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ARTICLE

Interpretation of the Scope of International Commercial Arbitration Agreements: A Comparison of Swiss and Turkish Case Law

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Abstract

Determining the extent to which parties have agreed to submit their disputes to arbitration is a matter of contract interpretation. It is very rare that an international arbitration convention or national legislation on international arbitration provides specific rules pertaining to interpretation of the scope of arbitration agreements. Therefore, general rules of contract interpretation are usually used as a starting point to construe the scope of international commercial arbitration agreements. Developing specific principles for interpretation is left to courts and arbitral tribunals. This paper focuses on the practice of courts regarding this matter in two countries, i.e., Switzerland and Turkey. The paper firstly provides an overview of the general principles adopted by the courts in the two countries. Then case law in both countries is compared and contrasted with regard to selected scenarios frequently occurring in practice. The comparison of case law reveals how courts' differing approaches to arbitration can make a difference in practice, even where very similar rules are applied. The comparison confirms the reputation of Swiss courts for adopting a pro-arbitration approach. Turkish courts, on the other hand, seem to be more reluctant in construing the scope of international commercial arbitration agreements broadly. This paper argues that the current practice in Turkey does not reflect the legislator's intent and courts should change their practice and adopt a more liberal approach in line with contemporary trends in international commercial arbitration practice.

Keywords Interpretation · Scope of international arbitration agreements · Termination · Settlement · Non-contractual claims · Related contracts

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1 Introduction

The Turkish legislator defines the term arbitration agreement under Art. 4 (1) of the International Arbitration Law (MTK)[1] as follows: 'An arbitration agreement is an agreement between the parties to settle through arbitration all or certain disputes that have arisen or that may arise from an existing legal relationship, whether contractual or not'.[2]

Chapter 12 of the Swiss Private International Law Act[3] (IPRG), which regulates international arbitration, does not define the term arbitration agreement. The Swiss Federal Supreme Court (SFSC, *Bundesgerichtshof*), however, adopts a similar definition to the one in MTK: 'The term arbitration agreement can be defined as an agreement by which two or more specified or identifiable parties agree to submit one or more disputes, existing or future, to binding arbitration to the exclusion of the original state jurisdiction'.[4]

Another definition is found in Art. II (1) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC), which is relevant as both Turkey and Switzerland are contracting states to NYC: '… an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration'.

All of these definitions show that parties' intent is decisive in determining the scope of disputes referred to arbitration. It is not only arbitral tribunals that are faced with this issue of determining whether they have jurisdiction or not. National courts may also need to determine the scope of disputes referred to arbitration, since it is explicitly stated in both Swiss and Turkish legislation concerning international arbitration that a national court shall decline jurisdiction if it is faced with an action concerning an arbitrable dispute within the scope of an arbitration agreement (IPRG Art. 7; MTK Art. 5).[5] Therefore, in cases where it is doubtful whether a given

[1] Milletlerarası Tahkim Kanunu (Law no. 4686, OG 5.7.2001/24453). For the English translation, see https://rm.coe.int/turkish-international-arbitration-law-ial-/1680a72d93 (accessed 2 November 2023). Domestic arbitration is regulated in Articles 407 ff of the Turkish Code of Civil Procedure (*Hukuk Muhakemeleri Kanunu* (HMK), Law no 6100, OG, 4.2.2011/27836). The rules on domestic arbitration may become relevant for international arbitration only to the extent that MTK refers to HMK. In other cases, the rules in HMK are not applicable to international arbitration (HMK Art. 407; MTK Art. 17).

[2] For the English translation, see https://rm.coe.int/turkish-international-arbitration-law-ial-/1680a72d93 (accessed 9 May 2024). This definition corresponds with the one in Art. 7 (1) of the UNCITRAL Model Law.

[3] *Bundesgesetz über das Internationale Privatrecht*, 18.12.1987, SR 291. For the English translation, see https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en (accessed 9 May 2024).

[4] BGer, 3.1.2022, 4A_460/2021 E. 3.1.4; BGE 147 III 107 E. 3.1.2; BGE 140 III 134 E. 3.1; BGE 130 III 66 E. 3.1.

[5] IPRG Art. 7: 'If parties have concluded an arbitration agreement with respect to an arbitrable dispute, a Swiss court before which an action is brought shall decline its jurisdiction, unless:
(a) the respondent has submitted to the procedure without reservation;
(b) the court finds that the arbitration agreement is invalid, inoperable or incapable of being performed; or
(c) the arbitral tribunal cannot be constituted for reasons for which the respondent in the arbitration is

dispute falls within the scope of the arbitration agreement, interpretation of the arbitration agreement by courts is necessary. This article aims to demonstrate how courts in Turkey and Switzerland differ in their approach regarding interpretation of arbitration agreements in certain scenarios where such doubt exists.

The choice of the two countries for comparison makes sense because the rules concerning the issue at hand in both countries are very similar. Turkey adopted the Swiss Civil Code and the Code of Obligations back in 1926, and since then has followed changes in those codes, closely implementing those in new codes enacted in the 21st century (Turkish Civil Code (TMK)[6] and Turkish Code of Obligations (TBK)[7]).[8]

The rules on international arbitration in both countries can be considered modern.[9] MTK's preamble states that this law was prepared 'based on the Model Law prepared by the United Nations Commission on International Trade Law (UNCITRAL) and the contemporary understanding, developments and principles in comparative international arbitration law'. IPRG, on the other hand, entered into force in 1989, i.e., before the finalization of the UNCITRAL Model Law.[10] Nevertheless, the differences between IPRG and the Model Law are not fundamental.[11] In any case, neither MTK nor IPRG contains any rules directly affecting the interpretation of arbitration agreements, and the general rules of interpretation in contract law are the same in both countries.

These similarities provide a fertile ground for demonstrating the effects of courts' differing approaches to arbitration. Swiss courts are known for their pro-arbitration approach in interpreting the scope of arbitration agreements;[12] whereas the same cannot be said for Turkish courts (at least in this context), as the comparison below will reveal.

The first part of this article discusses the general principles adopted by courts in interpreting arbitration agreements. In the second part of the article, case law from both countries pertaining to the determination of the substantive scope of arbitration

Footnote 5 (continued)
manifestly responsible.' (https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en)
MTK Art. 5 (1): 'If an action is brought before the court regarding a dispute which is the subject of an arbitration agreement, the other party may make an objection to the arbitration. The submission of that objection and the resolution of disputes concerning the validity of the arbitration agreement are subject to the provisions of the Code of Civil Procedure concerning initial objections. If such objection is accepted, then the court shall dismiss the action on procedural grounds.' (https://rm.coe.int/turkish-international-arbitration-law-ial-/1680a72d93)

[6] Türk Medeni Kanunu (Law no. 4721, OG 8.12.2001/24607).

[7] Türk Borçlar Kanunu (Law no. 6098, OG 4.2.2011/27836).

[8] Atamer (2008), p 723 ff; Önay (2018), p 223 ff.

[9] See further on international commercial arbitration in Switzerland, Berger and Kellerhals (2021), para. 70 ff. On Turkey, see Tarman (2014), p 245 ff.

[10] It was a deliberate choice of the Swiss legislator not to wait for the finalization of the Model Law in order not to risk further disputes (Richers and Magliana (2021), para. 5) after a difficult legislation process (Berger and Kellerhals (2021), paras. 85-86). Chapter 12 IPRG on international arbitration was revised and became effective as of 1.1.2021, but the revisions are not fundamental.

[11] Richers and Magliana (2021), para. 6.

[12] Born (2021), §9.02 D/1/b.

agreements by interpretation in selected scenarios is analyzed and compared, followed by concluding remarks.

2 General Principles in Interpreting Arbitration Agreements

One rarely finds specific rules on interpreting the scope of arbitration agreements, and therefore courts and arbitral tribunals in most legal systems resort to general rules of contract interpretation.[13] This also holds true for Swiss and Turkish law.

2.1 Swiss Law

General principles of interpretation regarding arbitration agreements in Swiss law are well established in case law. Many decisions by the SFSC contain similar general statements regarding the interpretation of arbitration agreements. An example from a relatively recent decision[14] is as follows:[15]

> The interpretation of an arbitration agreement follows the principles generally applicable to the interpretation of private declarations of intent. Accordingly, the common and actual will of the parties is primarily decisive (BGE 147 III 107 E. 3.1.2; 142 III 239 E. 5.2.1; 140 III 134 E. 3.2). This subjective interpretation is based on the assessment of evidence, which is generally not subject to review by the Federal Supreme Court (BGE 147 III 107 E. 3.1.2; 142 III 239 E. 5.2.1 with references). If the common and actual will of the parties cannot be determined with regard to the arbitration agreement, it must be interpreted according to the principle of reliance, i.e., the presumed will must be determined as it could and had to be understood by the respective recipient of the declaration in good faith (BGE 147 III 107 E. 3.1.2; 142 III 239 E. 5.2.1; 140 III 134 E. 3.2). When interpreting an arbitration agreement, its legal nature must be taken into account; in particular, it must be noted that the waiver of a state court severely restricts the avenues of appeal. According to federal court jurisprudence, such a waiver cannot be assumed lightly, which is why a restrictive interpretation is required in case of doubt (see BGE 147 III 107 E. 3.1.2; 144 III 235 E. 2.3.4; 140 III 134 E. 3.2).

This paragraph, equivalents of which are found in numerous decisions by the SFSC, firstly refers to general principles of interpretation. Accordingly, the common and actual intention of the parties, if ascertainable, is decisive (subjective interpretation).[16] Parties' common and true intention prevails over wording they used inadvertently or willfully in order to disguise the actual nature of the agreement (Swiss

[13] Ibid., §9.02 C.

[14] BGer, 03.01.2022, 4A_460/2021, Erw. 3.1.4.

[15] All translations into English are the author's own, unless stated otherwise.

[16] Berger and Kellerhals (2021), para. 480. For a list of decisions including similar statements, see Müller and Pearson (2019), pp 69-70.

Code of Obligations Art. 18). Where such intent cannot be ascertained, the so-called principle of reliance (*Vertrauensprinzip*) applies (objective interpretation).[17] The wording used by the parties is the starting point of the interpretation. Nonetheless, even if the wording is clear, it is possible to arrive at a conclusion diverging from such clear wording, relying on circumstances surrounding the given case and parties' apparent purpose.[18] The SFSC also adopts a reasonableness criterion in the interpretation pursuant to the principle of reliance. Accordingly, 'the court must take into account what is reasonable, because it cannot be assumed that the parties intended an unreasonable solution'.[19] The decisive moment of time in interpreting is the moment of contract formation; parties' conduct thereafter can only be taken into account as indications of their actual intention at the time of contract formation.[20] Where the interpretation pursuant to the principle of reliance is inconclusive, the SFSC occasionally makes use of the *contra proferentem* rule, which means that the interpretation in favor of the party that did not draft the arbitration agreement shall prevail.[21]

In addition to these general principles on interpretation, the SFSC then introduces a specific interpretation rule for arbitration agreements. Accordingly, a restrictive approach[22] shall be adopted due to the nature of the arbitration agreement, by which parties waive their right to take their case to national courts. In some decisions, the SFSC provides another reason for such a restrictive approach, i.e., significantly higher costs in resolving disputes through arbitration when compared with state litigation.[23]

It must be noted that this restrictive approach of the court is limited to the determination of parties' intention vis-à-vis submitting their disputes to arbitration.[24] Once it is established that parties have validly concluded an arbitration agreement,

[17] Berger and Kellerhals (2021), paras. 481-482. For a list of decisions including similar statements, see Müller and Pearson (2019), pp 71-72.

[18] BGE 140 III 134, Erw. 3.2. In the context of international commercial arbitration, parties often use standard texts recommended by arbitral institutions without much deliberation and negotiation on the scope of the disputes referred to arbitration (Born (2021), §9.02 D; Blackaby et al. (2023), para. 2.03).

[19] BGE 140 III 134, Erw. 3.2; BGE 133 III 607, Erw. 2.2; BGE 122 III 420, Erw. 3a; BGE 117 II 609, Erw. 6c; BGer, 24.1.2017, 4A 672/2016, Erw. 3.1.2.

[20] BGE 129 III 675, Erw. 2.3.

[21] BGer 4A_314/2017, 28.5.2018, Erw. 2.3.2.5; BGer, 15.9.2015, 4A_136/2015, Erw. 2.2.2; Oetiker (2018), Art. 178, para. 65; Gabriel and Landbrecht (2023), Art. 178, para. 350.

[22] Berger and Kellerhals (2021), para. 485 ff; Girsberger and Voser (2021), para. 378 ff; Gabriel and Landbrecht (2023), Art. 178, para. 352 ff; Oetiker (2018), Art. 178, paras. 67-68.

[23] BGE 116 Ia 56 E. 3b; BGE 129 III 675 E. 2.3; BGer, 19.05.2003, 4C.40/2003 E. 5.3.

[24] This restrictive approach has been subject to criticism in the literature. It has been argued that such an approach is not compatible with the *principle in favorem validates* adopted in IPRG 178 (2). The SFSC addressed this criticism and maintained its original position with the argument that IPRG 178 (2) only pertains to law applicable to the arbitration agreement and does not provide any rules for interpretation thereof (BGE 129 III 675, E. 2.3). Some commentators, while agreeing with the SFSC that IPRG Art. 178 (2) is not relevant for interpretation, argue that, in the context of international arbitration, a neutral approach, taking all circumstances of the given case into account, would be appropriate (Gränicher (2023), Art. 178, para. 77; Gabriel and Landbrecht (2023), Art. 178, para. 357 and sources cited therein). Berger and Kellerhals, on the other hand, argue that the SFSC's restrictive approach and therefore this debate have limited impact in practice (Berger and Kellerhals (2021), para. 488).

the SFSC adopts an extensive (liberal, broad) approach in construing the scope of the arbitration agreement:[25]

> If, on the other hand, it is established that an arbitration agreement exists, there is no reason for a restrictive interpretation; rather, it must be assumed that the parties wished the arbitral tribunal to have comprehensive jurisdiction (BGE 138 III 681 E. 4.4 p. 687; BGE 116 Ia 56 E. 3b; each with references).[26]

This extensive interpretation is particularly well founded where the arbitration agreement contains wording allowing such an approach, e.g., 'all disputes in connection with / related to the contract'.[27]

2.2 Turkish Law

The Turkish Court of Cassation (TCC, *Yargıtay*) is not as elaborate as the SFSC on the general principles applicable to interpretation of arbitration agreements. Nonetheless, clues as to the Court's approach can be discerned from individual cases. In one case, the Court of Cassation ruled that the phrase 'all disputes arising out of or relating to this agreement shall be submitted to FIFA' was not clear and definitive enough to show the parties' intention to arbitrate and reasoned this conclusion as follows:[28]

> Disputes arising between real or legal persons, shall as a rule be resolved by the judicial bodies within the state (courts). The resolution of disputes through mediation, arbitration, experts, etc., which are considered among alternative dispute resolution methods, depends on the free will of the parties or the existence of a legal provision that obliges to resort to such methods. Arbitration refers to the parties' assignment and authorization of private persons, called arbitrators, to resolve disputes instead of the state judiciary. As a result, in order to arbitrate, the parties must conclude an arbitration agreement or include an arbitration clause in the agreement. The arbitration clause, which states that the dispute will be resolved by the arbitrator or the arbitral tribunal, is the basic element of the arbitration agreement. In order for the arbitration clause or agreement to be valid, the parties must have clearly and definitely stated their intention to arbitrate in the arbitration clause or agreement in a manner that does not cause any dispute or confusion. In the established

[25] BGE 116 Ia 56 E. 5b; BGE 130 III 66 E. 3.2; BGer. 20.09.2011, 4A_103/2011 E. 3.2.1; BGE 138 III 681 E. 4.4. See also Berger and Kellerhals (2021), para. 489 ff; Richers and Magliana (2021), para. 66; Girsberger and Voser (2021), para. 384; Oetiker (2018), Art. 178, para. 69; Gränicher (2023), Art. 178, para. 59.

[26] BGE 140 III 134, Erw. 3.2.

[27] Girsberger and Voser (2021), para. 384; BGE 138 III 681, Erw. 4.4.

[28] Yargıtay, 13th Civil Chamber, 23.10.2019, 2018/2348, 2019/10372. For a similar case, where the clause 'disputes relating to the present Agreement may be referred to FIFA as the court of first instance and to the Court of Arbitration for Sport (CAS) as the appeal authority' was not deemed to be clear and definitive enough, see Yargıtay, 13th Civil Chamber, 20.11.2014, 12695/36882. In a case with similar facts, the SFSC decided that there was a valid arbitration agreement (BGE 138 III 29).

> case law of the Court of Cassation, it is accepted that in order for an arbitration clause or arbitration agreement to be considered valid, it must have been agreed that the dispute will be resolved by the arbitrator, and that any wording that eliminates or weakens the definite intention will render the arbitration agreement or clause null and void.

This passage from a relatively recent case is indicative of the TCC's restrictive approach in determining the intention to arbitrate. This approach, however, seems not to be limited to the determination of parties' intention vis-à-vis submitting their disputes to arbitration, but also extends to the determination of the arbitration agreement's scope, as will be revealed by the analysis of case law in selected scenarios below.

A (positively) surprising reasoning for interpreting arbitration agreements in an extensive manner is found in a recent decision by the Regional Appellate Court (*Bölge Adliye Mahkemesi*) in Istanbul:

> Recognizing this investment-incentivizing feature of arbitration, states have endeavored to reorganize their legal systems in line with this need. In line with this effort, Turkish arbitration law has adopted all international regulations of contemporary arbitration, and in this context, it has become a party to international conventions, and has taken the Model Law as a basis for the arbitration regulations in HMK and MTK … This will of the Turkish legislator encouraging arbitration should also be taken into account in the interpretation of the basic laws. In many contemporary legal systems, an interpretation favoring arbitration is preferred. This aims to reduce the workload of the courts and encourage domestic and foreign investments. As a result, the courts that examine the arbitration objection interpret the arbitration agreement as broadly as possible and ensure that the arbitration agreement is valid ... .[29] [emphasis added]

Although case law does not explicitly refer to the general rules on interpretation for arbitration agreements, it is stated in the literature that those will apply to arbitration agreements.[30] The general rules of interpretation for declarations of intent in Turkish law are identical to those in Swiss law. Pursuant to Art. 19 Turkish Code of Obligations (the equivalent of Art. 18 of its Swiss counterpart), the common and true intention of the parties prevails over wording they used inadvertently or willfully in order to disguise the actual nature of the agreement. Where such intention is not identifiable, the principle of reliance (*güven ilkesi*) is recognized also in Turkish law.[31] The *contra proferentem* rule is also accepted as a method of last resort.[32]

[29] İstanbul Bölge Adliye Mahkemesi, 14th Civil Chamber, 20.10.2022, 1843/1373 (the case concerned the arbitrability of a dispute regarding the dismissal of an executive of a company).

[30] Aydemir (2017), pp 140-143.

[31] See Kocayusufpaşaoğlu (2014), §13 and §32, para. 12; Helvacı (2017), p 53 ff. For a recent decision confirming the application of the principle of reliance in interpretation, see Yargıtay, 10th Civil Chamber, 15.9.2022, 8204/10701.

[32] Kocayusufpaşaoğlu (2014), §13, para. 17.

2.3 Law Applicable to the Interpretation of the Arbitration Agreement and the Role of NYC Art. II

The explanations above are based on the assumption that Swiss or Turkish law applies to the interpretation of the arbitration agreement. However, it may be the case that a different law applies to the interpretation of the arbitration agreement in a dispute before Swiss or Turkish courts.

In both Swiss and Turkish law, the law applicable to the substantive validity of arbitration agreements also governs the issue of interpretation.[33] In both legal systems, parties have autonomy in choosing the law applicable to the substantive validity of the arbitration agreement (IPRG Art. 178 (2); MTK Art. 4 (3)). Swiss law considers an arbitration agreement valid if it conforms to the law chosen by the parties, to the law applicable to the dispute, or to Swiss law (IPRG Art. 178 (2)).[34] Under Turkish law, lacking a choice of law, Turkish law applies to the substantive validity of the arbitration agreement (MTK Art. 4 (3)).

Although NYC does not contain an explicit provision on interpretation of arbitration agreements, it has been argued in the literature that its pro-arbitration objectives combined with the requirement to recognize and enforce international arbitration agreements (NYC Art. II) may be construed as a rule of interpretation mandated by international law.[35] This view, however, does not seem to have been followed by either Swiss or Turkish courts so far.

3 Comparison of Swiss and Turkish Case Law in Selected Scenarios

3.1 *De Facto* Continuation of Fixed-Term Continuous Contractual Relationships

In practice, it is not uncommon that the parties to a fixed-term contract regarding a continuous relationship (e.g., a lease agreement, a distributorship agreement) continue the relationship *de facto* without explicitly entering into a new agreement at the end of the term. In such a case, the problem arises whether the arbitration clause in the original (written) contract covers disputes arising out of the legal relationship continuing beyond the term agreed at the outset. Both the SFSC and the TCC had to deal with this problem in recent decisions.

[33] For Swiss law, see Berger and Kellerhals (2021), para. 477; Girsberger and Voser (2021), para. 374; Gabriel and Landbrecht (2023), Art. 178, para. 342; for Turkish law, see Özel (2008), p 89; Aydemir (2017), p 144.

[34] This means that the arbitration agreement may need to be interpreted pursuant to multiple laws (Gabriel and Landbrecht (2023), Art. 178, para. 343). IPRG Art. 178 (2) does not impose a hierarchy between these legal orders (Berger and Kellerhals (2021), para. 395; Oetiker (2018), Art. 178, para. 32).

[35] Born (2021), §9.02 A.

3.1.1 Turkish Case

The parties to the dispute entered into a distributorship agreement. They first signed a written agreement on 1.6.2005, followed by agreements dated 1.6.2007 and 1.1.2008 containing provisions very similar to the first one.

The last signed contract contains the following provision regarding the duration of the contract:

> This agreement shall remain in full force and effect for two (2) years from the effective date. This agreement shall expire at the end of the term unless both parties agree to renew it at least thirty (30) days prior to the expiration date.

The parties did not explicitly conclude an agreement before the expiration of the contract period, but after the expiration of the contract period, they continued the commercial relationship within the framework of their mutual rights and obligations in the said contract.

On 22.3.2017, the claimant terminated the contract due to the respondent's alleged breach of contract and claimed compensation. The last signed contract (dated 1.1.2008) contains the following provisions regarding the applicable law and dispute resolution:

> This agreement shall be governed by and construed in accordance with the laws of the Republic of Korea… .
> Any dispute, controversy or disagreement between the parties arising out of or in connection with this agreement or the breach of this agreement shall be finally settled by arbitration. Pursuant to the Commercial Arbitration Rules of the Korean Commercial Arbitration Board, the arbitration shall be conducted by three (3) arbitrators in Seoul, Republic of Korea. The decision of the arbitrators shall be final and binding on both parties.

Both the first instance court[36] and the Regional Appellate Court[37] ruled that parties tacitly prolonged (extended) the term of the distributorship agreement by their *de facto* continuation of their commercial relationship. Both courts considered the dispute, which arose after 1.1.2010, to be within the scope of the arbitration agreement, hence ruled that the dispute should be settled by arbitration. The Court of Cassation[38] overturned the decision by the Regional Appellate Court due to following reasons and ruled that the dispute should be resolved by national courts:

[36] İstanbul 14. Asliye Ticaret Mahkemesi, 26.9.2019, 2017/463, 2019/922.

[37] İstanbul Bölge Adliye Mahkemesi, 14th Civil Chamber, 26.2.2020, 2019/2499, 2020/248.

[38] Yargıtay, 11th Civil Chamber, 10.3.2022, 2020/1634, 2022/1742. For a critique of this decision, see Önay (2023), p 508 ff. After the initial submission of this article this case was brought before the TCC's General Civil Assembly (*Hukuk Genel Kurulu*) upon a decision of insistence by the first instance court. The General Civil Assembly agreed, by majority, with the decision of the 11th Civil Chamber and decided that the dispute should be resolved by national courts using similar reasoning (Yargıtay, General Civil Assembly, 29.11.2023, 2023/103, 2023/1185). The dissenting minority considered the dispute to be within the scope of the arbitration agreement, construing the *de facto* continuation of the relationship as prolongation of the existing contract, as argued in this article (see Section 3.1.3 below).

– The *de facto* continuation of the distributorship relationship does not qualify as a prolongation of the existing agreement, but as a new contract.
– Regarding this new contract, parties did not express their clear intention to arbitrate, which is a requirement for the existence of an arbitration agreement due to the exceptional nature of arbitration in comparison to court litigation.
– Even if the *de facto* continuation of the relationship is to be construed as the continuation of the relationship within the framework of the same contract, lacking an explicit agreement thereon, it is not possible to arrive at the conclusion that the arbitration agreement covers the extended period.

3.1.2 Swiss Case

The SFSC had to deal with the same issue a few years before the TCC.[39] As far as the issue at hand is concerned, the facts of this case are very similar to the one set out above. The dispute arose out of a distributorship relationship, which the parties *de facto* continued after the expiry of the initially agreed term.

The distribution agreement in question was signed by the parties on 9.10.2009 and was supposed to be in force until 31.12.2014. Negotiations regarding an agreement were initiated in the second half of 2014. However, an agreement could not be reached. Nonetheless, the parties continued their commercial relationship in 2015.

The distribution agreement contained the following provision:

> Any controversy or claim arising out of or relating to this 'Agreement' or the breach thereof shall be settled by arbitration. The number of arbitrators shall be 3 (three), One appointed by the 'Distributor', One appointed by the 'Company' and the Third being an independent body. The jurisdiction for arbitration shall be Ljubljana, the permanent arbitration of the Slovenian Chamber of Commerce, and Slovenian laws shall be used with regard to the resolution of the dispute. The language to be used in the arbitration proceeding shall be English. In the event that the 'Parties' are unable to agree on the acceptability of the Third arbitrator or in case agreed arbitration at relevant point of time shall not exist or be in function, the dispute shall be settled by the Competent Court in Ljubljana, Republic of Slovenia.

One of the issues the court had to deal with, albeit a secondary one,[40] was whether a dispute arising out of the relationship after the fixed term would fall within the scope of the arbitration agreement. The local court concluded that the distributorship agreement was implicitly extended upon the parties' *de facto* continuation of the relationship and that the arbitration agreement covered the disputes arising regarding the extended period. This finding of the local court was challenged on appeal on the grounds that the form requirement of Article II (2) of NYC was

[39] BGer, 17.4.2019, 4A_646/208.

[40] This decision is seen as a leading decision on arbitration agreements' extension to non-signatories (Favre-Bulle (2020), p 782) and is also regarded as important for recognizing that the formal requirements of IPRG Art. 178 (1) and NYC II (2) correspond to each other (see also Bianchi (2020)).

not complied with, with respect to the extended period, but the SFSC rejected this objection. According to the SFSC, since there was no change in the content of the rights and obligations of the parties for the extended period, there was no need for a new formal requirement pursuant to Article II (2) of NYC for the extended period. Therefore, the arbitration agreement concluded by the parties also covered the extension period, and the local court's decision of non-jurisdiction upon the arbitration objection was appropriate.[41]

3.1.3 Comparative Remarks

As the explanations above reveal, the SFSC and the TCC reached different conclusions when presented with cases with very similar facts. The first difference pertains to the way the *de facto* continuation of the relationship is construed legally. In my opinion, the SFSC's approach is the better one. In the absence of an agreement or circumstances indicative to the contrary, the parties would have intended to continue the existing contractual relationship, not form a new one. This would be the better view under both Swiss and Turkish law. Admittedly, in both of the cases above, the applicable law was neither Swiss nor Turkish law. In the Turkish case, Korean law was selected as the applicable law by the parties, whereas Slovenian law was applicable in the Swiss case. This issue should have been decided pursuant to the applicable law in question.[42]

The SFSC's approach to the main issue, i.e., the scope of the arbitration agreement, is also preferable to the TCC's approach. The TCC construed the *de facto* continuation as the formation of a new contract, which was not within the scope of the arbitration agreement concluded with regard to the previous contract. The TCC also stated *obiter dicta* that even if the *de facto* continuation of the relationship were to be construed as the continuation of the same contractual relationship, lacking an explicit agreement thereon, the arbitration agreement would not cover the extended period unless explicitly agreed otherwise by the parties.

I believe that the adoption of the exact opposite of the TCC's reasoning would be the better approach. As a rule, the parties shall be deemed to have continued the same contractual relationship and the arbitration agreement would cover the extended period in the absence of evidence to the contrary. Even if the parties are deemed to have formed a new contractual relationship after the expiry of the former one, the arbitration agreement shall be deemed to cover the contract as well, unless the parties' intention to the contrary can be established.[43] This makes sense because in an international commercial relationship, it may be assumed that reasonable businesspeople

[41] BGer, 17.4.2019, 4A_646/208, Erw. 2.6.2.

[42] This issue was actually brought up by the appellant in the Swiss case. However, the SFSC rejected the latter's claim that the lower court applied Slovenian law arbitrarily in the specific case. The SFSC ruled that the appellant failed to establish how the outcome of the decision would differ had Slovenian been applied. Since the SFSC only overturns a decision if not only the reasoning but also the result is untenable, the appeal based on this ground was rejected (BGer, 17.04.2019, 4A_646/208, Erw. 2.6.1).

[43] The same argument can also be found in the dissenting minority opinion of the TCC's General Assembly decision (Yargıtay, General Civil Assembly, 29.11.2023, 2023/103, 2023/1185).

would want a 'one-stop dispute resolution', i.e., to settle their disputes in a single centralized proceeding.[44] It would not be reasonable to assume that the parties wish to submit their disputes to arbitration until a specific date, and to the jurisdiction of national courts after that date for the same commercial relationship. The parties are of course free to do so, but such intention should not be presumed without supporting evidence. Furthermore, in the case at hand, the wording of the arbitration agreement[45] also calls for a broad interpretation and supports the conclusion that the arbitration agreement covers disputes regarding the period after the initially fixed term.

The view adopted here is also compatible with the literature on Article II (2) of NYC. Accordingly, the form requirement regulated under this provision does not apply where parties merely extend their contractual relationship.[46] A similar view is adopted with regard to a contract addendum or novation.[47] Unless parties have significantly modified their rights and duties under the contract with these agreements, no further form requirement is deemed necessary for the arbitration agreement to cover disputes arising out of such agreements.[48]

3.2 Out-of-Court Settlement and Liquidation/Termination Contracts

A common problem pertaining to interpretation of arbitration agreements with regard to their scope arises from settlement agreements.[49] It may be the case that parties have drafted a settlement agreement to settle issues under a preceding contract containing an arbitration agreement. If the settlement contract itself lacks an arbitration clause, will the disputes arising out of the settlement contract be subject to the arbitration agreement in the preceding contract? A similar question arises for liquidation/termination contracts.

3.2.1 Turkish Case Law

In two relatively recent decisions, Turkish courts had to deal with this issue.

a) The first decision[50] was one rendered by the TCC, where parties to the dispute entered into a construction contract on 8.5.2013, which was later terminated by the employer on 14.2.2014. This contract contained a valid arbitration clause, which was not disputed by the parties. In this clause, the parties agreed that any

[44] Born (2021), §9.02 A; Solomon (2021), para. 137.

[45] 'Any dispute, controversy or disagreement between the parties arising out of or in connection with this agreement…'.

[46] Solomon (2021), para. 105; Balthasar (2021), para. 33; Wolff (2019), para. 88; Haas and Kahlert (2020), para. 21.192.

[47] Wolff (2019), paras. 145-146. On this, see also a report by the UNCITRAL Secretary-General (A/CN.9/WG.II/WP.108/Add.1, para. 12 (g), 13).

[48] Wolff (2019), para. 88.

[49] See Born (2021), §9.02 E/6, fns. 325-328, for case law on this question in the context of international arbitration practices.

[50] Yargıtay, 15th Civil Chamber, 14.9.2017, 2017/776, 2017/2981.

disputes arising out of this contract and in connection with the performance of the contract should be settled by arbitration pursuant to the Rules of Arbitration of the ICC.

The parties then entered into another agreement on 1.3.2014 and determined the outstanding debt of the employer for the part of the work already completed by the contractor. The second paragraph of the protocol stated that the final amounts of receivables and payables would be determined after completion of the necessary examinations, and that the parties had accepted that they had no rights and receivables within the scope of the project as of the date of this agreement, except for the final account to be made in the future. The parties further agreed that no additional progress payment would be made other than the final calculation progress payment of the contractor and that this commitment invalidated the previous declarations and agreements.

In addition, in the last part of the second paragraph, the contractor promised that its subcontractors and workers should not be present at the project site for any action, demonstration or meeting. Otherwise and if the contractor were deemed faulty for such actions by an arbitral tribunal, consisting of 3 arbitrators and to be established by the ICC under the Rules of Arbitration of the ICC, the contractor should pay a contractual penalty of 1,000,000 Turkish liras.

The claim brought before a national court was about the contractor's claim for payment, and the employer raised an arbitration objection relying on the arbitration agreement in the first contract. The first instance court granted this objection and dismissed the claim.

The Court of Cassation overturned this decision upon the claimant's appeal. The reasoning of the TCC was that the dispute did not arise out of the first contract. According to the court, in the second agreement, the parties only agreed to submit to arbitration disputes regarding the presence of subcontractors and workers at the project site. Other disputes, such as the one at hand regarding the receivables of the contractor, should be settled by state courts, as in this second agreement the parties explicitly stated that they considered prior statements and agreements invalid.

b) The second decision was one by a first instance court in Istanbul.[51] In a proceeding regarding the enforcement of a foreign award where NYC was applicable, the court rendered a decision concerning a settlement agreement. The parties had been in a distributorship relationship since 2009 and their last written distributorship agreement was dated 7.1.2016, which was terminated on 6.2.2018. It was not contested that the distributorship agreement contained a valid arbitration clause. The respondent asserted that the parties entered into a settlement contract, which did not contain an arbitration clause, and the dispute at hand arose from that settlement contract. The respondent argued that the arbitration agreement did not cover such a dispute. The court rejected the respondent's argument, stating that the agreement, labeled as settlement by the respondent, was merely a payment

[51] İstanbul 12. Asliye Ticaret Mahkemesi, 18.7.2019, 128/611.

plan liquidating the parties' relationship, which repealed neither the distributorship nor the arbitration agreement.

3.2.2 Swiss Case Law

The SFSC had to deal with the issue as to whether the arbitration agreement also covered disputes arising out of settlement and termination contracts relatively earlier.

a) In a case from the year 1990, the SFSC had to weigh in on the question whether an arbitration agreement made with regard to a contract would also cover disputes arising out of a contract whereby parties mutually terminated the original contract. The SFSC, after making general remarks on interpretation, ruled that unless the parties expressly stipulated otherwise in their termination agreement, it was generally to be assumed that they also wished the arbitration clause to continue to apply to disputes in connection with the termination of the contract.[52]

b) In another case, from 1995, the SFSC this time had to resolve a dispute concerning an out-of-court settlement.[53] The parties to the dispute had concluded ten sales contracts, all of which contained arbitration clauses. Later, they entered into a settlement agreement, which contained a jurisdiction clause rendering courts in Istanbul competent. The SFSC first acknowledged that whether the jurisdiction clause rendered the arbitration clauses null and void was a question of contract interpretation. According to the SFSC, unless otherwise stipulated, the arbitration clause survives the main contract, so that arbitrators remain competent to decide disputes concerning the liquidation of the contractual relationship based on a settlement agreement as well.[54] Whether the settlement contract has novatory effect or not is not relevant. However, the parties can also terminate their arbitration agreement while entering into a settlement contract. The court concluded that where parties include a jurisdiction clause into the settlement agreement, their intention to cancel the arbitration agreement in the previous contract shall be presumed,[55] and this was the case in the given dispute. Therefore, the SFSC concluded that the parties had replaced their previous arbitration agreements with their jurisdiction clause.[56]

[52] BGE 116 Ia 56, Erw 3b.

[53] BGE 121 III 495.

[54] It seems that the SFSC reached the same conclusion in an earlier case, from 1989 (BGE 115 II 390). The relevant part of the decision (Erw. 4b/bb) is not published but cited in the literature (Müller and Pearson (2019), IPRG 178, para. 3.6).

[55] The same presumption was used by the SFSC in a more recent case (BGer, 17.1.2013, 4A_244/2012, Erw. 4.5).

[56] BGE 121 III 495, Erw. 5.

3.2.3 Comparative Remarks

The cases analyzed above reveal that in the context of settlement and termination, courts in both countries try to interpret parties' intention at the moment they conclude the second contract. Did the parties intend to annul their arbitration agreement or not? The principles adopted by the SFSC to answer this question seem appropriate. Accordingly, when parties to a contract which contains an arbitration clause conclude a second contract of settlement or termination, unless agreed otherwise it should be assumed that they consider disputes arising out of the second contract to be within the scope of the arbitration agreement.[57] Whether the second contract novates[58] or terminates the contract does not make any difference. The arbitration agreement may survive such novation or termination due to the separability principle.[59]

The presumption shall be reversed if parties have included a dispute resolution clause in the second contract contradicting the clause in the first contract. In that case, parties shall be deemed to have replaced the arbitration agreement with the new clause.[60] This was the case in the second decision by the SFSC.[61]

The facts of the first decision from Turkish case law[62] are more challenging. There, the parties did include a new arbitration clause in the second contract regulating the termination of their relationship. However, they did so only with regard to an obligation and a penalty clause, which they introduced in the second contract. Does that mean that they intended to terminate their initial arbitration agreement? I believe that this question should have been answered in negative. It seems reasonable to assume that the parties still considered their disputes with regard to the outstanding claim of the contractor to be subject to arbitration but needed to clarify their intention to arbitrate disputes arising from the new obligation they introduced with the new clause. In this case, the two clauses are not contradictory but complementary. The TCC's reasoning that the parties explicitly stated that they considered prior statements and agreements invalid to render the arbitration agreement terminated is not convincing, since this statement pertains to their rights and obligations from the main contract, not to the arbitration agreement.

The second decision from Turkish case law seems accurate in terms of its outcome. However, the reasoning provided seems a bit problematic. The court considered the dispute at hand within the scope of the arbitration agreement, because the second agreement (labeled as settlement by the respondent) was merely a payment plan liquidating the parties' relationship, which repealed neither the distributorship

[57] See also Gabriel and Landbrecht (2023), Art. 178, para. 509; Oetiker (2018), Art. 178, para. 109; Gränicher (2023), Art. 178, para. 58.

[58] Berger and Kellerhals (2021), para. 515a.

[59] Gabriel and Landbrecht (2023), Art. 178, paras. 507-509.

[60] Ibid., Art. 178, para. 509; Richers and Magliana (2021), para. 49; Berger and Kellerhals (2021), para. 621 (the authors accept this outcome 'regardless of whether the text of the new arbitration clause is identical, similar or compatible with the text of the old clause').

[61] BGE 121 III 495.

[62] Yargıtay, 15th Civil Chamber, 14.9.2017, 776/2981.

nor the arbitration agreement. This reasoning seems to imply that the outcome would have been different if the second agreement had been a settlement agreement novating the main contract. As explained, this would not always be correct.

It should also be noted that the TCC's restrictive approach with regard to settlement agreements is criticized in the Turkish legal literature. It has been argued that parties would reasonably expect their disputes arising out of the settlement to be resolved pursuant to the arbitration clause in the main agreement.[63]

3.3 Non-Contractual Claims Related to the Contract

An interpretative question often faced in the context of international arbitration is whether an arbitration agreement concluded to mainly cover contractual claims would also cover non-contractual claims connected with the contract.[64] Such claims may, for example, be of a statutory nature, based on tort, unjust enrichment or benevolent intervention in another's affairs (*negotiorum gestio*).[65]

3.3.1 Turkish Case

In a dispute between a script writer and a film producer, the TCC made a decision pertaining to this issue. The contract between the script writer and the producer contained a valid arbitration clause, and the contract stipulated that in the event a sequel to the movie was to be recorded, a new contract between the parties should be signed and the script writer should receive at least double the amount in royalty payments. The script writer sued the producer claiming that they released a sequel without informing them and claimed damages relying on Article 68/1 of the Law on Intellectual and Artistic Works (*Fikir ve Sanat Eserleri Kanunu*).[66] The producer raised an arbitration objection. The first instance court rejected this objection on the grounds that the dispute at hand was about the sequel, which was not the subject of the contract containing the arbitration clause. The decision was appealed, and the TCC rejected the appeal with regard to the jurisdiction and upheld the decision by the first instance court.[67]

[63] Akıncı (2020), pp 76-78. It should be noted that those critics cite a case from 2014 (Yargıtay, 11th Civil Chamber, 10.12.2014, 13227/19386) as an example of the TCC's restrictive approach to settlement agreements (Akıncı (2020), p 76; Sılacı Korkmaz (2020), p 65). To my understanding, based merely on the text of the TCC decision, this case is not about the question whether an arbitration clause would cover disputes arising from the settlement. In this case, it seems both the main contract and the settlement contract contained arbitration clauses, but the dispute arose out of an additional agreement between the parties (see Section 3.4.2 below). To be fair, the facts are not very clear in the decision.

[64] Born (2021), §9.02 F/1; Blackaby et al. (2023), para. 2.71 ff.

[65] A similar problem may be encountered with regard to quasi-contractual claims like *culpa in contrahendo*, liability based on reliance.

[66] This article provides a remedy to the person whose rights have been violated to claim up to three times the amount they would have received if the violator had been granted a license.

[67] Yargıtay, 11th Civil Chamber, 4.5.2016, 2015/8556, 2016/5014.

3.3.2 Swiss Case Law

a) The SFSC had to decide on a case in 2003, the facts of which are to a certain extent comparable to the Turkish case cited above.[68] The dispute arose from a contract called 'Secrecy Agreement', whereby it was intended to set up a joint research and development program to increase the thermal insulation capacity of foam plastics and to exchange confidential information in the course of this program. According to a clause in the agreement, 'disputes resulting from or with regard to this agreement' should be resolved by arbitration. The dispute was about patent applications made by and patents granted to one of the parties to the 'Secrecy Agreement'. The claimants sued the respondents with regard to these patents and patent applications. The Cantonal Appellate Court (*Obergericht*) in Lucerne did not evaluate the merits of the case due to lack of jurisdiction, as it ruled that the dispute fell within the scope of the arbitration agreement. The case was brought before the SFSC by the claimants, who argued that the Appellate Court was wrong in affirming arbitral jurisdiction because the dispute did not arise from the Secrecy Agreement but solely from relevant provisions of the Patent Act. The claimants argued further that the Secrecy Agreement had a term of one year and the alleged patent infringements occurred years later. It was the claimants' argument that if the Appellate Court's interpretation were adopted, the arbitration agreement would be binding on the parties even decades after for any patent invalidity or infringement claims. The SFSC rejected this argument and held that the dispute as to the rights regarding the invention was definitely related to the Secrecy Agreement. According to the SFSC, the fact that the claims were based on the Patent Act did not necessarily mean that the claim did not have a connection to the contract. The court also declared it irrelevant whether the Secrecy Agreement was limited in time at all or whether individual obligations under it were limited in time and whether the cooperation between the parties had already ended when the respondent completed the invention and applied for registration of the patents in dispute.[69]

b) In a case from 2012, the SFSC ruled that a claim based on ingenuine benevolent intervention in another's affair fell within the scope of an arbitration agreement made with regard to a mandate and trust contract regarding formation of a foundation in Panama and management of its assets. According to the SFSC, if an arbitration agreement is formulated in such a way that it is also intended to cover disputes arising 'in connection with' the contract, this must be understood in good faith as meaning that the parties did not wish to litigate the claims arising from their contractually regulated relationship under different legal bases with different dispute resolution methods. Rather, the presumed intention of the parties should

[68] BGer, 19.5.2003, 4C.40/2003.
[69] Ibid., Erw. 5.4.

be that they wanted to submit all claims arising from or directly affecting the facts regulated by the contract to the exclusive jurisdiction of the arbitral tribunal.[70]

c) In another case, from 2008, the SFSC made an *obiter dicta* statement with regard to tort claims. The case concerned a scenario with multiple related contracts.[71] While interpreting the wording 'in connection with this contract', the court ruled that such clauses should not be construed in a way to cover other contracts with different arbitration clauses, but rather disputes regarding the contract's formation and enforceability, claims resulting from its termination and relevant tort claims.[72]

3.3.3 Comparative Remarks

Decisions by both courts with regard to non-contractual claims in relation to the contract show that, again, the TCC adopts a more restrictive approach when compared to the SFSC. In the Turkish case, the connection of the statutory claim to the contract is very obvious. The same act constitutes both a breach of contract and a violation of the statute. The fact that the claimant relied on the statute should not have made the dispute fall outside of the arbitration agreement, unless the parties' intention to the contrary could have been determined by interpretation. Admittedly, the wording of the arbitration clause is not provided in this case, therefore a definitive analysis is not possible. If the arbitration clause contained wording like 'all disputes in connection with the contract' or 'any dispute related to the contract', one could easily consider this claim to be within the scope of the arbitration agreement. Even if the clause did not contain such wording, but merely one such as 'all disputes arising out of this contract', the better view would still seem to be to consider non-contractual claims to be within the scope, where the same act constitutes a breach of contract.[73]

The pro-arbitration approach adopted by the SFSC is the better one. The Swiss doctrine, in line with the case law, considers non-contractual claims in connection with the contract to be within the scope of the arbitration agreement, provided that the arbitration clause is drafted broadly to cover disputes related to the contract.[74] *A fortiori*, the same holds true for claims based on *culpa in contrahendo* liability and liability based on reliance.[75]

[70] BGer, 6.8.2012, 4A_119/2012, Erw. 4.1-4.4. For the same decision, see also BGE 138 III 687 ff, where only part of the cited paragraphs is published.

[71] See Section 3.4.1 below.

[72] BGer, 29.2.2008, 4A_452/2007, Erw. 2.5.1.

[73] Berger and Kellerhals (2021), para. 512.

[74] Ibid., para. 511; Girsberger and Voser (2021), para. 309, 413; Gabriel and Landbrecht (2023), para. 42; Gränicher (2023), Art. 178, para. 59; Oetiker (2018), Art. 178, para. 113; Richers and Magliana (2021), para. 60.

[75] Berger and Kellerhals (2021), paras. 508-510.

3.4 Extension of the Arbitration Agreement to Related Contracts

Another common problem encountered with regard to interpretation of arbitration agreements occurs in the so-called multi-contract contexts.[76] In these cases, the question arises whether an arbitration clause in one of these contracts can be extended to other, related contracts.

3.4.1 Swiss Case Law

a) The SFSC decided on a case in a multi-contract context in the year 2008.[77] The parties to the dispute had initially concluded two contracts (one on 23.10.2000 and one entered into force on 1.1.2004) concerning supply of ferrotitanium. Both contracts contained dispute resolution clauses rendering courts in Zürich competent and Swiss law applicable. In the time period between 20.6.2002 and 5.5.2005, the parties concluded five more contracts, which they labeled as successive supply contracts. Those contracts contained dispute resolution clauses, submitting all disputes and disagreements arising in the course of performance of the contract to arbitration by the International Commercial Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation and the parties chose Russian law as applicable law to the contract. On 18.7.2006, the parties made an addendum to their first two contracts and replaced the dispute resolution clause therein with an arbitration clause submitting all disputes arising out of or in connection with these contracts to arbitration in accordance with the International Rules of Arbitration of the Swiss Chambers of Commerce. One of the parties sued the other based on the last arbitration clause for claims arising out of the first two contracts as well as a contract concluded in the time period between 20.6.2002 and 5.5.2005 (one of the successive supply contracts).

The arbitral tribunal decided that it did not have jurisdiction with regard to disputes arising out of the successive supply contract. The claimant asserted that the tribunal was wrong to deny jurisdiction. Therefore, the problem the SFSC had to resolve was whether the last contract was also within the scope of the last arbitration agreement made by the parties. The claimant based their argument on the wording of the last arbitration agreement, which included 'disputes in connection with the contract' and argued that all contracts concluded between the parties were connected. The SFSC rejected this argument, stating that the phrase 'in connection with this contract' was to be understood to mean further claims in connection with the said contract (formation, termination, etc.), but not without further ado also claims arising from other contracts connected in certain elements with this contract. According to the court, this result was further confirmed by the fact that those connected contracts contained arbitration agreements clearly different from the last one.[78]

[76] See Born (2021), §9.02 F/5; Hanotiau (1998), p 369 ff.

[77] BGer, 29.2.2008, 4A_452/2007.

[78] Ibid., Erw. 2.5.2.-2.5.3.

b) In a CAS Arbitration case from 2011, the SFSC held that the arbitration clause in a licensing agreement, obliging an association (licensor) to issue approval certificates for the licensee's boxing equipment in exchange for a fee, also covered disputes arising from a subsequent sales contract for boxing equipment between the same parties.[79] The SFSC first emphasized that the scope of an arbitration might extend to accessory or ancillary contracts (*contrats accessoires ou annexes*), unless such contracts contained a specific dispute resolution clause of different content. The court admitted that *prima facie* the wording of the arbitration clause only referred to disputes arising out of the licensing agreement[80] but ruled that the subsequent sales contract should be considered an ancillary contract within the scope of the arbitration agreement based on the facts of the case. Firstly, the court emphasized that the articles of association of the party challenging the jurisdiction of the arbitral tribunal had provisions aiming at excluding jurisdiction of national courts in favor of CAS arbitration as far as possible. Secondly, the court stressed that the licensing agreement between the parties was not a typical license contract but imposed more extensive obligations on parties, deeming it closely connected to the subsequent sales contracts.[81]

c) In another case, from 2016, the SFSC had to decide whether an arbitration clause in a framework contract could be extended to sales contracts concluded subsequently.[82] The court stated that, according to 'the group of contracts theory' (*la théorie du groupe de contrats*), when several contracts are materially connected, such as the framework agreement and the various related contracts, but only one of them contains an arbitration clause, it is to be presumed, in the absence of an explicit rule to the contrary, that the parties also intended to subject the other contracts in the same group to this arbitration clause. For the case at hand, the court considered that there was no doubt about the intention of the parties to submit disputes regarding subsequent contracts to arbitration, for two reasons. Firstly, the interdependence between the framework contract and the sales contracts was clear. Secondly, the fact that the sales contracts did not contain any dispute resolution clauses confirmed the parties' intention.[83] It must also be noted that the arbitration clause in the framework contract was drafted broadly.[84]

[79] BGer, 20.9.2011, 4A_103/2011.

[80] 'Should a disagreement over the interpretation of any terms of this Agreement arise, the Parties agree to submit the dispute to the Court of Arbitration for Sport, Lausanne, Switzerland, whose decision shall be final and binding on both Parties. While the pending question is being arbitrated, the remainder of this Agreement shall remain in effect' [emphasis added].

[81] BGer, 20.9.2011, 4A_103/2011, Erw. 3.2.2.

[82] BGE 142 III 239.

[83] Ibid., Erw. 5.2.3.

[84] 'Any dispute, controversy or claim arising out of or in relation to this Contract, including the validity, invalidity, breach or termination thereof shall be settled by amicable negotiations and friendly discussions between both parties. In case no settlement can be reached, such dispute shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce in force when the Notice of Arbitration is submitted in accordance with these Rules' (BGE 142 III 240).

d) In a more recent case, from 2020,[85] following a tender process, the parties signed a 'Quality Assurance Agreement' (QAA) in the expectation to enter into a supply relationship. The QAA contained the following arbitration clause:

> If all parties in a dispute have their headquarters in Germany, the sole place of jurisdiction for any contract dispute is Stuttgart. For processes in front of district courts, Stuttgart District Court (70190 Stuttgart) is the responsible court in this case. In all other cases, contract disputes shall be settled definitively in accordance with the Rules of Arbitration of the International Chamber of Commerce by one or several arbitrators appointed in accordance with this ordinance. The place of arbitration is Zurich, Switzerland, unless the parties in dispute agree a different location.

After signing this agreement, the parties continued negotiating on a draft contract until one of them (respondent) broke off the negotiations. The other party (claimant) claimed that the parties already had a binding agreement for deliveries and threatened to sue the respondent for damages. The respondent argued that they had not entered into a binding agreement with regard to the deliveries and further asserted that, anyway, they had the right the cancel the project. The claimant sued for damages pursuant to the rules of ICC Arbitration and the respondent's defense included, *inter alia*, the challenge to the jurisdiction of the arbitral tribunal. The arbitral tribunal decided that it had jurisdiction to hear the case and the decision was appealed by the respondent, asserting that the decision should be annulled due to the tribunal's lack of jurisdiction.

The SFSC upheld the tribunal's decision by interpreting the arbitration clause in an extensive manner. According to the court, the respondent could not, in good faith, understand the arbitration clause as covering only specific aspects of their relationship, i.e., only those regulated under the QAA. The objective interpretation of the clause rather led to the conclusion that the parties intended the arbitration clause to apply to the entire supply relationship. This conclusion was further supported by the fact that the unsigned draft on which the parties were negotiating also contained an identical arbitration clause and the issue of dispute resolution was already an issue discussed in negotiations where the respondent asked to replace the jurisdiction clause in the claimant's general terms with an ICC Arbitration clause.[86]

3.4.2 Turkish Case Law

a) In a case from 2014, the TCC made a decision (possibly) regarding this issue.[87] Admittedly, the facts of the case are not very clear. The facts presented below

[85] BGer, 6.1.2020, 4A_342/2019.

[86] BGer, 6.1.2020, 4A_342/2019, Erw. 3.3-3.4. See also Girsberger and Voser (2021), para. 385a; Kunz (2020), pp 143-144.

[87] Yargıtay, 11th Civil Chamber, 10.12.2014, 13227/19386.

reflect the author's understanding solely based on the text of the decision.[88] The parties entered into two agreements (share purchase agreement and settlement agreement) on 30.7.2008 and 16.2.2010 respectively. Both contracts contained arbitration clauses submitting disputes to arbitration in London. According to these two contracts, the respondents were obliged to make certain payments with regard to tax obligations, additional permissions, etc. Due to their financial strains, the respondents asked the claimant to make these payments on their behalf on the understanding that they would later cover the costs incurred. The claimant agreed and made those payments, but the respondents did not pay when the claimant requested payment as agreed. The claimant sued the respondents in the national court and the respondents raised an arbitration objection. The first instance court granted this objection, stating that the contracts between the parties contained arbitration clauses. The decision was appealed by the claimant and the TCC overturned the decision by the first instance court. According to the TCC, the dispute did not arise from the contracts signed between the parties but pertained to a subsequent obligation assumed independently of the contracts. For this reason, according to the court, the arbitration agreement did not concern the dispute at hand and could not be applied.

b) In a case from 2016, the TCC again decided on the applicability of an arbitration agreement to a dispute arising out of a related contract.[89] In this dispute, the parties signed two agreements. The first agreement (18.6.2014) contained an arbitration clause; the second (15.9.2014) did not. The second agreement stated that this was an inseparable/integral part of the first agreement. The claimant raised a claim relying on the second agreement in a national court and the respondent raised an arbitration objection. The first instance court granted this objection and dismissed the claim, relying on the provision in the second agreement deeming the second agreement as an inseparable/integral part of the first one. The Court of Cassation, on the other hand, emphasized that the same provision in the second agreement allowed the use of this agreement as a separate contract and that the parties had agreed that the claimant's right to sue in state courts in Istanbul and London was not restricted. The decision by the first instance court was overturned due to the lack of an arbitration agreement with regard to the second contract.

c) In a case from 2017, the TCC did not consider a related agreement to be within the scope of the arbitration agreement.[90] The parties to the dispute had concluded a contract whereby the claimant was obliged to procure drilling equipment and to provide services needed with regard to drilling. The contract signed between the parties contained an arbitration clause. The parties later made an agreement with regard to the procurement of a sludge pump via e-mail correspondence. The

[88] In the literature, two authors presented the facts in a different manner (see n. 63 above). The decision is open to criticism irrespective of the two different presentations of the facts.

[89] Yargıtay, 19th Civil Chamber, 21.11.2016, 4076/14937.

[90] Yargıtay, 23rd Civil Chamber, 25.10.2017, 2015/9863, 2017/2892.

sludge pump was supposed to be leased to the respondent and the claimant asked for a guarantee of a lease for at least 300 days. The respondent agreed to pay for 300 days even in case the pump would be used for a shorter time. After using the pump for 68.5 days, the respondent only paid for those days and refused to pay for the remaining 231.5 days. The claimant sued the respondent in court for damages and the respondent raised an arbitration objection. The first instance court ruled that the dispute subject to the lawsuit arose from the agreement regarding the supply of the sludge pump, not from the agreement signed between the parties (containing an arbitration clause), and for this reason, the arbitration objection was not granted. The decision was appealed by the respondent's counsel. The Turkish Court of Cassation upheld the decision of the first instance court by merely stating that 'it did not find any inconsistencies or mistakes of law in the decision by the first instance court'.

3.4.3 Comparative Remarks

The question whether an arbitration agreement would cover disputes arising out of related contracts to the main contract is a challenging one. A careful analysis of the facts in question is required to determine parties' intentions. Two scenarios where such analysis is relatively easier are the following: i) the parties have concluded a framework contract containing an arbitration clause and concluded subsequent contracts within the framework of that contract without making any additional agreement as to dispute resolution; ii) the parties have concluded a contract containing an arbitration clause as well as other related contracts containing differing dispute resolution clauses.

In the first scenario, it is clear that the parties intended to have the framework contract govern their future contracts to be concluded within that framework. It follows that the arbitration agreement is also meant to include disputes arising out of those subsequent contracts.[91] In the second scenario, the parties made a dispute resolution agreement for each contract and their intention seems clear at first glance: they want each clause to apply to the contract in which it is found.[92] An exception to that result could only apply if one could prove that the parties intended to replace the dispute resolution clause in the previous contract with the new one.[93] Arriving at that conclusion would of course require additional supporting facts to establish that this was actually what the parties intended.[94]

[91] This was the case in one of the SFSC decisions cited above (BGE 142 III 239). For Swiss literature on this issue, see Berger and Kellerhals (2021), para. 517; Gabriel and Landbrecht (2023), Art. 178, para. 525; Oetiker (2018), Art. 178, para. 108; Girsberger and Voser (2021), para. 588.

[92] This was the case in one of the TCC decisions cited above (Yargıtay, 19th Civil Chamber, 21.11.2016, 4076/14937): the court emphasized that the parties explicitly agreed in the second contract that their right to sue in state courts of London and Istanbul was not restricted. For Swiss literature on this issue, see Berger and Kellerhals (2021) para. 516; Gabriel and Landbrecht (2023), Art. 178, para. 527; Oetiker (2018), Art. 178, para. 108; Gränicher (2023), Art. 178, para. 60; Girsberger and Voser (2021), para. 589.

[93] Oetiker (2018), Art. 178, para. 109.

[94] In one of the decisions by the SFSC cited above, the court rejected the argument that the new arbitration clause replaced the former as there was no supporting evidence to the contrary (BGer, 29.2.2008, 4A_452/2007).

Relatively more difficult scenarios are those where one of the related contracts contains an arbitration clause whereas the other(s) do not. In that case, the relationship between the contracts may be relevant in determining the parties' intention. In the context of international commercial arbitration, it is stated in the literature that courts tend to extend an arbitration clause to another contract, where the parties to both contracts are the same and the contracts are related (e.g., concluded within the auspices of a single project).[95] Born provides two quotations (one from a recent decision by the Higher Regional Court in Karlsruhe and one by Hanotiau) aptly demonstrating this approach:

> [A]n arbitration clause will generally be interpreted broadly, also in order to avoid a generally undesirable splitting of fora. In case of doubt, an arbitration agreement also includes later supplements or specifications – depending on the circumstances this may even include disputes originating from other, related contracts. This is because, as a rule, the parties intend to subject the legal consequences arising from a uniform factual situation to a uniform forum; related issues should remain together.[96]

> [T]he courts have uniformly concluded that if two agreements between the same parties are closely connected and one finds its origin in the other, or is the complement or the implementation of the other, the absence of an arbitration clause in one of the contracts does not prevent disputes arising from the two agreements from being submitted to an arbitral tribunal and decided together.[97]

Based on the aforementioned, the cited decisions by the SFSC seem mostly in line with the trends in international commercial arbitration. It is noteworthy that in each decision the SFSC provided additional factual support for the outcome it reached, focusing on the relationship between the contracts and whether the related contract contained a differing dispute resolution clause to determine the parties' intention.[98] Contracts factually related to the original contract (e.g., a group of contracts concluded for a single project) and addenda or supplements to the original contract are, in case of doubt, considered to be within the scope of the arbitration agreement concluded with regard to the original contract.[99]

Two of the Turkish cases cited above, however, lack proper reasoning. In the first case,[100] the parties merely made an addendum to the existing contract. The second

[95] Born (2021), §9.02 F/5.

[96] OLG Karlsruhe (10th Civil Senate), 18.6.2018 - 10 Sch 2/18, BeckRS 2018, 42747 (Born (2021), §9.02 F/5).

[97] Hanotiau (2006), para. 281 (Born (2021), §9.02 F/5).

[98] In two of the decisions cited above, the SFSC emphasized the relationship between the contracts in question and the lack of differing dispute resolution clauses in the other contracts while ruling for the extension of the arbitration clause (BGer, 20.9.2011, 4A_103/2011, Erw. 3.2.2; BGer, 6.1.2020, 4A_342/2019).

[99] Berger and Kellerhals (2021), paras. 515a-515b; Gabriel and Landbrecht (2023), Art. 178, para. 525; Oetiker (2018), Art. 178, para. 109; Girsberger and Voser (2021), para. 589.

[100] Yargıtay, 11th Civil Chamber, 10.12.2014, 13227/19386.

agreement only aimed to have one of the parties perform the other party's certain obligations on the understanding that the latter would cover the costs in the future. Any dispute arising from this additional agreement should have been considered within the scope of the arbitration agreement unless evidence to the contrary existed, and the TCC did not provide any.

In the second case, the dispute arose out of a contract concluded via e-mail correspondence regarding the rental of a sludge pump. The parties were already within a legal relationship, whereby the claimant procured drilling equipment and provided services needed for drilling to the respondent, and it also seems they had signed an agreement with an arbitration clause. The court rejected the arbitration objection, merely stating that the dispute did not arise from the signed agreement between the parties but from an agreement regarding a sludge pump concluded via e-mail correspondence. The TCC upheld the decision of the first instance court by merely stating that 'it did not find any inconsistencies or mistakes of law in the decision by the first instance court'. To say the least, this is not a properly reasoned decision. To start with, the relationship between the agreements was not explained. What were the rights and obligations of the parties in the signed contract? Could the agreement regarding the sludge pump be considered as an amendment to that contract or as a separate contract within the framework of that contract? How broad was the arbitration clause in the signed agreement drafted? A proper interpretation of the arbitration agreement does not seem possible without the answers to those questions. From the facts provided in the decision, it would seem that the agreement regarding the sludge pump was a contract related to the contract containing the arbitration clause. In the absence of evidence to the contrary (which is not provided in the decision), one could assume that the dispute would fall within the scope of the arbitration agreement.

4 Concluding Remarks

The analysis above reveals that even where a very similar set of rules is applied, courts' approach to arbitration may make a big difference in practice. The decisions by the Turkish courts seem to be in stark contrast to the pro-arbitration approach of the Swiss courts in the given context. The courts in Turkey (especially the TCC) refuse to give effect to arbitration agreements with the mere reasoning that a given dispute did not directly arise from the contract containing an arbitration clause. This approach not only demonstrates an anti-arbitration sentiment but is also over-simplified. The interpretation of arbitration agreements with regard to their substantive scope may prove complicated, especially in scenarios like those analyzed above. A careful consideration of facts is required to construe the scope of an arbitration agreement so as to give full effect to the parties' intentions, and it might actually be the case that the parties have intended to resolve a dispute related to the contract by arbitration even though it does not directly arise from the contract containing the arbitration clause.

This brings me to another striking difference between the decisions in the two countries, which concerns the way in which the decisions are drafted. The interpretation of contracts is a very fact-specific activity and one would expect detailed facts

to be presented in decisions by courts engaging in such activity. However, the facts in the decisions by the Turkish courts are sometimes unclear or incomplete. A surprising fact is that only one of the Turkish decisions cited above contains the actual arbitration clause, which should be the starting point of interpretation. In contrast, the SFSC gives a detailed account of the facts and in most cases cites the arbitration agreement in question.

Given the current court practice in Turkey, parties that want to resolve their disputes through arbitration are well advised to make their intention to arbitrate explicitly clear if there is a chance that their arbitration agreement will be interpreted by Turkish courts. Instead of using broadly drafted standard clauses, using wording clearly defining subsequent contracts that parties wish to include in the scope could be helpful. Parties wishing to include non-contractual claims related to the contract in the scope of their arbitration agreement are also advised to address this issue explicitly. Lastly, in cases where there is a group of contracts, including arbitration clauses in each contract could help in overcoming courts' bias against arbitration in the scenarios analyzed above.

It must also be noted that current court practice in Turkey does not reflect the legislative intent. It was the legislator's intention to create a legal framework based on the Model Law prepared by the United Nations Commission on International Trade Law (UNCITRAL) and the contemporary understanding, developments and principles in comparative international arbitration law, as evidenced by the statements in the explanatory notes of both MTK and HMK. To quote a statement in a recent decision by a Regional Appellate Court in Istanbul:

> The will of the Turkish legislator encouraging arbitration should also be taken into account in the interpretation of the basic laws … . As a result, the courts that examine the arbitration objection interpret the arbitration agreement as broadly as possible and ensure that the arbitration agreement is valid.[101]

There are also views in literature calling for a broad interpretation of arbitration agreements, particularly in the context of international commercial arbitration.[102] Nonetheless, it seems that these views have not yet resonated with the TCC.

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[101] İstanbul Bölge Adliye Mahkemesi, 14th Civil Chamber, 20.10.2022, 1843/1373.
[102] Özel (2008), p 86; Aydemir (2017), pp 142-43.

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