

Challenge to jurisdiction over counterclaims outside scope of arbitration agreement dismissed (Swiss Supreme court)

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

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In *Decision 4A_214/2022*, the Swiss Supreme court refused to set aside an award on the ground that the sole arbitrator had wrongly accepted jurisdiction over the counterclaim that fell outside the scope of the arbitration agreement, as the claimant was found to have expressly accepted jurisdiction.

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In a recently published German-language decision, the Swiss Supreme court dismissed a challenge to an award on the ground that the sole arbitrator had wrongly accepted jurisdiction over the respondent's counterclaim.

The dispute arose out of a purchase contract for crude iron which contained a clause providing for arbitration under the Swiss Rules. The claimant sought payment of USD7.5 million under the contract. While the respondent did not dispute the initial payment obligation, it raised a set-off defence for the full amount. In addition, it submitted a counterclaim in an amount of approximately USD3.7 million. The sole arbitrator granted the claimant's claim in full, finding that set-off was contractually prohibited, and partially granted the respondent's counterclaim in an amount of approximately USD2.5 million.

Both parties sought to set aside the award. The claimant argued, among other things, that the awarded counterclaim was not covered by the arbitration agreement and the sole arbitrator had wrongly accepted jurisdiction. The sole arbitrator awarded the counterclaim based on specific claims arising out of a relationship with company D (the D Claims). However, according to the claimant, the respondent had relied on the D Claims as a basis for its set-off defence, not for its counterclaim. Since Article 21(5) of the 2012 Swiss Rules provides that "[t]he arbitral tribunal shall have jurisdiction to hear a set-off defence even if the relationship out of which the defence is said to arise does not fall within the scope of the Arbitration Agreement", the claimant had not objected to the sole arbitrator's jurisdiction over the D Claims.

According to the court, in its statement of reply in the arbitration, the claimant expressly recognised the sole arbitrator's jurisdiction not only over the respondent's set-off defence, but also over the counterclaim. The claimant merely reserved the right to challenge the jurisdiction of the sole arbitrator over "further potential counterclaims of respondent", which clearly did not pertain to the existing counterclaim. The court therefore confirmed the sole arbitrator's finding that the claimant had accepted jurisdiction over the counterclaim.

This decision highlights the importance of the distinction between set-off defence and counterclaims, especially in a Swiss Rules arbitration. If the claimant had not been found to have accepted jurisdiction, the court would have had to examine whether the sole arbitrator had jurisdiction over counterclaims arising out of separate agreements, an issue that gives rise to some debate in literature.

Case: [Decision 4A_214/2022 \(26 October 2022\)](#) (Swiss Supreme Court).

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