Arbitrability of Tenancy Disputes under Swiss Law

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The present article examines the arbitrability of tenancy disputes under Swiss law. Domestic arbitrations of tenancy disputes are subjected to the appointment of the competent conciliation authority as the arbitral tribunal. The author argues that such limitation should also apply to international arbitrations but rejects the usually invoked public policy argument.

Abstract provided by the Editorial Board

Arbitrability is a requirement for the validity of an arbitration agreement and thus, at the same time a condition for the jurisdiction of the arbitral tribunal.[1] In its objective sense, arbitrability designates the issues being capable of settlement by arbitration.[2] Most states consider any commercial matter to be arbitrable and only have very limited exceptions to this general rule.[3] The non-arbitrability of certain claims usually stems from the public importance of the issue or a perceived need for judicial protection.[4]

When taking a look at the CO[5], it becomes apparent that tenancy agreements relating to residential and commercial premises are subject to special legislation.[6] Furthermore, several provisions in the CPC[7] facilitate access to the adjudicating bodies for tenants.[8] This calls into question the arbitrability of claims relating to such agreements.

A. Division between Domestic and International Arbitration

The legal basis governing the issue of arbitrability depends foremost on whether the arbitration is considered to be of domestic or international nature. The former is governed by the CPC (Art. 353 ff.) and the latter by the PILA[9] (Art. 176 ff.).
The PILA applies if at least one of the parties has its domicile outside of Switzerland when signing the arbitration agreement.[10] Consequently, the CPC finds application when both parties are domiciled in Switzerland.[11] However, due attention is to be paid to the possibility for parties to explicitly provide in the arbitration agreement to have the PILA applied despite the domestic nature of the arbitration;[12] the same holds true vice-versa for international arbitration.[13]

B. Arbitrability of Tenancy Disputes in Domestic Arbitration

According to Art. 354 CPC, all claims, over which the parties may freely dispose, are arbitrable. The freedom to dispose over a claim must be examined under the lex causae, which in domestic cases typically leads to the application of substantive Swiss law.[14] Accordingly, a claim is considered to be of the parties' free disposition if they are free to relinquish to their claim or solve a thereto-related dispute by means of a settlement.[15] The claims must not necessarily be of monetary nature in order to be arbitrable.[16]
Claims relating to tenancy agreements are contractual rights and thus usually at the free disposition of the

1 DFT 118 II 353 cons. 3.a. Also see B. Berger/F. Kellerhals, International and Domestic Arbitration in Switzerland, 2nd ed., Berne 2010, N 169.
2 DFT 118 II 193 cons. 5.c.aa. Also see D. Girsberger/N. Voser, International Arbitration in Switzerland, 2nd ed., Zürich/Basle/Geneva 2012, p. 68.
3 See D. Girsberger/N. Voser, (Fn. 1), p. 7.
4 G. Born, International Arbitration: Law and Practice, Biggleswade 2012, p. 82.
5 Swiss Code of Obligations (CO) of 30 March 1911 (SR 220).
6 See e.g. Art. 269 ff. of the CO ("Section Two: Protection against Unfair Rents or other Unfair Claims by the Landlord in respect of Leases of Residential and Commercial Premises").
7 Swiss Civil Procedure Code (CPC) of 19 December 2008 (SR 272).
8 See e.g. Art. 113 para. 2 lit. c or Art. 243 para. 2 lit. c CPC.
9 Swiss Federal Act on Private International Law (PILA) of 18 December 1987 (SR 291).
10 Art. 176 para. 1 PILA.
11 Art. 353 para. 1 CPC.
12 Art. 352 para. 2 CPC.
13 Art. 176 para. 2 PILA.
14 Berger/Kellerhals, Fn. 1, N 234.
15 W. Wenger, in: Sutter-Somm et al. (eds.), Kommentar zur schweizerischen Zivilprozessordnung, 2nd ed., Zurich/Basle/Geneva 2013, Art. 354 N 6; F. Dasser, in: Oberhammer et al. (eds.), KuKo ZPO, Basle 2014, Art. 354 N 5; M. Stacher, in: Brunner et al. (eds.), Schweizerische Zivilprozessordnung (ZPO), Zurich/St. Gallen 2011, Art. 354 N 10.
16 U. Weber-Stecher, BSK ZPO, 2nd ed., Basle 2013, Art. 354 N 7.

parties.[17] Swiss substantive law does not impose any restrictions in this regard. Hence, domestic tenancy disputes are in general arbitrable.

However, an exception must be made for tenancy agreements relating to residential premises. Pursuant to Art. 361 para. 4 CPC,[18] parties to a dispute arising from a tenancy agreement are solely permitted to appoint the competent conciliation authority as the arbitral tribunal. Thus, the parties are denied free choice of arbitrators, which is an essential feature of arbitration.[19] Hence, claims stemming from tenancy agreements relating to residential premises might be formally arbitrable, but deviate from common principles of arbitration.[20]

The idea behind Art. 361 para. 4 CPC is to protect the tenant who usually carries less bargaining power than the landlord.[21] It allows to keep tenancy disputes – at least formally – arbitrable and to still comply with the principle of protection of tenants underlying the CO.[22]

C. Arbitrability of Tenancy Disputes in International Arbitration

Pursuant to Art. 177 PILA, every pecuniary claim may be the subject of arbitration. The Swiss Federal Tribunal interprets this article broadly by subsuming all disputes under this provision, which have a monetary value for the parties meaning an interest that is measurable in monetary terms.[23] In contrast to the CPC, it is not required that the parties may dispose freely of the claim at stake.[24]

In general, claims arising out of tenancy agreements concern an interest of a party, which is measurable in monetary terms. Hence, claims arising for example out of a tenancy agreement between an Austrian landlord and a Swiss tenant regarding premises in Switzerland must be considered arbitrable.

The PILA does not contain an explicit exception regarding tenancy agreements relating to residential premises. Yet, certain scholars argue that the restriction to arbitral proceedings set forth in Art. 361 para. 4 CPC shall also apply to international arbitration proceedings.[25] This issue has not yet been addressed by the Swiss Federal Tribunal.

This uncertainty weighs even heavier since parties whose arbitration would be subject to the provisions of the CPC are provided with the possibility to declare the PILA applicable to their arbitration. This would also concern the issue of arbitrability and might enable parties to have their tenancy disputes relating to residential premises resolved through means of arbitration.[26]

It seems unsatisfying that tenancy disputes relating to residential premises shall be arbitrable when for example the landlord is domiciled in a foreign country, but non-arbitrable when the landlord has its domicile in Switzerland. The tenant has in both scenarios the exact same need for protection, which after all is the underlying rationale of Art. 361 para. 4 of the CPC. However, when considering the wording of Art 177 PILA and the relevant case law of the Swiss Federal Tribunal, it seems impossible to differentiate between tenancy agreements relating to residential premises and those relating to commercial premises. The criterion of pecuniary nature installed by Art. 177 PILA does not leave room for differentiating claims based on the nature of their cause.

Certain scholars try to overcome this obstacle by arguing that Art. 361 para. 4 CPC forms part of Swiss public policy rendering the matter non-

[17] Dasser, Fn. 15, Art. 354 N 8; D. Lachat/R. Püntener, Behörden und Verfahren, in: Lachat (ed.), Mietrecht für die Praxis, 8th ed., Zurich 2009, N 5/1.8; Weber-Stecher, Fn. 16, Art. 354 N 28.

[18] Before the entering into force of the CPC, this provision formed part of the substantive tenancy law (Art. 274a para. 1 lit. e old CO).

[19] I. Schwander/M. Stacher, in: Brunner et al. (eds.), Schweizerische Zivilprozessordnung (ZPO), Zurich/St. Gallen 2011, Art. 361 N 13.

[20] M. Stacher, Fn. 15, Art. 354 N 12. Contra: W. Wenger, Schiedsgerichtsbarkeit, ZZZ 2007, p. 401, 405; Weber-Stecher, Fn. 16, Art. 354 N 38 (denying the character of arbitration to proceedings conducted under Art. 361 para. 4 CPC and thus concluding that claims stemming from residential tenancy agreement are non-arbitrable).

[21] P. Schweizer, in: Bohnet (ed.), CPC, Code de procédure civile commenté, Basle 2011, Art. 361 N 10.

[22] Dasser, Fn. 15, Art. 361 N 12.

[23] DFT 118 II 353 cons. 3.b. Also see R. Mabillard/R. Briner, in: BSK IPRG, 3rd ed., Basle 2013, Art. 177 N 10.

[24] Berger/Kellerhals, Fn. 1, N 198.

[25] In favour: Wenger, Fn. 15, Art. 354 N 18; Lachat/Püntener, N 5/1.8; P. Habegger, BSK ZPO, 2nd ed., Basle 2013, Art. 361 N 38, with further references. Rejecting: J.-F. Poudret/S. Besson, Comparative Law of International Arbitration, London 2007, N 366; Berger/Kellerhals, Fn. 1, N 228.

[26] Dasser, Fn. 15, Art. 354 N 14. Contra: Schwander/Stacher, Fn. 20, Art. 361 N 19.

arbitrable.[27] However, only disregard of fundamental legal principles leading to results incompatible with legal and moral values are considered a breach of public policy.[28] Among these principles are pacta sunt servanda or the prohibition against abuse of rights. Art. 361 para. 4 CPC does not come close to a comparable fundamental principle.[29]

Yet, when a provision is formulated very broadly its wording can at times seem to be overinclusive. The provision does not differentiate two situations which should be. In such circumstances, the law contains a so-called "unreal" lacuna ("unechte Lücke").[30] Such "unreal" lacuna is to be dealt with by adding the reasonable restriction to the overinclusive provision.[31] A tenant of residential premises has the same need for protection regardless of whether his landlord is domiciled in or outside of Switzerland. Thus, it seems to make little sense to treat these two situations differently in regard to arbitrability. Therefore, it must be assumed that Art. 177 PILA is overinclusive and lacks an exception for tenancy agreements relating to residential premises. This lacuna is to be solved by applying the Art. 362 para. 4 CPC by analogy to international arbitration proceedings.

D. Conclusion

To sum up, when both – the landlord and the tenant – are domiciled in Switzerland, only claims stemming from tenancy agreements relating to commercial premises are fully arbitrable. Disputes arising from tenancy agreements relating to residential premises are formally arbitrable, but the parties are solely permitted to appoint the competent conciliation authority as the arbitral tribunal.
If the landlord or the tenant is domiciled outside of Switzerland, the same should hold true. However, scholars are discordant in regard to the arbitrability of disputes arising from tenancy agreements relating to residential premises. The lack of clear case law or a unanimous approach among scholars in this regard leaves the parties to a tenancy agreement relating to residential premises with considerable uncertainty.

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27 See Habegger, Fn. 26, Art. 354 N 38; Wenger, Fn. 15, Art. 354 N 18.
28 DFT 116 II 634, cons. 4.
29 Berger/Kellerhals, Fn. 1, N 229; Poudret/Besson, Fn. 26, N 366.
30 See E. A. Kramer, Juristische Methodenlehre, 4th ed., Bern 2013, p. 199 ff.
31 Kramer, Fn. 31, p. 225. Also see DFT 121 III 219, cons. 1.d.aa.