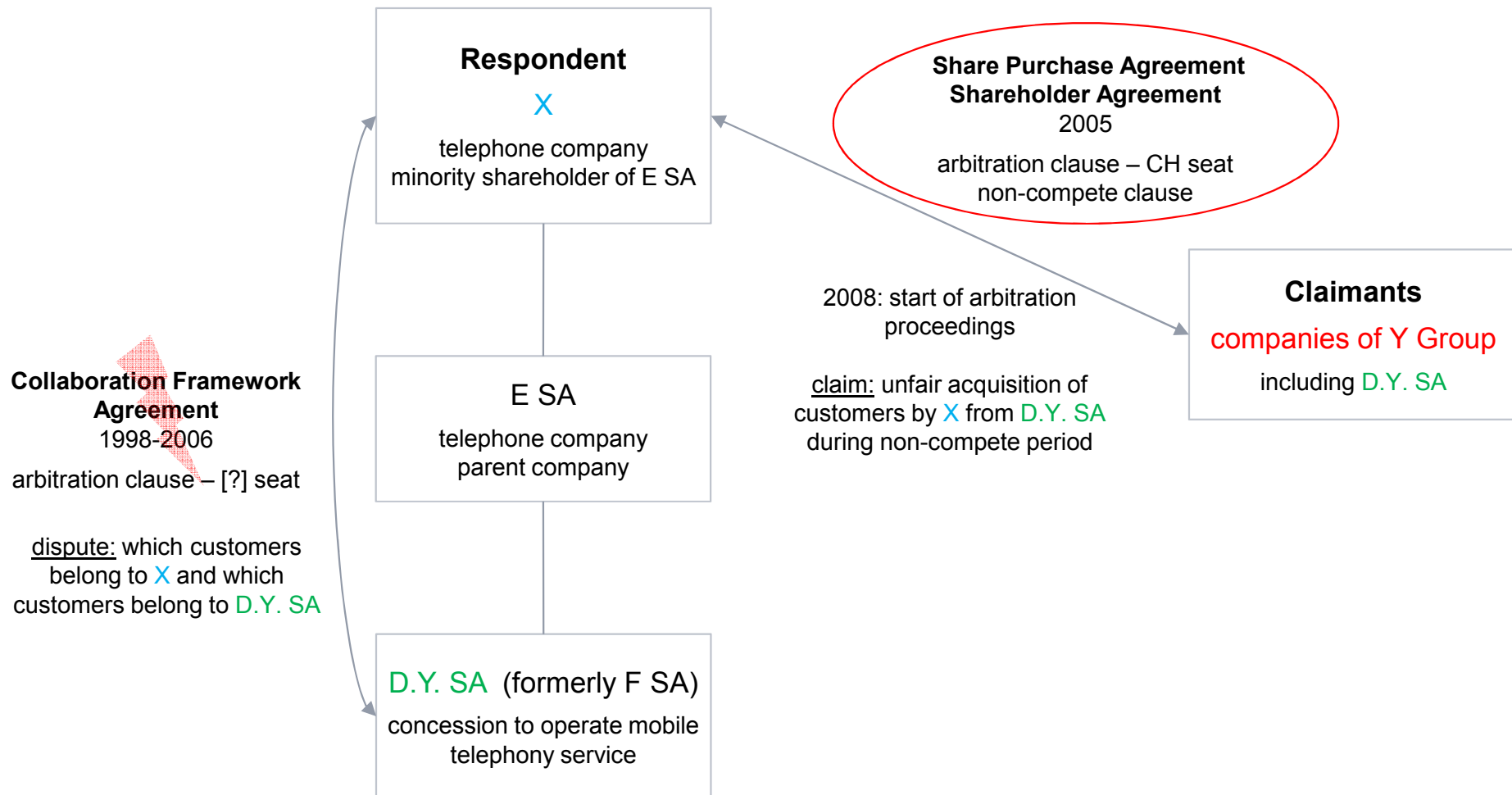
*"The arbitral tribunal **shall have jurisdiction** to hear a set-off defence **even if the relationship out of which the defence is said to arise is not within the scope of the arbitration clause**, or falls within the scope of another arbitration agreement or forum-selection clause."*

- Article 21(3) UNCITRAL Arbitration 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.**"*

# Practice of the Swiss Federal Supreme Court

## Decision 4A\_482/2010: Facts



# Practice of the Swiss Federal Supreme Court

## Decision 4A\_482/2010: Reasoning

- Has the arbitral tribunal jurisdiction to decide on issues relating to the dispute arising out of the Collaboration Framework Agreement?
- An arbitral tribunal only has jurisdiction if the dispute falls within the scope of the arbitration agreement
- But: an arbitral tribunal has jurisdiction to decide on **preliminary issues** on which the outcome of the main dispute is depended even if these issues are not within the scope of the arbitration agreement (with reference to 4A\_428/2010, para. 2, and ATF 133 III 139, para. 5)

- Obiter dictum:

*"In the same vein and with regard to the set-off the tendency is to generalize the principle 'le juge d'action est le juge de l'exception', 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.**" (para. 4.3.1)*

- Lalive/Poudret/Reymond
- Poudret/Besson
- Berger/Kellerhals
- Substantive approach – "*The judge of the action is the judge of the objection*":
  - Arbitral tribunal has jurisdiction over set-off defense if available under the applicable substantive law
  - Exception: waiver to raise set-off defense
  - Mere conclusion of different arbitration agreement is not a waiver to raise set-off defense
- Kaufmann-Kohler/Rigozzi
- Keller/Girsberger (Zurich Commentary on PILA 148)
- Presumed intention that arbitral tribunal has jurisdiction:
  - Presumption can be overruled
  - E.g. main claim is subject to "fast-track" proceedings or arbitration agreement requires arbitrators to have special expertise
- Schott/Courvoisier
- Dasser  
(both in Basel Commentary on PILA 148 and 186)
- Consideration of parties' hypothetical intention:
  - In case neither an express nor implied intention of the parties can be established
- Bucher, FS Geimer
- Heini (Zurich Commentary on PILA 186) – if set-off is subject to arbitration
- Traditional approach – presumed intention that arbitral tribunal has no jurisdiction:
  - Set-off claim must be covered by arbitration agreement
  - No extension of jurisdiction based on applicable substantive law

# Contact

BÄR  
& KARRER



**Andrea Roth**  
**Zurich**

Phone: +41 54 261 52 92  
andrea.roth@baerkarrer.ch



## **Zurich**

Brandschenkestrasse 90  
CH-8027 Zurich  
T: +41 58 261 50 00  
F: +41 58 261 50 01  
zurich@baerkarrer.ch

## **Geneva**

12, quai de la Poste  
CH-1211 Geneva 11  
T: +41 58 261 57 00  
F: +41 58 261 57 01  
geneve@baerkarrer.ch

## **Zug**

Baarerstrasse 8  
CH-6301 Zug  
T: +41 58 261 59 00  
F: +41 58 261 59 01  
zug@baerkarrer.ch

## **Lugano**

Via Vegezzi 6  
CH-6901 Lugano  
T: +41 58 261 58 00  
F: +41 58 261 58 01  
lugano@baerkarrer.ch