

Waiving the right to arbitrate by initiating court proceedings

Introduction

An arbitration agreement may cease to apply if the parties agree on its termination. According to Swedish law it may also be terminated as any other agreement, i.e. in accordance with general contract law principles.¹ It may therefore be terminated or made ineffective simply by the conduct of the parties (impliedly or tacitly), partly or wholly. The parties may agree that the arbitration agreement shall not apply to a certain dispute or that it shall cease to apply entirely. A common example is that a plaintiff and a defendant (by not objecting) tacitly agree to submit a dispute to an ordinary court of law although an arbitration clause in a contract between the parties provides for arbitration. In such a case, the arbitration agreement is made ineffective in respect of the dispute at hand by the conduct of the parties.²

Furthermore, and which is the subject matter of this article, pursuant to the general principles of Swedish law, a party may also *unilaterally* lose its right to rely on an arbitration agreement by *waiving* it, while the other party retains its right pursuant to the arbitration agreement. Having lost this right, a party may be in a difficult position if it intends to take legal action against the counterparty. Below we will deal with this issue under Swedish law in comparison with the laws of England, France, Germany and Switzerland.

Swedish law

Certain instances where a party is deemed to have waived its rights under the arbitration agreement

Statutory law

Section 4 of the Swedish Arbitration Act of 1999 (“Arbitration Act”) sets out the fundamental principle that a Swedish court may not, upon objection by a party, rule on an issue which

¹ The Arbitration Law Review Committee, p.108 et seq. (Sw: *SOU 1994:81*), Heuman Juridisk Tidskrift 1990/91 p. 317 and Heuman, *Arbitration law of Sweden: Practice and Procedure*, 2003, p. 116.

² In our view the defendant’s omission to raise an objection would not mean that it has waived the right to request arbitration also in the future regarding other claims (that are not *res judicata*) covered by the arbitration agreement (see Cars, *Lagen om skiljeförfarande*, 2001, 3rd ed., p. 61 and 64 and Olsson & Kvarn, *Lagen om skiljeförfarande*, 2000, s. 59. Cf. Section 3 of the Arbitration Act of 1929 (Sw: *lag (1929:145) om skiljemän*) (“tvistens prövning”).

pursuant to an arbitration agreement shall be decided by arbitrators.³ It further follows from Section 5 of the Arbitration Act⁴ that a party will lose its right to rely on the arbitration agreement *as a bar to court proceedings* where the party:

1. has opposed a request for arbitration;
2. fails to appoint an arbitrator in due time; or
3. fails, in due time, to provide his share of the requested security for the compensation to the arbitrators.

The forfeited right in the three situations above is limited to the dispute at hand.⁵ Hence, the validity or the legal effect of the arbitration agreement is curtailed but the arbitration agreement in itself remains valid and binding. This means that the arbitration agreement - in the aforesaid three cases - still applies if a party chooses to continue the arbitration proceedings notwithstanding the counterparty's obstruction. Further, a party who initially chooses to obstruct the arbitration proceedings by, for instance, failing to appoint an arbitrator, may, after an arbitral tribunal has been duly appointed, later join the proceedings and present his case.

The Arbitration Act does not contain any provision on whether the forfeited right in subsections one, two or three above is irrevocable, i.e. can a party who corrects its obstructive demeanor before the other party has taken any procedural steps based thereon, regain its right to rely on the agreement? In view of the categorical wording of Section 5 of the Arbitration Act, it must be assumed that the forfeited right cannot be regained after correction.⁶

The statutory provisions above describe three specific examples where certain abusive behavior from one party means that it, if acting as a respondent, cannot rely on the arbitration agreement as a *bar to court proceedings*. However, the general view in the Swedish legal

³ Section 4 of the Arbitration Act (*Sw: lag (1999:116) om skiljeförfarande*) and the Government Bill (*Sw: prop.*) 1998/99:35 p. 165 and 216.

⁴ Cf. Section 3 of the Arbitration Act of 1929.

⁵ See the Supreme Court case *Systherm vs. Kordab* (NJA 2008 p. 476), Cf. Lindskog, *Skiljeförfarande*, 2005, p. 336 et seq.

⁶ Cf. a party's failure to invoke an arbitration agreement when he first pleads his case on the merits in a court of law (Section 4, second paragraph of the Arbitration Act) and Madsen, *Commercial Arbitration in Sweden*, 3rd ed., 2007, p. 107. Lindskog, *Skiljeförfarande*, 2005, p. 365, is of the opinion that correction may, in certain circumstances, entitle the defaulting party to regain his right to rely on the arbitration agreement.

doctrine is that a party may also waive its right to rely on an arbitration agreement in other instances.

The legal doctrine and the case law

Although not provided for in the Arbitration Act a party can also lose its right to rely on the arbitration agreement in other circumstances and not merely the right to refer to it as a bar to court proceedings.⁷ A party may *unilaterally* waive a right to invoke the arbitration agreement while the other party retains it.⁸ This means that the other party is in a situation where it can choose if it wishes to initiate arbitration or court proceedings. If a claimant, who has lost the right to rely on the arbitration agreement, initiates court proceedings, the respondent may refer to an arbitration agreement as a bar to the proceedings. If the claimant instead requests arbitration, the case will be dismissed if the respondent shows that the claimant has lost the right to rely on the arbitration agreement. A party may of course try to contact the other party to ask for a confirmation of what dispute resolution procedure it prefers to use. Such request may, however, be left without a response. Failing to answer is not deemed an implied consent to the suggested dispute resolution procedure.⁹

A party may unilaterally lose its right to invoke the arbitration agreement by express *statements* or by taking a certain *procedural action* which demonstrates that it views the arbitration agreement to be invalid. This may be seen as a waiver by that party and a declaration that it refrains from invoking the arbitration agreement. It would then face the legal consequences that it cannot rely on the arbitration agreement as a bar to court proceedings, nor can it request arbitration or obtain the assistance of a district court to appoint an arbitrator on behalf of the other party. A party should avoid putting itself in such a position that the counterparty is given an opportunity to choose between litigation and arbitration.¹⁰

Statements in writing must be clear and unequivocal to be interpreted as waivers of the right to arbitrate. Unclear statements cannot be ascribed such a legal effect.¹¹ As an example, Heuman mentions the situation when it is not clear whether a party is contesting the authority

⁷ Lindskog, *Skiljeförfarande*, 2005, p. 362 et seq and p. 354 footnote 4.

⁸ Heuman, *Arbitration Law of Sweden: Practice and Procedure*, 2003, p. 123 et seq.

⁹ Heuman, op. cit. p. 124 and Ramberg & Ramberg, *Allmän avtalsrätt*, 2010, p. 116.

¹⁰ Heuman, op. cit., p. 124.

¹¹ Heuman, op. cit., p. 124, Heuman, *Juridisk Tidskrift* 1990/91, p. 317 footnote 30 and Heuman, *Current Issues in Swedish Arbitration*, p. 27 et seq.

of the arbitral tribunal to try a certain dispute or whether it is denying the right to obtain relief on the merits.

Furthermore, a statement made or a procedural action taken that is deemed to be a unilateral waiver of rights of the arbitration agreement, is most likely irrevocable. This is in contrast to procedural motions in court proceedings governed by the Code of Judicial Procedure (*Sw. rättegångsbalken* (1942:740) which can be withdrawn.¹²

With respect to *statements* by a party on the applicability of an arbitration clause the courts generally take a very cautious view when considering if rights of an arbitration agreement have been waived. In *Kenneth P. vs. Hotell- och Restauranganställdas Förbund*¹³ the Labour Court (*Sw: Arbetsdomstolen*) found that a party who had declared that the opposite party could “sue” it had not refrained from its right to invoke the arbitration clause. In yet another case the employer had attached an appeal instruction to the notice of termination of an employee. The employment contract included an arbitration clause. Considering the wording of the appeal instruction from the employer the Labour Court held that the employee was not bound by the arbitration clause (*Alf Pålsson vs. Louis de Portere Svenska Aktiebolag i Stockholm*).¹⁴ The employee was therefore entitled to initiate court proceedings. Please note that the two cases involved labor law disputes with private individuals. On balance, a court may be more inclined to deem the employer or the labor organization to have waived an arbitration clause if the opposing party is a private individual. In general, a statement by a party that it intends to initiate court proceedings does not constitute a conclusive statement in respect of the applicability of the arbitration clause.¹⁵ Further, a party who does not request arbitration for some time after a court has dismissed the opposing party’s court action, at the party’s request (having referred to the arbitration clause as a bar to such proceedings), is not deemed to have waived the arbitration agreement.¹⁶

With respect to taking *procedural action* there seems to be a general consensus in Swedish legal doctrine that a party which initiates court proceedings is *deemed to have waived the*

¹² Cf. the Court of Appeal in *AB Po-Bo Byggtjänst v. Britt L. and Tord L.* (NJA 1982 p. 711). See also Heuman, *Juridisk Tidskrift*, 1996/97, pp. 31-32 and Heuman, *op. cit.*, p. 125.

¹³ AD 1977 no. 74.

¹⁴ AD 1977 no. 110.

¹⁵ Ylästalo, *Tidskrift för Sveriges Advokatsamfund*, 1961-1962, p. 324.

¹⁶ Heuman, *op. cit.*, p. 125 and Domke, *Domke on Commercial Arbitration*, 1992, § 19:01.

right to invoke the arbitration agreement.¹⁷ The waiver assessment is based on a contract law analysis. However, there may be instances where a party does not waive its right to arbitrate by initiating a court action if, e.g. the circumstances show that the party in question did not choose litigation instead of arbitration and the opposing party must have understood that this was the case.¹⁸ Further exceptions to this principle is where a party has sought interim relief in court¹⁹ or initiated summary proceedings regarding a claim which it regards as non-contentious. In the latter case it does not lose the right to request arbitration even though the respondent contests the claim, preventing the matter to be decided by the Enforcement Agency (*Sw:Kronofogden*).²⁰ This exception came into force by the enactment of the Arbitration Act in 1999.

With regard to the interpretation of the unilateral waiver a party may be deemed to have waived the arbitration clause in its entirety or it may be limited to the dispute at hand.²¹ However, it is usually the case that a party does not explain to what extent it refrains from its right to invoke the arbitration clause.²² Hence, it is often difficult to assess to what extent a party has waived its right to arbitrate.²³ Professor Heuman argues that a waiver should include all alternative legal grounds, objections and reliefs sought based thereon that are covered by the legal effect (*Sw. rättskraft*) of an award or a judgment.²⁴ It is doubtful whether a waiver could be limited to certain grounds for a claim or whether certain objections might be excluded from the legal effect of the waiver. The legal effect of an implicit waiver of the right to arbitrate has been tried by the courts. Several of the cases referred to below concern summary proceedings before the above exception for such proceedings was enacted and

¹⁷ The Arbitration Law Review Committee, 1994:81, p. 99, the Government Bill, 1998/99:35, p. 71, Cars, *Lagen om skiljeförfarande*, 2001, 3rd ed., p. 61, Heuman, *Svensk och Internationell skiljedom*, 1988, pp. 13-19, Heuman, op. cit. p. 127-128, Olsson & Kvart, *Lagen om skiljeförfarande*, 2000, p. 59 and Madsen, *Commercial Arbitration in Sweden*, 2007, 3rd ed., p. 107 (“This follows from the principle that the party commencing litigation may be deemed to have refrained from invoking the arbitration agreement.”).

¹⁸ See the judgement by Svea Court of Appeal on 15 November, 2005, in *OAO Arkhangelskoe Geologodobychnoe Predpriyatie vs. Archangel Diamond Corporation* (case no. T 2277-04). The Court confirmed the principle as such but found that a party had not waived its right to arbitrate for a specific issue since (i) its initial request for arbitration had been dismissed for lack of jurisdiction, (ii) the award on jurisdiction was challenged by the party in Swedish courts and (iii) it had initiated court proceedings in the US three years after the arbitration had been requested. See also the judgement by the Svea Court of Appeal on 25 May 2004 in *Republiken Kazakstan v. MTR Metals Ltd* (Svea Court of Appeal, case no. T 1361-02).

¹⁹ Section 4, para 3 of the Arbitration Act.

²⁰ Section 4, para 2, 3rd sentence of the Arbitration Act and lagen (1990:746) om betalningsföreläggande och handräckning, § 60.

²¹ Heuman, op. cit., p. 128.

²² Heuman, op. cit., p. 128.

²³ Heuman, *Svensk och Internationell Skiljedom*, 1988, p. 14

²⁴ Heuman, op. cit., p. 128.

should therefore be moot.²⁵ However, they are still relevant as an illustration of the principle that a party commencing litigation may be deemed to have refrained from invoking the arbitration agreement.

In *Hans Schröder AB vs. Svenska Aktiebolaget Lebam* the plaintiff claimed payment on basis of two bills of exchange in a debt recovery action (summary proceedings). In the following ordinary court proceedings the defendant objected that the claim should be denied as it had rescinded (*Sw. hävt*) the purchase due to defects of the goods. The plaintiff invoked the arbitration clause in the purchase contract as a bar for trying these objections in the court proceedings.²⁶

The Supreme Court found that the arbitration agreement covered a dispute on the fulfillment of the bills of exchange, which had been accepted in connection with the purchase. However, by initiating summary proceedings the plaintiff had waived the right to exercise rights pursuant to the arbitration agreement as a bar to objections from the opposing party regarding the underlying purchase contract. Hence, the Court held that the defendant's objections could be tried in the ordinary court proceedings.²⁷

In *Byggnadsaktiebolaget Lennart Hultenberg vs. Bostadsrättsföreningen Hytten*²⁸ two parties (a contractor and a developer) had entered into a construction contract. The contract contained an arbitration clause providing that all disputes emanating from the construction contract were to be settled by arbitration. The contractor had granted a credit secured by a mortgage to the developer who had issued a promissory note. In a debt recovery action (summary proceedings) the contractor claimed payment with reference to the promissory note. In the following ordinary proceedings the developer refuted liability and presented a counter-claim due to defects in the construction. The contractor requested the court to dismiss the developer's counter-claim because the contract provided for arbitration.

The Supreme Court held that the arbitration clause in the construction contract covered disputes regarding the contractor's right to claim payment for its work with reference to a mortgage, since the promissory note and the security (the mortgage) originated from the construction contract. In addition, the Court held that by initiating court proceedings the

²⁵ Lindskog, *Skiljeförfarande*, 2005, p. 364.

²⁶ Supreme Court case no. NJA 1964 p. 2.

²⁷ Madsen, *Commercial Arbitration in Sweden*, 2007, 3rd edition, p. 107 and Lindskog, *Skiljeförfarande*, 1995, p. 363. See also Heuman, *Svensk och Internationell Skiljedom*, 1988, p. 13.

²⁸ Supreme Court case no. NJA 1972 p. 458.

contractor had lost its right to rely on the arbitration clause not only with regard to claims under the promissory note, but also in respect of the legal relationship based on the construction contract *to the extent that it was relevant to determine the contractor's claim for payment under the promissory note*. The developer's set-off objections were therefore admissible as it related to the construction contract. The waiver of the right to arbitrate was given an extensive interpretation.²⁹

In *Printcard i Lund AB vs. Svealand Kanal AB in bankruptcy and Lena E*³⁰ the plaintiff had sued for payment of loans provided to the defendant - an agent - based on promissory notes issued in connection with an agency agreement. The defendant made set-off objections referring to a claim for commission under the agency agreement. The agency agreement included an arbitration clause. The Court of Appeal (the case was never tried by the Supreme Court) found that the plaintiff's claim under the promissory notes was related to the agency agreement to such an extent that the arbitration clause was considered to cover also a dispute regarding the plaintiff's right to payment under the promissory notes. By initiating court proceedings the plaintiff had waived its right to rely on the arbitration clause in respect of a dispute concerning the promissory notes or the agency agreement with regard to any legal relationship which is relevant for trying the plaintiff's claim under the promissory notes. The defendant's set-off objections relating to a claim for commission under the agency agreement was therefore admitted by the Court of Appeal.

In *Kalaföretaget Säljprofilen AB vs. Acke N*³¹ the plaintiff claimed payment for goods delivered. The defendant denied the claim by reference to a counter-claim due to breach of contract. The counter-claim was not merely referred to by way of set-off up to *summa concurrens*, but the defendant had filed a cross-complaint for an amount exceeding the principal sum. The plaintiff requested the Court to dismiss the counter-claim as all disputes arising from the contract were to be settled by arbitration. Hence, it was alleged that the arbitration clause constituted a bar to the counterclaim being tried in court.

The fact that the plaintiff had initiated court proceedings for payment of goods delivered did not, according to the Court of Appeal mean (the case was never tried by the Supreme Court)

²⁹ See also Heuman, *Svensk och Internationell Skiljedom*, 1988, p. 15-16.

³⁰ Svea Court of Appeal case no. RH 1996:122

³¹ The Scania and Blekinge Court of Appeal case no. RH 1994:63.

that it had lost its right to invoke the arbitration clause as a bar for trying a different dispute raised by the respondent under the same contract (an agency agreement).

In *VISAB Värmecenter i Sverige AB vs. Stockholms Värmecenter AB*³² the background was the following.

Two parties had entered into an agency agreement which contained an arbitration clause according to which all disputes concerning the application and interpretation of the agency agreement, and any other dispute emanating thereunder, were to be settled by arbitration. Simultaneously, the parties entered into another agreement (the “Second Agreement”) regarding a debt which had arisen in the parties’ previous business relations. According to the Second Agreement the debt was to be settled monthly by deduction of the compensation received by the agent, Stockholms Värmecenter, under the agency agreement and a promissory note was issued for the outstanding debt. Neither the Second Agreement nor the promissory note included an arbitration clause or any provision on how disputes should be settled.

VISAB Värmecenter initiated debt recovery proceedings (summary proceedings) against Stockholms Värmecenter claiming payment of the debt due under the Second Agreement. Stockholms Värmecenter filed a cross-complaint referring to a counter-claim based partly on the agency agreement, partly on the Second Agreement. VISAB Värmecenter requested the Court to dismiss (but not on the merits) Stockholms Värmecenter’s counter-claim to the extent it was based on the agency agreement because disputes hereunder were to be settled by arbitration. Stockholms Värmecenter argued that VISAB Värmecenter had lost its right to invoke the arbitration clause of the agency agreement by initiating the debt recovery proceedings.

The Svea Court of Appeal held as follows. The content of the agency agreement and the Second Agreement, clearly showed that the parties did not intend that the arbitration clause in the agency agreement would apply to the dispute regarding the promissory note. Hence, VISAB Värmecenter could invoke the arbitration clause as a bar to court proceedings. By initiating court proceedings regarding a claim under the Second Agreement, VISAB Värmecenter had not forfeited its right to rely on the arbitration clause in the agency agreement.³³

In *Karmöy Seafoods AB (“Karmöy”) vs. Foodeo Sweden AB (“Foodeo”)*³⁴ the background was the following.

During 2000, Karmöy and Foodeo agreed that Foodeo would deliver equipment to Karmöy for Karmöy’s production of ready-made fish dishes in meal packages to be sold and distributed in grocery stores. A dispute arose with respect to the payment of the deliveries. Foodeo requested arbitration against Karmöy. Foodeo requested the arbitral tribunal to order Karmöy to pay SEK 2,581,964 plus interest for deliveries made. Karmöy refuted Foodeo’s claims and filed a

³²Svea Court of Appeal case no. RH 1985:51

³³ See also Heuman, *Svensk och Internationell Skiljedom*, 1988, p. 17-19.

³⁴ Decision issued by the Scania and Blekinge Court of Appeal on 17 December 2004 in case Ö 1856-03. See also Lamm & Sharpe, Chapter 10 (Inoperative arbitration agreements under the New York Convention) in *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention in Practice*, 2008, p. 318.

counter-claim in the arbitration proceedings. Karmöy requested the arbitral tribunal to order Foodeo, against redelivery of the equipment, to pay SEK 2,765,631 to Karmöy plus interest and to pay damages to Karmöy in the amount of SEK 2,196,200. Foodeo refuted the counter-claim. The arbitrators requested security for the payment of their fees. Foodeo did not pay its share of the requested security. Karmöy was offered an opportunity to pay the entire security amount, including Foodeo's part. Karmöy declined the offer and urged the arbitral tribunal to dismiss the proceedings but not on the merits. Foodeo also notified the arbitral tribunal that they would not pay their share of the requested security. The arbitration proceedings were dismissed by the arbitral tribunal.

Karmöy initiated court proceedings in the district court with reference to Section 5 of the Arbitration Act.³⁵ Karmöy's claim was the same as the counter-claim in the arbitration proceedings but the amount claimed for damages was lower. Foodeo refuted Karmöy's claim and filed a counter-claim similar to its claim in the arbitration proceedings. Karmöy requested that the court dismissed Foodeo's counter-claim as this claim was covered by the arbitration clause which constituted a bar to court proceedings. Karmöy argued that although Foodeo might not rely on the arbitration agreement as a bar to court proceedings, while having failed to duly pay the requested security, Foodeo was, however, still bound by the arbitration agreement with respect to its counter-claim. According to Karmöy, the district court must therefore dismiss Foodeo's counter-claim. Foodeo denied Karmöy's request for dismissal of Foodeo's counter-claim. Foodeo argued that Karmöy had waived its right to arbitrate by initiating court proceedings. Thus, Karmöy had waived its right to have the questions at hand resolved by arbitration. Karmöy denied that it had waived its right to invoke the arbitration agreement by initiating court proceedings. Karmöy's action to initiate court proceedings was caused by Foodeo's failure to pay the security for the arbitral tribunal's fees and costs. Foodeo's actions in the arbitration proceedings meant that Foodeo - but not Karmöy - had lost its right to invoke the arbitration agreement in the pending court proceedings.

The *District Court* found that Foodeo had lost its right to invoke the arbitration agreement as a bar to court proceedings due to its failure to advance the security requested by the arbitral tribunal. However, the arbitration agreement was not null and void - it could still be invoked by Karmöy in the same matter. As Karmöy had chosen not to continue the previous arbitration proceedings or initiate new arbitration proceedings, Karmöy waived its right to invoke the arbitration agreement as a bar to court proceedings by suing Foodeo in the district court. Karmöy's motion to dismiss Foodeo's counter-claim, due to lack of jurisdiction, was denied.

The *Appeal Court* held that a party which initiates court proceedings is deemed to have waived its right to arbitrate with respect to the legal relationship to which its claim refers.³⁶ A plaintiff that initiates court proceedings waives its right to invoke the arbitration agreement as a bar to court proceedings with respect to all alternative allegations and defenses from the plaintiff's and the respondent's side, regardless of whether they are presented or not, if they would be covered by the legal force (*res judicata*) of the judgment under Swedish procedural

³⁵ Section 5, item 3 provides that a party may not rely on the arbitration agreement as a bar to court proceedings if it fails to duly pay security for the arbitrators' fee as requested by the arbitrators.

³⁶ Government Bill 1998/99:35 p. 71 and Olsson & Kvarn, *Lagen om skiljeförfarande*, 2000, p. 59.

law.³⁷ Since Foodeo's counter-claim in the court proceedings concerned the same legal relationship as Karmöy's claim, Karmöy had waived its right to invoke the arbitration agreement as a bar to court proceedings *also* with regard to Foodeo's counter-claim. This applied notwithstanding that Foodeo previously had lost its right to invoke the arbitration agreement as a bar to court proceedings due to failure to advance security for the arbitrators' fees.

*Waiver of the right to arbitrate when Swedish law was the lex arbitri - Alucoal vs. NKAZ*³⁸

In 2001, Alucoal, a company domiciled in Cyprus, initiated arbitration proceedings against Novokuznetsk Aluminium Plant ("NKAZ"), a producer of aluminium in Russia, pursuant to the Arbitration Rules of the Stockholm Chamber of Commerce. The claim was in the sum of US\$ 360 million and the basis for it was wrongful avoidance of long-term contracts for deliveries of substantial volumes annually of aluminium and other goods.

Prior to initiating arbitration proceedings in Stockholm, Alucoal, had sued NKAZ as one of the parties in courts in New York in a so-called RICO (Racketeer Influenced and Corrupt Organizations) action and relied, *inter alia*, on the contracts which were the basis for the arbitration in Stockholm. These contracts included arbitration clauses providing for SCC arbitration.

In the arbitral proceedings in Stockholm, initiated after the RICO proceedings, the Arbitral Tribunal, consisting of three prominent arbitrators from Denmark, Sweden and England, found that it had no jurisdiction to try the merits of the dispute because Alucoal had waived its right to arbitrate by initiating legal actions before the U.S. courts. The Arbitral Tribunal issued its final award on 15 June 2004 (the award was subsequently challenged by Alucoal at the Svea Court of Appeal and it is therefore no longer confidential).³⁹

The Arbitral Tribunal concluded that Swedish law, as the *lex arbitri*, was the governing law of the dispute. According to the Swedish Arbitration Act and Swedish legal doctrine, a party loses his right to invoke an arbitration agreement once he opposes a request for arbitration from the opposing party (see Section 5, para. 1 of the Arbitration Act). The Tribunal referred to Heuman's statements that the act of opposing arbitration is an

³⁷ The Appeal Court referred to Heuman, *Skiljemannarätt*, 1999, p. 145 et seq. and the Supreme Court case NJA 1972 p. 458.

³⁸ Case no. 022/2001 under the Arbitration Rules of the Stockholm Chamber of Commerce.

³⁹ The challenge action was withdrawn from the Court of Appeal and it was thus not tried.

irrevocable and unilateral act.⁴⁰ The Arbitral Tribunal noted that Section 5 of the Arbitration Act did not regulate the opposite situation where a party sues in a court instead of going to arbitration. By way of analogy, it had been argued in legal doctrine that the party should then also lose his right to invoke the arbitration agreement.⁴¹ Furthermore, the Arbitral Tribunal noted that Section 4, para 2 and 3 of the Arbitration Act provide that the initiation of summary proceedings for the collection of debt or the submission of a request for the purpose of obtaining an order for interim measures do not imply a waiver of the right to have the merits of the claim decided by arbitration. In the Tribunal's view it was, in support of such analogy, appropriate to interpret these rules *e contrario*.

The Arbitral Tribunal held that Alucoal had in the RICO proceedings, amongst other things, claimed damages pursuant to the *same contracts* based on the *same facts* as those in the arbitration proceedings.⁴² The Arbitral Tribunal was satisfied that had these claims been submitted to a Swedish court, Alucoal would irrevocably have waived its right to refer these claims to arbitration, as Professor Heuman suggests. According to the Arbitral Tribunal the answer should, in principle, be no different because the claim was submitted to a court in New York. Accordingly, the Arbitral Tribunal found that "the inclusion of that claim [the claims for damages in the RICO proceedings] involved a *unilateral act* of Alucoal which on the basis of Swedish law we find to be irrevocable." (our italics)⁴³ The Arbitral Tribunal also considered, although did not apply it to the issue at hand, the decision of the English court in *Lloyd v. Wright* [1983] 1 QB 1065, where a somewhat comparable situation arose. The Arbitral Tribunal mentioned that it was apparent that Swedish law materially differed from English law in respect of waiver and repudiation.

⁴⁰ Heuman, op. cit. pp. 125-127.

⁴¹ Heuman, op. cit., p. 127.

⁴² A conclusion that RICO claims may be contractual in nature and amenable to arbitration is consistent with the findings of other courts that have considered the matter, including unanimous opinions of the United States Supreme Court. See *PacificCare Health Sys., Inc. v. Book*, 538 U.S. 401, 405-07 (2003) (unanimous Supreme Court ruling that parties should be compelled to arbitrate treble damage RICO claims pertaining to health care organizations' failure to reimburse for physician services notwithstanding contractual limitations on arbitrator authority to award punitive damages); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (unanimous Supreme Court ruling that parties in securities brokerage dispute may "effectively vindicate their RICO claim[s] in an arbitral forum" and if parties have "made the bargain to arbitrate" they should be "held to their bargain.").

⁴³ Second Interim Award, Case 022/2001 between Alucoal Holding Ltd and JSC Novokuznetsk Aluminium Plant, section 55.

The Tribunal concluded that by commencing proceedings in the United States on the same basis as it was seeking relief in the arbitration, Alucoal waived its right to arbitrate. Hence, the Tribunal had no jurisdiction to try the dispute.

Brief summary of the principles applying under Swedish law

1. *Waiving rights to arbitrate*

It follows from Swedish court cases and Swedish legal doctrine (accounted for above) that a party may unilaterally waive its right to arbitrate if it initiates a court action. There is no requirement that the parties agree (expressly or tacitly) that the arbitration agreement shall not apply to the case at hand. Statements by a party may also be interpreted as a waiver of the right to arbitrate if they clearly show an intention from a party not to invoke the arbitration clause.⁴⁴

2. *Legal effect of waiver*

The scope of a waiver is determined by interpretation. Usually the waiver covers all alternative allegations and defenses of the plaintiff and the respondent, regardless of whether they are presented or not, if they would be covered by the legal force (*res judicata*) of the judgment under Swedish procedural law. The waiver would include the right to invoke the arbitration agreement as a bar to court proceedings. However, the arbitration clause is not null and void *per se*. It is still valid for other relief not covered by the *res judicata* effect. Based on the above statements by the Arbitral Tribunal in *Alucoal vs. NKAZ*, and assuming Swedish law is the *lex arbitri*, a party would waive its right to arbitrate if court proceedings are initiated in other jurisdictions than Sweden concerning the same facts and same contracts.

3. *The waiver is irrevocable*

A waiver of the right to arbitrate is probably irrevocable under Swedish law.

English law⁴⁵

⁴⁴ Heuman, op. cit., p. 125.

⁴⁵ The section on English law is authored by Phillip Capper, partner of White & Case LLP, London, with the assistance of associates Clare Connellan, Dipen Sabharwal and Clemmie Jepson –Turner.

Waiving rights under arbitration clauses

Summary

In general, if a party to an arbitration agreement commences proceedings in the English courts in respect of a matter to which an arbitration agreement is applicable, this is likely to be treated as a breach of the arbitration agreement which will constitute a waiver of the right to arbitrate. Up until the point at which the defendant responds to the issue of proceedings it appears that the waiver is revocable. The potential breach of the agreement by the claimant would be repudiatory. A repudiatory breach requires the defendant to elect to accept the repudiation, and thereby discharge the agreement, or to affirm the agreement and require it to be observed. In the absence of any other correspondence, until the defendant responds to the court proceedings, it will neither yet have accepted the repudiation, thereby discharging the agreement to arbitrate (*Downing v Al Tameer Establishment* [2002] EWCA Civ 721), nor affirmed the agreement to arbitrate (by seeking a stay of proceedings under section 9 of the Arbitration Act 1996).

Therefore, in the absence of a response in the court proceedings from the defendant (or other relevant correspondence), the claimant, who had commenced court proceedings, could commence an arbitration. However, once the defendant has responded to the court proceedings, the claimant's waiver of its right to arbitrate will become either:

- a) irrevocably waived, if the defendant takes a step in the proceedings to answer the substantive claim, thereby accepting the repudiation and waiving its own right to arbitrate by discharging the arbitration agreement; or
- b) redundant, if the defendant makes a successful application under section 9 of the Arbitration Act 1996 to seek a stay of proceedings and have the matter referred to arbitration.

Policy

The foundations of section 9 of the Arbitration Act 1996 can be seen in Article 8 UNCITRAL Model Law and Article II New York Convention 1954. Both of these operate to create an obligation upon a court in which proceedings have been commenced by a party, in breach of an arbitration agreement, to refer the parties to arbitration, if so requested by the other party, unless the court finds that the agreement is “null and void, inoperative or incapable of being

performed” (Article 8 UNCITRAL Model Law and Article II New York Convention 1954). Section 9(4) of the Arbitration Act 1996 picks up this wording and imposes a mandatory stay on proceedings unless the court is satisfied that “the arbitration agreement is null and void, inoperative, or incapable of being performed”. It is therefore clear that the English courts, in line with the Model Law and New York Convention 1954, give great importance to what has been agreed between the parties and will do their utmost to give effect to an agreement to arbitrate.

However, the obligation under the English Arbitration Act to order a mandatory stay arises only if the party who has not commenced court proceedings (i.e. the defendant in the court proceedings) wishes the matter to be referred to arbitration. The defendant is free to allow the court proceedings to continue in disregard of the arbitration agreement.

Waiving right to arbitrate

The existence of an agreement to arbitrate will not prevent either party from commencing judicial proceedings in court (*Downing v Al Tameer Establishment* [2002] EWCA Civ 72; *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All ER (Comm) 303; *Scott v Avery* 91856) 5HL Cas 811). However, the issue of proceedings in court by one party will usually amount to a waiver of that party’s right to have the same dispute determined by arbitration (*Herschel Engineering Ltd v Breen Property Ltd* [2000] All ER (D)559) if the defendant is content to have proceedings in court.

This is also supported by section 9(1) of the Arbitration Act which provides that: “a party to an arbitration agreement against whom legal proceedings are brought (by way of claim or counterclaim) in respect of a matter, which under the agreement is to be referred to arbitration, may... apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter”.

However, a party’s right under section 9(1) to seek a stay is lost if that party takes a step in the proceedings to answer the substantive claim (section 9(3)). In *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* ([1978] 1 Lloyd’s Rep 357, at 361), Lord Denning held that to constitute ‘a step in the proceedings’ depriving a party of its right to arbitrate, the action of this party “must be one which impliedly confirms the correctness of the proceedings and the willingness of the [party] to go along with a determination by the Courts of law instead of

arbitration”. Therefore, conduct which illustrates an intention to abandon the right to arbitration will be construed as taking a step in the proceedings, for example, filing a defence – section 9(3) refers to taking “any step in the proceedings to answer the substantive claim”.

With regard to proceedings instituted in foreign courts, English conflict rules provide that the English courts will not regard a defendant as having answered the substantive claim in those foreign proceedings unless those steps are regarded as a submission by the foreign court (*Thyssen Inc. v Calypso Shipping Corp SA* [2000] 2 All ER (Comm) 97).

Legal Effect of Waiver

When a party waives its right to have a dispute determined by arbitration by initiating proceedings it waives this right in respect of all matters that can be properly brought before the court in relation to that particular dispute.

In *Ahad v Uddin* ([2005] EWCA Civ 883) the claimant commenced proceedings in court in breach of an arbitration agreement, and the defendant subsequently filed a defence thereby waiving his right under section 9(1) of the Arbitration Act 1996. Subsequently, the claimant received permission to amend the particulars of claim so as to include issues which were closely related to the action. The defendant contended that these additional issues should be referred to arbitration and applied for a stay of court proceedings in respect of these issues under section 9 of the Arbitration Act 1996.

The issue was whether the amendments to the particulars of claim formed part of dispute of which the court was already seized, or whether they were discrete matters in respect of which section 9 of the Arbitration Act 1996 entitled the defendant to apply for a stay of the proceedings, in respect of those issues, and insist that they be arbitrated. The Court of Appeal held that the additional issues were in respect of the matter raised by the original proceedings in relation to which the defendant had already waived his right to apply for a stay of proceedings under section 9(1) by taking a number of steps in the proceedings.

Is the waiver irrevocable?

The waiver will only be irrevocable if the defendant in the court proceedings accepts the claimant's repudiatory breach of the agreement to arbitrate by taking steps in the proceedings.

In [*Delta Reclamation Limited v Premier Waste Management Limited* \(\[2008\] EWHC 2579 \(QB\)\)](#) the English High Court considered an application by a claimant to stay its own claim, and the defendant's counterclaim, in favour of arbitration. The agreement between the parties contained a clause submitting all disputes to arbitration. When a dispute arose, the claimant sought an interim injunction compelling compliance with the agreement. The application was made in a Part 7 claim form (used for the commencement of proceedings) rather than making an application for interim measures in support of arbitration (using a Part 8 arbitration claim form). The application was refused. Some months later, the claimant served a notice of arbitration. The defendant responded by serving its defence and counterclaim in the court proceedings and challenging in correspondence the claimant's right to pursue arbitration. The claimant applied to stay its claim and the defendant's counterclaim. The court granted a stay of the counterclaim under section 9 of the Arbitration Act 1996, and a stay of the claim under its case management powers in CPR 3.1(2)(f). Although it was "highly arguable" ([*Delta Reclamation Limited v Premier Waste Management Limited* \(\[2008\] EWHC 2579 \(QB\), paragraph 35\)](#)) that the issue of the Part 7 claim form amounted to a breach of the arbitration agreement, the defendant had not done anything which would amount to an acceptance of that breach, so as to bring the arbitration agreement to an end. However, had the claimant's issue of the claim form been accepted by the defendant, this would have amounted to an acceptance of the claimant's repudiatory breach, and the claimant would therefore have lost the right to resort to arbitration.

In [*Downing v Al Tameer Establishment* \(\[2002\] EWCA Civ 721\)](#) the Court of Appeal held that assertions made by the defendant in correspondence prior to the commencement of court proceedings, that there was no contract between the parties, amounted to a repudiation of the agreement to arbitrate. Consequently, the claimant's subsequent commencement of proceedings amounted to an acceptance of this repudiatory breach thereby terminating the agreement to arbitrate.

Therefore, it can be seen that English law focuses less on the concept of waiver as such (and whether it could ever be revocable). Rather, English law uses ordinary contract law principles to identify repudiation (repudiatory breach) of the agreement to arbitrate. Only if the repudiation is accepted will the parties both be discharged from further performance of the

agreement to arbitrate. Acceptance of a repudiation is by that means irrevocable in its consequence. It can be undone only by both parties agreeing again to arbitrate.

French law⁴⁶

Under French law, parties can waive their right to arbitrate either expressly or implicitly (by their conduct).⁴⁷ One of the main vectors of implicit waiver is the submission of a dispute to a national court.

Conditions for Implicit Waiver

The implicit waiver of an arbitration agreement by initiating court proceedings raises two important issues.

First, if a party submits a dispute which is covered by an arbitration agreement, to a national court, either French or foreign,⁴⁸ such party would be found to have implicitly waived its right to refer such dispute to arbitration (without prejudice to the other party's rights under the arbitration agreement) if:

- (a) The claim referred to the national courts “ought to have been submitted to arbitration” rather than the national courts;⁴⁹
- (b) Such claim concerns the merits of the dispute;⁵⁰ and
- (c) The act by which such party submits the dispute to a national court can unequivocally be interpreted as expressing its intention to waive its right to arbitrate.⁵¹

As a result, the failure to appoint an arbitrator within the time limit provided by the arbitration agreement, the referral to a national court of a claim falling outside the arbitrators’

⁴⁶ This section is authored by Asoid García-Márquez, White &Case LLP, Paris.

⁴⁷ See, CA Paris, June 7, 1984, *Société Belin v. Société d’Aide Technique et de Coopération S.A.T.E.C.*, Rev. arb. 1984, p. 504; see also, Fouchard/Gaillard/Goldman *On International Commercial Arbitration* (1999), p. 441, para. 736.

⁴⁸ See, CA Paris, July 7, 1994, *Uzinexportimport Romanian Co. v. Attock Cement Co.*, Rev. arb. 1995, p. 107. In this matter, the claimant referred the dispute to the courts of Pakistan.

⁴⁹ See, Cass. 1e civ., June 6, 1978, *British Leyland International Services v. Société d’Exploitation des Etablissements Richard*, 105 JDI 907 (1978), p. 908.

⁵⁰ See, CA Paris, July 7, 1994, *Uzinexportimport Romanian Co v. Attock Cement Co*, op. cit., p. 107.

⁵¹ See, Cass. 2e civ., February 18, 1999, *Igla v. Société Soulier et autre*, Rev. arb. 1999, p. 299.

jurisdiction or an application to a court for interim relief cannot constitute a waiver of the right to arbitrate.⁵² However, if either of the parties has seized a national court to seek interim relief, it will be deemed to have waived its rights to arbitrate if the national court is required to rule on the merits in order to grant the requested relief. This principle was confirmed by the Paris Court of Appeals in the *Uzinexportimport* case.⁵³ In that matter, the claimant had applied for a permanent injunction before the courts of Pakistan. In order for the court to issue the order, it was required to rule on the merits. When the claimant subsequently referred the dispute to arbitration, the arbitral tribunal declined jurisdiction on the grounds that the claimant had waived its right to arbitrate, because the courts in Pakistan had previously ruled on the merits of the dispute. The Paris Court of Appeals confirmed the arbitral tribunal's ruling and held that the parties to an arbitration agreement may waive their rights to arbitrate under the same, and such waiver "can be inferred from the fact that [the claimant] has applied to a court, provided that the claim in question concerns the merits of the dispute and thus ought to have been submitted to arbitration".⁵⁴

Second, when a plaintiff commences judicial proceedings and the defendant does not challenge the national courts' jurisdiction, both parties are deemed to have waived their rights under the arbitration agreement.⁵⁵

This is consistent with Article 1458 of the French Code of Civil Procedure, which provides that "[w]hen a dispute submitted to an arbitral tribunal by virtue of an arbitration agreement is brought before a national court, such court shall decline jurisdiction. If the arbitral tribunal has not yet been seized of the matter, the court shall also decline jurisdiction unless the arbitration agreement is manifestly void. In neither case may the court decline jurisdiction on its own motion".⁵⁶ Thus, unless the defendant objects to the court's jurisdiction, a French court has to consider that it has jurisdiction, even in the presence of an arbitration agreement.

Further, pursuant to article 74 of the French Code of Civil Procedure, a plea as to the courts' jurisdiction must be raised by the parties *in limine litis*, *i.e.* at the commencement of the

⁵² See, Fouchard/Gaillard/Goldman, *op. cit.*, p. 442, para. 736.

⁵³ See, CA Paris, July 7, 1994, *Uzinexportimport Romanian Co. v. Attock Cement Co.*, *op. cit.*, p. 107.

⁵⁴ See, CA Paris, July 7, 1994, *Uzinexportimport Romanian Co. v. Attock Cement Co.*, *op. cit.*, p. 107, translation from French to English excerpted from Fouchard/Gaillard/Goldman, *op. cit.* p. 442, para. 736.

⁵⁵ See, CA Paris, Juin 7, 1984, *Société Belin v. Société d'Aide Technique et de Coopération S.A.T.E.C.*, *op. cit.*, p. 504; see also, Fouchard/Gaillard/Goldman, *op. cit.*, p. 441, para. 736.

⁵⁶ The applicability of this provision (originally intended to apply to domestic arbitrations) to international arbitrations in France has been confirmed by the French Court of Cassation in Cass. 1e civ., June 28, 1989, *Eurodif v. République Islamique d'Iran*, *Rev. arb.* 1989, p. 653.

proceedings, or prior to filing a defence on the merits of the dispute or plea of non-admissibility.⁵⁷

Scope of the implicit waiver

A party's implicit waiver extends beyond the specific dispute submitted to the national courts, to any claims under the same arbitration agreement.⁵⁸

In the 1975 case of *Consorts Bordigoni et autre v. dame Cornu*, parties to a contract providing for arbitration litigated a first dispute before the national courts, before reaching an amicable settlement of the same. One of the parties subsequently referred a new dispute, under the same contract, to arbitration, and the respondent objected to arbitral jurisdiction. The French Court of Cassation ruled that the parties, "by having accepted to litigate a first dispute before the [national courts], had waived their right to invoke the arbitration agreement".⁵⁹

Similarly, in its 1978 decision in the *British Leyland International Services* case, the Court of Cassation stated that the waiver of a party's right to arbitrate by initiating court proceedings covers "not only the particular claim brought before the Court, but also any related counterclaims that could be raised by the other party in respect of the same contract".⁶⁰ The plaintiff, by commencing proceedings in court, had waived its right to invoke the arbitration agreement and, therefore, was precluded from relying on the same as a defence against a counterclaim submitted by the defendant.⁶¹

In *Sociétés Cofief et Codix v. Société Alix*, the Court of Cassation confirmed that the waiver of the arbitral jurisdiction extended to "all the effects of the arbitration clause".⁶²

The irrevocability of the implicit waiver

As seen above, the implicit waiver of a party's right to arbitrate can only be revoked by a respondent challenging the court's jurisdiction. Otherwise, the absence of such challenge will

⁵⁷ See, Article 74 of the French Code of Civil Procedure; for applications of this principle, see, e.g. Cass. 1e civ., January 23, 2007, *Sociétés Cofief et Codix v. Société Alix*, Rev. arb., 2007, p. 136.

⁵⁸ See, Loquin, Arbitrage, Jur.-cl. Procédure civile (1994), fasc. 1034, p. 12, para. 47.

⁵⁹ See, Cass. 1e civ., June 17, 1975, *Consorts Bordigoni et autre v. dame Cornu*, Rev. arb. 1976, p. 189.

⁶⁰ See, *British Leyland International Services v. Société d'Exploitation des Etablissements Richard*, op. cit., p. 907.

⁶¹ See, *British Leyland International Services v. Société d'Exploitation des Etablissements Richard*, op. cit., p. 910.

⁶² See, Cass. 1e civ., January 23, 2007, *Sociétés Cofief et Codix v. Société Alix*, op. cit., p. 294.

constitute an implicit consent to waive the arbitration agreement “to all [its] effects”.⁶³ As a result, the waiver is irrevocable.

German law⁶⁴

The general rule

The general rule in Germany is that a party does not waive its right to arbitrate by initiating court proceedings, neither by initiating court proceedings to pursue a claim nor for the purpose to request provisional measures.⁶⁵ However, the arbitration agreement might be revoked implicitly if the defendant does not object to the admissibility of the court proceedings under special circumstances. The objection to the admissibility of the court proceedings might also violate standards of good faith in situations of set-off and counter-claim.

If a party to an arbitration agreement brings court proceedings against the other party to pursue a claim that is within the scope of the arbitration agreement, the defendant can raise an objection that the court is not competent. The court will then dismiss the action as inadmissible, unless the arbitration agreement is null and void, inoperative or incapable of being performed.⁶⁶

After the action has been dismissed, the claimant will have to take recourse to arbitration. The courts dismiss the action to force the claimant to take recourse to arbitration and to enforce the arbitration agreement.

Revocation of the arbitration agreement

When the claimant sues the defendant in court, in violation of an arbitration agreement to pursue a claim that is within the scope of the arbitration agreement, the defendant might refrain from raising an objection. This joint behavior of the parties might amount to an

63 See, Cass. 1e civ., January 23, 2007, *Sociétés Cofief et Codix v. Société Alix*, op. cit., p. 294.

64 This section is authored by Patricia Nacimiento, partner of White & Case LLP, Frankfurt, with the assistance of associate Verena Groß for advice and authoring under German law.

65 German arbitration law allows a claimant to ask a state court for provisional measures. The arbitration agreement is not affected by it. This follows from the wording of sec. 1033 ZPO (§ 1033. Schiedsvereinbarung und einstweilige gerichtliche Maßnahmen.

66 §1032 Schiedsvereinbarung und Klage vor Gericht.

implied revocation of the arbitration agreement. The initiation of the court proceedings can be considered an offer of the claimant to revoke the arbitration agreement and respondent's arguing on the merits an acceptance of this offer.

There is no consensus in academic writing as to the requirements for such an implicit revocation. The preferable view is that there have to be additional circumstances and the threshold to prove the parties' joint will to revoke the arbitration agreement is rather high.⁶⁷ Others assume that the fact that the respondent does not raise an objection suffices.⁶⁸

The implied revocation can for example play a role when the claimant withdraws his action and later starts proceedings again.⁶⁹

Objection to admissibility is against good faith

Assume that the claimant initiates state court proceedings, although there is an arbitration clause. The respondent brings a counter-claim that also falls within the scope of this arbitration clause. The claimant (who is at the same time the defendant as regards the counter-claim) objects to the admissibility of the counter-claim arguing that there is an arbitration agreement.⁷⁰

In this case the claimant is not allowed to object to the admissibility of the court action. To our knowledge there are no court cases that have decided that question; however it seems to be the unanimous view in academic writing.

The legal argumentation is that the objection raised by the defendant is inadmissible where the defendant acts in bad faith and therefore violates Sec. 242 German Civil Code.⁷¹

The idea behind Sec. 242 German Civil Code is that a party's behavior may not be contradictory (*venire contra factum proprium*). A party that initiates court proceedings, but at

67 Voit, in: Musielak (ed.) ZPO, 7th ed., 2009, sec. 1032, para. 7.

68 Schwab/Walter, Schiedsgerichtsbarkeit, 7th ed., 2005, Chap. 8, para. 5.

69 Voit, in: Musielak (ed.), ZPO, 7th ed., 2009, sec. 1032, para. 7.

70 Huber, in: Böckstiegl/Kröll/Nacimiento (eds.), Arbitration in Germany: The Model Law in Practice, p. 142; Münch, in: Münchener Kommentar zur Zivilprozessordnung, 3rd ed., 2008, sec. 1032, para. 10.

71 § 242 Leistung nach Treu und Glauben.

the same time denies the other party access to the state courts, displays a contradictory behavior. Therefore, the claimant is not entitled to object to the counter-claim.⁷²

It is irrelevant that this is a provision of German substantive law. This provision incorporates the general concept of good faith and is therefore applied even when the procedural relationship between the parties is in question.

⁷² The set-off situation is similar. Assume that the claimant initiates court proceedings in violation of the arbitration agreement between the parties. The defendant introduces a claim for set-off that is also within the scope of the arbitration agreement. The claimant objects arguing that the set-off claim is not admissible in court proceedings.

The situation has been decided by the Higher Regional Court Munich (*OLG München*; OLG München MDR 1981, 766, cited and approved in OLG Düsseldorf NJW 1983, 2149, 2150). The court held that the claimant's objection was inadmissible. It should be added that under German law the claimant may also raise an objection against the admissibility of a set-off claim of the defendant, if the set-off claim falls under the arbitration agreement (Münch, in: Münchener Kommentar zur Zivilprozessordnung, 3rd ed., 2008, sec 1032, para 14). The court found that in this particular case the claimant acted in bad faith because it started court proceedings and then objected to the admissibility of court proceedings. This was a contradictory behavior that amounted to bad faith. By initiating court proceedings the claimant had made the defendant believe that it can have its claim in court decided as well. In the court's view it was irrelevant that the defendant did not object to the admissibility of the claimant's claim (in time).

This decision might also have implications for the aforementioned counter-claim-scenario. The situation of set-off is comparable to the situation involving a counter-claim. It could reasonably be expected, therefore, that a German court would decide the counter-claim-scenario in the same way as the OLG München decided on the question of set-off.

The following situation arises. The parties enter into an arbitration agreement. The defendant is not able to pay the advance on costs of the arbitration proceedings. Therefore, the claimant initiates court proceedings to pursue a claim under the arbitration agreement, arguing that the arbitration agreement is inoperative. The defendant objects to the admissibility of the court proceedings and introduces a set-off claim that is also within the scope of the arbitration agreement. The claimant opposes the set-off claim pointing to the arbitration agreement.

A case based on these facts was decided by the German Federal Court of Justice (*Bundesgerichtshof, BGH*; BGH NJW 2000, 3720). It illustrates the reverse situation. The court discussed (in paragraph II.1b)) whether the claimant could rely on the inoperativeness of the arbitration agreement or whether this would be against standards of good faith. The claimant displayed a contradictory behavior because he objected to the set-off claim and at the same time he had started court proceedings. Nevertheless, the court held that the claimant did not violate the standards of good faith. The case is special in so far as the claimant considered the arbitration agreement inoperative. The claimant would have been without access to justice if access to the courts were denied as the defendant did not have the financial means to conduct the arbitral proceedings.

The court only decided on the admissibility of the claimant's action and did not directly decide whether the claimant could raise an objection against the set-off claim. It referred the case back for a new trial. The decision of the lower instance court is not published.

This court decision does not make any difference with respect to the inadmissibility of the objection to the set-off claim.

Would the answers above differ if the proceedings were instituted in courts abroad?

Revocation of the arbitration agreement

The existence and revocation of the arbitration agreement is determined by the law governing the arbitration agreement. The aforementioned principles on implicit revocation of the arbitration agreement are therefore applicable if the arbitration agreement is governed by German law. Therefore, it should be irrelevant whether the court proceedings are instituted in Germany or abroad. In our view, the claimant's behavior can be interpreted as an offer to revoke the arbitration agreement no matter where it initiates the court proceedings, if German law governs the arbitration agreement.

Objection to admissibility is against good faith

The arguments as outlined above apply where the claimant takes recourse to German courts. It is irrelevant in this context whether the arbitration agreement is governed by German law or whether the seat of the arbitration is in Germany. This is stated in Sec. 1025 II German Code of Civil Procedure.⁷³

On the other hand, if the claimant sues the defendant in foreign courts, the arbitration laws of these states will be applicable. In most arbitration laws, the provisions on the stay of legal proceedings are applicable no matter where the seat of the arbitration is, cf. Art. 1 (2) UNCITRAL Model Law on International Commercial Arbitration. The answer therefore depends on the content of these national laws.

Does the waiver also affect other disputes that the parties wish to arbitrate?

Revocation of the arbitration agreement

⁷³ § 1025 Anwendungsbereich

(1) Die Vorschriften dieses Buches sind anzuwenden, wenn der Ort des Schiedsverfahrens im Sinne des § 1043 Abs. 1 in Deutschland liegt.

(2) Die Bestimmungen der 1032, 1033 und 1050 sind auch dann anzuwenden, wenn der Ort des Schiedsverfahrens im Ausland liegt oder noch nicht bestimmt ist. (...)

In case of an implicit revocation of the arbitration agreement all disputes are affected as the arbitration agreement no longer exists. The claimant will not be able to refer other claims to arbitration unless the parties enter into a new arbitration agreement. As outlined above, an arbitration agreement is not automatically revoked if the respondent decides against raising an objection against the admissibility of the court proceedings.

Objection to admissibility is against good faith

In our view, the claimant does not forfeit his right to bring arbitration proceedings for other claims that were not the object of the court proceedings, in the cases where the objection against the admissibility is against good faith as outlined above. Sec. 242 German Civil Code operates in a way that does not affect the validity of the arbitration agreement. It merely affects the objection to the admissibility of a claim.

Is the waiver irrevocable or can a party regain its right to rely on the arbitration agreement by for example revoking the court proceedings ?

After the contract to revoke is concluded

Once the contract to revoke the arbitration agreement is concluded, the claimant will be bound by it. It will be of no avail to then withdraw the court proceedings. Therefore, it has to be determined when the defendant accepts the offer to revoke the arbitration agreement. This is the latest possible moment for the claimant to withdraw its claim.

When accepting the view that additional circumstances are necessary for an implied revocation of the arbitration agreement, the acceptance will not take place before this special circumstance occurs.

If one accepts the view that no special circumstances are necessary then the following applies: According to German law, the defendant must have objected prior to the beginning of the oral hearing. Unless there are special circumstances, one cannot assume that the respondent has accepted the offer of revocation before that moment.

Before the contract to revoke is concluded

In our view, the claimant is able to withdraw his action before the implicit contract is concluded and is able to rely on the arbitration agreement again.

According to German substantive law, once an offer is made it cannot be unilaterally withdrawn and remains valid until the respondent can reasonably be expected to accept the offer. On the other hand, under procedural law a claimant is able to withdraw its action before the hearing without the consent of the defendant, sec. 269 I German Code of Civil Procedure.⁷⁴ It seems to us that this provision prevails.

Objection to admissibility is against good faith

In our view, the claimant is able to withdraw his claim and is able to rely on the arbitration agreement again. Section 242 German Civil Code operates in a way that only affects the objection to the admissibility of a claim. When the claimant withdraws the court action he abandons his contradictory behavior and hence Sec. 242 German Civil Code is no longer applicable.

*Swiss law*⁷⁵

To what extent does a party waive its rights under an arbitration agreement by instigating proceedings in ordinary courts?

a) Waiver by the Claimant?

If a party to an arbitration agreement initiates state-court proceedings in Switzerland (with a view to a decision on the merits), the opposing party may raise the plea of lack of jurisdiction. The basis of the arbitration defence is article II(3) of the New York Convention

⁷⁴ § 269 Klagerücknahme

(1) Die Klage kann ohne Einwilligung des Beklagten nur bis zum Beginn der mündlichen Verhandlung des Beklagten zur Hauptsache zurückgenommen werden. (...)

⁷⁵ This section is authored by Micha Bühler, Counsel, lic. iur., LL.M., Attorney at law, and Marco Stacher, Dr. iur., LL.M., Attorney at Law, Walder Wyss & Partners Ltd., Switzerland, Zürich.

(“NYC”) if the seat of the agreed-upon arbitral tribunal is outside Switzerland. If the seat of the arbitral tribunal is in Switzerland, then the basis of the defense is article 7 of the Swiss Private International Law Act (“PILA”)⁷⁶. The state court must deny its jurisdiction if the plea is justified,⁷⁷ and the claimant will have to start arbitration in order to pursue its claims.

It follows from the above that a party does not, from a Swiss perspective, waive its rights under the arbitration agreement by initiating state-court proceedings. Rather, the claimant can still rely on and continues to be bound by the arbitration agreement if the state court denies its jurisdiction due to the existence of an arbitration agreement.⁷⁸ If the state court, however, affirms its jurisdiction, its decision is considered to have *res judicata* effect for arbitral tribunals within Switzerland.⁷⁹ As a result, the claimant can, for the particular matter in dispute, no longer proceed to arbitration. Only to this extent does bringing an action in state courts produce effects akin to a waiver of the arbitration agreement.

b) Joint revocation by the parties

The situation is different if the respondent fails to raise the plea of lack of jurisdiction prior to pleading on the merits in the state-court proceedings. Here, the state court will affirm its jurisdiction (cf. article 7(a) PILA). Insofar as Swiss law applies to the arbitration agreement, this is generally considered to constitute a tacit mutual waiver

⁷⁶ Article 7 PILA: “If the parties have concluded an arbitration agreement with respect to an arbitrable dispute, the Swiss court before which the action is brought shall decline its jurisdiction unless:

a. The respondent proceeded to the merits without contesting jurisdiction;
b. The court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or
c. The arbitral tribunal cannot be constituted for reasons for which the respondent in the arbitration proceeding is manifestly responsible.”

⁷⁷ According to the Swiss Federal Tribunal, the state court is limited to a summary review of the arbitration agreement if the seat of the arbitral tribunal is in Switzerland (DFT 4A_436/2007; 4P.114/2004, cons. 7.3; DFT 122 III 139, cons. 2b), and therefore must deny jurisdiction upon a plea of lack of jurisdiction if there is, *prima facie*, a valid arbitration agreement.

⁷⁸ This is indirectly confirmed by Swiss doctrine: BERNHARD BERGER/ FRANZ KELLERHALS, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, at N. 620, e.g. state that a respondent who raises the plea of lack of jurisdiction in a state-court proceeding may not – upon the state court denying its jurisdiction - raise the plea of lack of jurisdiction in the subsequent arbitration by arguing there is no valid arbitration agreement (*venire contra factum proprium*).

⁷⁹ See DFT 4P.114/2004, cons. 7.3; DFT 121 III 38, cons. 2b; WERNER WENGER / MARKUS SCHOTT, in: *Basler Kommentar, Internationales Privatrecht*, 2. Aufl., Basel 2007, N. 10 ad article 186 PILA. Note, however, the new article 186(1bis) PILA which entered into force as of 1 March 2007 and reads as follows: “[The arbitral tribunal] shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a state court or another arbitral tribunal, unless there are serious reasons to stay the proceedings.” Arguably this provision also excludes a *res judicata* effect on the arbitral tribunal.

or revocation of the arbitration agreement: By applying to a state court, the claimant makes an implied offer to the respondent not to apply the arbitration agreement with respect to the matter in dispute. By participating in the state-court proceedings without raising the plea of lack of jurisdiction, the respondent impliedly accepts this offer.⁸⁰ The parties thus revoke the arbitration agreement by their subsequent agreement to not apply it.

Whether such revocation agreement affects the arbitration agreement in its entirety or only a part of its scope of application (i.e. the matter in dispute before the state- court) must be determined by an interpretation of the parties' intent. The fact that the implied offer and acceptance not to apply the arbitration agreement are exchanged in the ambit of a state-court proceeding relating to a particular claim in dispute generally suggests the latter.

c) Waiver by the (counter-) respondent?

The above applies *vice versa* when the respondent in the state-court proceedings submits a counterclaim whose subject-matter is within the scope of the arbitration agreement.

Additional difficulties arise where a party sues in state court but relies on the arbitration agreement for arguing a lack of jurisdiction of the court to hear the counterclaim. Whether the respondent to the counterclaim is entitled to rely on the arbitration agreement will largely depend on the circumstances of the particular case. The defence is admissible if it does not contradict the claimant's own case; for instance, if the claimant argues that the counterclaim is within the scope of the arbitration agreement while its own claim is not. If, however, the respondent to the counterclaim raises the arbitration defence based on the argument that all claims out of a certain contract must be arbitrated, yet bases its own claim on such contract, then its conduct is contradictory and abusive. As a consequence, the plea of lack of jurisdiction may be dismissed based on article 2 of the Swiss Civil Code ("CC"). This result would, however, not stem from an implied "waiver", but from the general principle

⁸⁰ MARCO STACHER, Die Rechtsnatur der Schiedsvereinbarung, at N. 93 et seq; WERNER WENGER / MARKUS SCHOTT, a.a.O., N. 83 ad article 178 PILA.

that an abuse of rights is prohibited and will not be protected.⁸¹

B. Would the answer differ if the proceedings were instituted in courts in Switzerland or abroad?

The revocation of an arbitration agreement is determined by the law governing the arbitration agreement. From the perspective of an arbitral tribunal seated in Switzerland or a Swiss state court, it is therefore irrelevant in which jurisdiction the state-court proceedings were initiated if the conduct by the parties in such proceedings is tantamount to the conclusion of a revocation agreement. The above, therefore, should apply to an arbitration agreement governed by Swiss law irrespective of whether the state-court litigation takes place in Switzerland or elsewhere.⁸²

Before Swiss courts, the parties may rely on article 2 CC to defend against an arbitration defence brought by the other party in contradiction to the latter's conduct regarding its own (counter-) claim, (see above). Whether such defence is available in proceedings before a foreign court will be determined by the *lex fori* of that court. In other words, the question whether an arbitration defence is abusive as a result of such party having itself instituted court proceedings, is to be determined by the *lex fori*, and not by the law governing the arbitration agreement.

C. Does the waiver also affect other disputes that the parties wish to arbitrate?

As noted above, the answer will depend on how the actions and declarations of the parties are construed based on the circumstances of the case. We submit that, as a general rule, the revocation agreement only includes the specific claims in dispute before the state court.

Article 2 CC does not affect the validity of an arbitration agreement as such, but only

⁸¹ An analogous reasoning applies if the respondent does not submit a counterclaim, but files before another court.

⁸² Under article 178(2) PILA, the substantive validity of an arbitration agreement providing for an arbitral tribunal having its seat in Switzerland, is governed by (i) Swiss law, (ii) the *lex causae* or (iii) the law chosen by the parties to govern the arbitration agreement. The arbitration agreement is valid, if it is valid under either of these (potentially three) laws. If it is valid under more than one law, the arbitration agreement is only revoked if revoked under all of the laws under which it initially was valid: If it is, e.g. only revoked under Swiss law, but not under the law chosen by the parties, there still exists an arbitration agreement under that law so that the prerequisite of article 178(2) PILA remains satisfied.

concerns the admissibility of the procedural conduct of a party. If the court finds that the plea of lack of jurisdiction is abusive, this therefore only entails that the party in question will not be heard with its arbitration defence in the pending state-court proceeding. The party may, however, still initiate arbitration for other claims or, if the state court denied its jurisdiction for other reasons, even for the same claims.

D. Is the waiver irrevocable or can a party regain its right to rely on the arbitration agreement by for example revoking the court proceedings?

Once the revocation agreement is concluded, both parties are bound by it and, accordingly, neither party can unilaterally “revive” the arbitration agreement. If the claimant in the state-court proceedings withdraws its claim after the respondent accepted to litigate before such court, such withdrawal does not affect the revocation of the arbitration agreement. Prior to the respondent’s implied acceptance, the claimant may withdraw its offer to revoke and thus prevent the conclusion of a revocation agreement (such withdrawal may, however, have with-prejudice effect on the merits and thus results in the forfeiture of the claim according to the applicable law).

Concluding remarks

A comparison between the different jurisdictions of Sweden, France, England, Germany and Switzerland on waiving the right to arbitrate shows that Swedish and French law are the only legal systems where a party can unilaterally (and implicitly) waive its right to arbitrate by initiating court proceedings. This may have dramatic and unforeseen consequences for a party, especially in an international context as has been demonstrated, inter alia, by the award issued in *Alucoal vs. NKAZ* matter, where Swedish law was *lex arbitri*. In England, Germany and Switzerland both parties must accept, by revocation or acceptance of repudiation, that the arbitration agreements shall not apply to the relevant matter in order to make the arbitration agreement ineffective. Under Swedish, English and Swiss law the legal effect of the waiver, or revocation/acceptance of repudiation, seems to cover only the dispute at hand and, with respect to Swedish law, all alternative allegations and objections, whether presented or not, covered by the legal force (*res judicata*) of a judgement under Swedish procedural law. French and German law stand out as exceptions in this regard as the waiver (revocation)

renders a valid arbitration agreement unenforceable. No further disputes under the same contract may be arbitrated unless the parties agree otherwise. In addition, the waiver or revocation is irrevocable in all of the above jurisdictions. Furthermore, when assessing the consequences of initiating a court action in violation of an arbitration agreement, it seems to be irrelevant in the five legal systems whether those proceedings were commenced in foreign or domestic jurisdictions.