CHAPTER 12

The (Swedish) Doctrine of Assertion: And the Scope of the Arbitration Agreement

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§12.01 INTRODUCTION

The scope of the arbitration agreement is central to the arbitral jurisdiction. It concerns the issue of the subject matter ambit (*ratione materiae*) of a binding arbitration agreement. The scope of the arbitration agreement is considered a question of interpretation that is to be determined according to the civil law rules and principles on contract interpretation.[1] In that sense, the arbitration agreement is an expression of the common intention of the parties to submit to arbitration instead of litigation; it is an exercise of party autonomy, by means of which the parties waive the right of access to court. Another significant factor concerns the identity of the matter in dispute. Arbitral jurisdiction requires that the actual dispute constitutes a type of dispute covered by the scope. This implies that it is necessary to establish what the matter in dispute concerns. Under Swedish law, the civil procedural law principle denoted '*påståendedoktrinen*' (the doctrine of assertion) is considered applicable when identifying the matter in dispute significant to the competence of the arbitral tribunal.[2]

1. *See*, *e.g.*, NJA 2019 p. 171 (Belgor); Stefan Lindskog, *Skiljeförfarande, En kommentar* (3rd ed. Norstedts Juridik 2020), 119, 194; Finn Madsen, *Commercial Arbitration in Sweden* (5th ed. Jure Förlag 2020), 52; Thorsten Cars, *Lagen om skiljeförfarande, En kommentar* (2nd ed. Faktas Digitala Bibliotek 2000), 37.
2. Lars Heuman, *Skiljemannarätt* (Norstedts Juridik 1999), 76 et seq., and in *Vilken beviskravsbetydelse har separabilitetsprincipen, påståendedoktrinen och anknytningsdoktrinen för bedömningen av behörighetsfrågor inom skiljedomsrätten?*, JT 2009-10, 335, *Undantag från påståendedoktrinen och regeln att en skiljeklausul endast avser avtalet*, JT 2017-18, 899; Lindskog, *supra* n. 1, at 195 et seq.; Patrik Schöldström, *Påståendedoktrinen och skiljeförfarande*, JT 2008-09, 138, and in *Kärandens påstående som grund för domstols behörighet*, *Till minnet av Södra Roslags tingsrätt* (Jure, 2007), 172 et seq.; NJA 2008 p. 406 (Petrobart).

This chapter seeks to capture the implications of the doctrine of assertion in relation to the scope of the arbitration agreement. The question that arises is whether an application of the doctrine of assertion implies that the dispute is identified in a way which implements the scope of the arbitration agreement – and it comes to a head where the parties agree that there are various binding contracts between them, but disagree on which of the contracts the matter in dispute concerns. A further question is whether the rather recent case NJA 2019 p. 171[3] is of importance in this context. The chapter will also briefly look at how the arbitral jurisdiction factor concerning the identity of the matter in dispute is dealt with in the legal systems of Switzerland and England,[4] and finally, whether and how the question is governed by the UNCITRAL Model Law on International Commercial Arbitration[5] (the Model Law).

§12.02 THE ARBITRAL JURISDICTION FACTOR CONCERNING THE IDENTITY OF THE MATTER IN DISPUTE

The starting point should be that the procedural law rules and principles applicable when identifying the matter in dispute significant to arbitral jurisdiction contribute, as far as possible, to the realisation of the scope of the arbitration agreement. In other words, that the applicable procedural law rules and principles result in the matter being identified in a way which does not permit a compromise with the intention of the parties – as expressed in the arbitration agreement – as to the type of disputes that are to be submitted to arbitration.

In the context of identifying the matter in dispute significant to arbitral jurisdiction, the English scholar Joseph stated in 2005 that '[t]here is surprisingly little discussion of this in the English authorities'.[6] However, more recently, in *Mozambique v. Credit Suisse International*,[7] Lady Justice Carr DBE said:

> I also accept that there is a two-stage test (although the considerations that arise may overlap and it may be convenient to consider the questions together): first to identify the matter and secondly to decide if that matter is one that the parties have agreed can only be arbitrated.

3. Also referred to by the Supreme Court as Belgor, Högsta domstolen, *Döpta rättsfall från Högsta domstolen*, www.domstol.se (2022-08-04).
4. English law means the law in England and Wales.
5. UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006, Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex 1 and Sixty-first Session, Supplement No. 17 (A/61/17), Annex 1.
6. David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd ed. Sweet & Maxwell 2005), 285.
7. *Mozambique v. Credit Suisse International* [2021] EWCA Civ 329. *See also Premier Cruises Ltd v. DLA Piper Rus Ltd and DLA Piper UK LLP* [2021] EWHC 151 (Comm); *Melford Capital Partners (Holdings) LLP and others v. Frederick John Wingfield Digby* [2021] EWHC 872 (Ch); *Sodawiczny v. Ruhan* [2018] EWHC 1908 [Comm].

In Sweden, the doctrine of assertion applicable when identifying the matter in dispute has been intensely discussed in legal doctrine over a long period of time and in recent decades also referred to in case law.[8]

[A] Identifying the Matter in Dispute Significant to Questions of Jurisdiction

When the arbitral tribunal, on the basis of section 2 paragraph 1 of the Swedish Arbitration Act,[9] containing the principle of the competence-competence, is deciding whether a particular dispute falls under the arbitration agreement, the actual dispute per se requires an analysis in order to identify the matter in dispute.[10] The arbitral tribunal has to determine whether the actual dispute constitutes such a type of dispute as the parties have agreed to submit to arbitration. Identifying the matter in dispute, significant to arbitral jurisdiction, implies establishing whether it concerns the contract containing the arbitration agreement or another contract/matter covered by the scope of the arbitration agreement. In this chapter, the contract containing the arbitration agreement will be referred to as the 'host contract' where applicable.

The above may be compared to situations where the courts are determining whether proceedings have been initiated in the correct forum. Also then, it is often necessary to identify what matter the dispute concerns.[11] Identifying the matter in dispute here implies determining whether the circumstances founding the jurisdiction of the court are at hand. What is decisive is whether the dispute concerns a matter

8. *See, e.g.*, Lars Welamson, *Anm av Bolding*: Skiljedom, SvJT 1964 pp. 278 et seq.; Heuman, *supra* n. 2, at 76 et seq., and in *Vilken beviskravsbetydelse har separabilitetsprincipen, påståendedoktrinen och anknytningsdoktrinen för bedömningen av behörighetsfrågor inom skiljedomsrätten?,* JT 2009-10, 335, *Bevisbördan för skiljeavtal och tolkningsresonemang som grund för skiljebundenhet*, JT 2011-12, 652 et seq, *supra* n. 2, JT 2017-18, 899 et seq.; Lindskog, *supra* n. 1, at 195 et seq.; Schöldström, *supra* n. 2, JT 2008-09, 138, *Till Minne av Södra Roslags tingsrätt*, 172 et seq., and in *Skiljeklausuler och utomobligatoriska anspråk*, JT 2017-18, 719 et seq.; Finn Madsen, *Påståendedoktrin eller anknytningsdoktrin, Efter vilka principer ska en domstol eller skiljenämnd ta ställning till verkan av en skiljeklausul i ljuset av nyare rättspraxis?,* SvJT 2013 pp. 734 et seq., and in *The Swedish 'Belgor' case and the scope and applicability of arbitral agreements*, Dispute resolution in business law, ACLU (Lund University 2020) 79 et seq.; NJA 2008 p. 406 (Petrobart); NJA 2012 p. 183 (Concorp); NJA 2017 p. 226 (*Avräkningsfallet)*.

9. *Lag* (1999:116) *om skiljeförfarande*.

10. Section 2 of the Swedish Arbitration Act is worded:

> (para. 1) The arbitrators may rule on their own jurisdiction to decide the dispute.
>
> (para. 2) If the arbitrators have rendered a decision finding that they have jurisdiction to adjudicate the dispute, any party that disagrees with the decision may request the Court of Appeal to review the decision. Such a request shall be brought within thirty days from when the party was notified of the decision. The arbitrators may continue the arbitration pending the court's determination.
>
> (para. 3) The provisions of Sections 34 and 36 apply in an action to challenge an arbitration award that includes a decision on jurisdiction. (Translated in *The Swedish Arbitration Act (Lag (1999:116) om skiljeförfarande)*, Swedish Ministry of Justice, Ds 1999:22, revised and updated by Joel Dahlquist on behalf of the Arbitration Institute of the Stockholm Chamber of Commerce).

11. *See, e.g.*, Lennart Pålsson, *Dubbelrelevanta rättsfakta vid prövning av domstols behörighet,* SvJT 1999 pp. 316 et seq.

governed by the relevant rule of jurisdiction.[12] One example is the *forum solutionis contractus* rule in Article 7(1) of the Recast Brussels Regulation, according to which it is decisive whether the matter in dispute concerns a contract.[13] A further, and similar, example is the domestic *forum contractus* rule contained in Chapter 10 section 4 of the Swedish Code of Judicial Procedure.[14]

Identifying the matter in dispute significant to arbitral jurisdiction raises questions of fact and questions of law. The first question that arises is whether the contract in question exists. Significant in that respect is, in the main, whether facts ultimate to the formation of contracts are present.[15] The second question is whether the circumstances in dispute pertain to the contract. The first question consequently regards the consideration of the relevant facts. The second question involves a legal consideration of these facts.

As to litigation, the main rule is that a party shall prove the circumstances relevant to the jurisdiction of a court that is called upon.[16] For instance, where proceedings are initiated in accordance with the *forum contractus* rule contained in Chapter 10 section 4 of the Swedish Code of Judicial Procedure, the claimant would have to prove the facts relevant to the existence of the contract alleged as basis to the jurisdiction.[17] This implies that the claimant has to prove the facts relevant when identifying the matter in dispute significant to the jurisdiction.

Considering the main rule in court proceedings, the starting point should be that the claimant has the burden of proving that the arbitral tribunal is competent. This

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12. *See, e.g.*, Pålsson, *ibid*.
13. *See* Alexander Layton, Hugh Mercer, *European Civil Practice*, Vol. I (2nd ed. Thomson/Sweet & Maxwell 2004), 410. Art. 7(1) of the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 351, 20.12.2012, p. 1-32,* is worded:

> A person domiciled in a Member State may be sued in another Member State:
> (1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
> (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
> – in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
> – in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;
> (c) if point (b) does not apply then point (a) applies[.]

14. *Rättegångsbalk* (1942:740). Chapter 10 section 4 of the Swedish Code of Judicial Procedure is worded:

> A person with no known residence within the Realm who has entered into an obligation or otherwise incurred a debt in the Realm may be sued in a dispute concerning the same at the place where the obligation was created or the debt incurred.

(Translated in *The Swedish Code of Judicial Procedure (Rättegångsbalk (1942:740))*, Swedish Ministry of Justice, Ds 1998:65, updated 2015-04-02, www.regeringen.se, 2022-02-14, 11.45)

15. *See*, *e.g.*, NJA 2005 p. 586.
16. *See* NJA 2005 p. 586; Pålsson, *supra* n. 10, at 315 et seq.
17. Pålsson, *ibid.*

would then mean that the claimant has the burden of proof as regards all facts ultimate to the competence of the arbitral tribunal. Both facts relevant to the identity of the matter in dispute and facts relevant to the arbitration agreement may be considered to constitute facts ultimate to the arbitral tribunal's competence. In legal doctrine, the arguments concerning the burden of proof in arbitration primarily involve the arbitration agreement. The burden of proof in this regard is considered to lie with the claimant.[18] Yet, the arguments outlined above suggest that the claimant has the burden of proving the facts relevant to the identity of the matter in dispute, in the same way as the facts relevant to the arbitration agreement.

[B] The Meaning of the Doctrine of Assertion

The doctrine of assertion is a civil procedural law principle applicable when the courts determine questions of procedural impediments. It means that such determinations are based on the claimant's assertion regarding the claimed (substantive) right. The claimant does not have to prove the facts that are asserted.[19] Thus, the doctrine of assertion concerns the assessment of facts relevant to questions of procedural impediments.[20] It also applies to questions of jurisdiction.[21] For instance, when determining the jurisdiction where an action for the fulfilment of a contract obligation is initiated, and the defendant contests that a contract has been concluded.[22] When the jurisdiction of the court is being determined, applying the doctrine means that the mere assertion of the facts constituting the cause of action of the claim in question is decisive.[23]

Yet, the doctrine of assertion also comprises legal issues.[24] This means that it applies to questions of law significant to court jurisdiction. In this respect, the relevant legal issues have different characteristics. Decisive in that respect is the applicable jurisdiction rule. Applying the doctrine of assertion to the relevant legal issues when identifying the matter in dispute significant to court jurisdiction implies that no legal examination is made but that a party's legal assertions are sufficient.

Central to the meaning of the doctrine of assertion is the *rationes* behind it. The reasons for the doctrine include various aspects, all of which emanate from the importance of separating questions of procedural requirements from questions of the

18. Bolding, p. 55; Lindskog, *supra* n. 1, at 99 footnote 356.
19. Lars Heuman, Peter Westberg, *Argumentationsformer inom processrätten* (2nd ed. Juristförlaget Stockholm 1995), 31; Per Olof Ekelöf, Henrik Edelstam, Lars Heuman, *Rättegång IV* (7th edn Norstedts Juridik 2009), 80.
20. Ekelöf/Edelstam/Heuman, *ibid*.
21. As to international jurisdiction: NJA 2005 p. 586; NJA 2009 p. 519; NJA 2012 p. 483; Pålsson, *supra* n. 10, at 315 et seq., 319 et seq. As to questions of internal jurisdiction; Pålsson, *supra* n. 10, at 319; Schöldström, *supra* n. 2, *Till Minnet av Södra Roslags tingsrätt*, 173, and JT 2008-09, 140.
22. *See* NJA 2005 p. 586.
23. *See, e.g.*, Pålsson, *supra* n. 10, at 316 et seq.; Schöldström, *supra* n. 2, JT 2008-09, 140.
24. *See*, *e.g.*, NJA 1973 p. 1 (I-III); NJA 1973 p. 527; NJA 1976 p. 422; NJA 2004 p. 743; Heuman, *supra* n. 7, JT 2009-10, 349 et seq., *supra* n. 2, JT 2017-18, 899 et seq.; Schöldström, *supra* n. 2, *Till Minne av Södra Roslags tingsrätt*, 172. *See also* the dissenting opinion of the Supreme Court Judge Asp in NJA 2017 p. 577 (*Fjällägenheten*).

merits of a dispute.[25] According to both the case law and legal doctrine, policy reasons and procedural economy objectives suggest avoiding the court having to consider the merits of a dispute in order to determine its competence.[26] A requirement that a party shall prove the facts that are relevant when identifying a matter in dispute significant to the jurisdiction may result in a complex procedure before the addressed court as to a matter which the court (or another forum) may have to decide on later when trying the merits of the dispute.[27] Such matters should only be examined once, namely when the court determines the merits of the dispute. The fact that the determination of the jurisdiction can normally be challenged adds a further ingredient to the complexity.[28] Moreover, it is argued that it should be avoided that the determination of the jurisdiction anticipates the examination of the merits.[29] Another, particularly underlined *rationale* is to enable the attaining of binding judgments on the merits with res iudicata effect and to avoid dismissals of cases without such effect.[30] The opposite is considered to imply a substantial disadvantage for the defendant.[31]

As follows from the *ratio* of the doctrine of assertion, the doctrine deals with situations involving doubly relevant ultimate facts.[32] Similarly, it applies to legal issues which are doubly relevant.[33] Legal doctrine defines doubly relevant ultimate facts as facts to which two legal consequences are connected: one procedural and one substantive.[34] Doubly relevant ultimate facts constitute a general phenomenon in procedural law. Such facts may occur in connection with most procedural requirements. Inherent in the double relevance, in the context of jurisdiction, is that the fact simultaneously constitutes a prerequisite both to the jurisdiction and to the substantive matter. This means that the facts simultaneously constitute facts ultimate to the legal consequence provided for in the relevant rule of jurisdiction and to the legal consequence provided for in the relevant substantive legal rule. The result is that doubly relevant ultimate facts simultaneously constitute both facts ultimate to the competence and ultimate facts.

25. Heuman/Westberg, *supra* n. 18, at 31. It is further argued that the doctrine of assertion provides a solution in line with the general tendency to limit the number of questions determined in proceedings for procedural impediments. Pålsson, *supra* n. 10, at 319; Per Henrik Lindblom, *Processhinder: om skillnaden mellan formell och materiell rätt i civilprocessen, särskilt vid bristande talerätt* (Norstedts Förlag 1974), 257, *Miljöprocess: om domstolarnas roll, forum, kumulation, intresseavvägning, officialprövning, taleformer, talerätt, åberopsrätt, bevisning, förenklad skadeståndsberäkning och rättskraft vid civilprocessuell domstolstalan i miljömål D 1* (Iustus Förlag 2001), 42.
26. Pålsson, *supra* n. 10, at 326; NJA 2005 p. 586.
27. NJA 2005 p. 586.
28. *Ibid*.
29. Heuman/Westberg, *supra* n. 18, at 31.
30. Pålsson, *supra* n. 10, at 326 et seq.
31. *Ibid*.
32. *See* Per Olof Ekelöf, *Rättegång II* (8th ed. Norstedts Juridik 1996), 18, 107; Pålsson, *supra* n. 10, at 329; Per Olof Ekelöf, Henrik Edelstam, Mikael Pauli, *Rättegång II* (9th ed. Norstedts Juridik 2015), 11; Ekelöf/Edelstam/Heuman, *supra* n. 18, at 80; Schöldström, *supra* n. 2, JT 2008-09, 140; NJA 2005 p. 586.
33. *See*, *e.g.*, NJA 1973 p. 1 (I-III); NJA 1973 p. 527; NJA 1976 p. 422; NJA 2004 p. 743.
34. *See, e.g.*, Heuman, *supra* n. 7, JT 2009-10, 336.

The phenomenon of doubly relevant ultimate facts may occur in situations where jurisdiction is based on a *forum contractus* rule. For instance, if the claimant initiates court proceedings and claims delivery of goods on the basis of a sale and purchase contract, the existence of the contract is relevant both to the merits of the dispute and to the question of jurisdiction. The existence of the contract determines whether the defendant is under an obligation to deliver the goods and whether the claimant has initiated proceedings in the correct forum.[35]

A conceivable consequence of applying the doctrine of assertion may be that when a court examines the merits of the dispute at a later stage, the court may have to reject the claim despite that there, in fact, exist reasons to dismiss the action.[36] That may occur where the court bases the determination of the jurisdiction on the mere assertion of the relevant facts – because they are doubly relevant – but, later, when determining the merits of the dispute, examines the facts and concludes that they do not exist.

The doctrine of assertion contains a requirement implying that the assertion of facts ultimate to the competence which are doubly relevant is decisive only if it is not obviously unfounded.[37] This means that the court may base the determination of the jurisdiction on a party's assertion of doubly relevant ultimate facts – unless the assertion appears to be obviously unfounded.[38] The requirement may be considered to reveal the actual meaning of the alleviation of the standard of proof granted by the doctrine of assertion when the court identifies the matter in dispute significant to its jurisdiction. Of the party's burden of proof remains a requirement that doubly relevant ultimate facts are presented with a certain degree of plausibility and that ultimate facts of single relevance must be proven.

The doctrine of assertion does not seem to involve the requirement in respect of legal assertions.[39] This means that an intellectually awkward plausibility assessment of the question of law – which the requirement would result in – would be avoided.

Several legal systems contain principles corresponding to the Swedish doctrine of assertion. For instance, Swiss law contains a similar procedural law principle applicable, *inter alia,* when a court identifies a matter in dispute significant to its jurisdiction.[40] In the same way as the doctrine of assertion, the Swiss principle implies that a

35. *See, e.g.*, Pålsson, *supra* n. 10, at 319.
36. *See, e.g.*, NJA 2005 p. 586; Ekelöf/Edelstam/Pauli, *supra* n. 31, at 22; Schöldström, *supra* n. 2, JT 2008-09, 140.
37. *See* NJA 2005 p. 586; NJA 2009 p. 519; NJA 2012 p. 483; Schöldström, *supra* n. 2, *Till Minnet av Södra Roslags tingsrätt*, 172 et seq., and JT 2008-09, 140 et seq.
38. *See* Schöldström, *supra* n. 2, Södra Roslags tingsrätt, 172 et seq.
39. Cases where the doctrine of assertion has been applied to legal issues significant to questions of jurisdiction do not mention the requirement. *See*, *e.g.*, NJA 1973 p. 1 (I-III); NJA 1973 p. 527; NJA 1976 p. 422; NJA 2004 p. 743. Moreover, it may be noted that a separate opinion of the judge in NJA 1973 p. 1 (I), and referred to in both NJA 1973 p. 1 (II) and (III), may be understood to mean that the requirement should not apply to legal assertions.
40. Max Guldener, *Schweizerisches Zivilprozessrecht* (3rd ed. Schulthess Polygraphischer Verlag 1979), 106; Samuel Baumgartner, Annette Dolge, Alexander Markus, Karl Spühler, *Schweizerisches Zivilprozessrecht – und Grundzüge des internationalen Zivilprozessrechts* (10th ed. Stämpfli Verlag 2018),74; BGE 137 III 32; BGE 122 III 249; BGE 119 II 66; BGer 25.11.2020, 4A 440/2020.

party does not have to prove the facts relevant in that regard, but the party's corresponding assertion is sufficient.[41] In addition, the reasons for the Swiss principle emanate from the importance of separating questions of procedural requirements from questions of the merits of a dispute.[42] Moreover, the Swiss Federal Tribunal explicitly states that the very essence of the principle is to enable attaining binding judgments on the merits with res iudicata effect.[43]

The Swiss procedural law principle is denoted '*Grundsatz der Zulässigkeitsprüfung nach dem Klageinhalt*' (the principle of examination of admissibility according to the content of the action).[44] It applies both when the courts determine questions of substantive-matter jurisdiction as well as questions of territorial jurisdiction.[45] In a Swiss doctoral thesis from 2010, Hoffmann-Nowotny argues that Swiss law in fact involves two different principles. One of them is the principle mentioned. The other is denoted '*Theorie der doppelrelvanten Tatsache*' (the theory of doubly relevant facts). He is of the opinion that both principles lead to the same result and could be considered essentially identical.[46] However, after *inter alia* analysing BGE 122 III 249, Hoffmann-Nowotny concludes that this case suggests a shift from the former principle to the theory of doubly relevant facts.[47]

However, the more recent case BGE 137 III 32 appears to establish that the principle of examination of admissibility, according to the content of the action, constitutes an overall procedural law principle which concerns both the existence of the relevant facts and their legal qualification. In the former respect, the Swiss Federal Tribunal stated that an assertion of doubly relevant facts is sufficient.[48] Thus, the case may be understood to refer to both principles and to suggest that the theory of doubly relevant facts constitutes a part of the principle of examination of admissibility according to the content of the action. BGE 137 III 32 indicates that no comprehensive examination of questions of law significant to court jurisdiction is required. For instance, where the nature of a legal relationship is decisive to the jurisdiction, it is sufficient that the court investigates whether it may reasonably be inferred, based on the alleged facts, that such a legal relationship exists.

41. Guldener, *supra* n. 40, at 106; Baumgartner/Dolge/Markus/Spühler, *supra* n. 40, at 74; BGE 137 III 32; BGE 3 I 626 at 633; BGE 119 II 66; BGE 122 III 249; BGer 25.11.2020, 4A 440/2020; BGer 25.09.2006, 4P 104/2006. Urs H. Hoffmann-Nowotny, *Doppelrelevante Tatsachen in Zivilprozess und Schiedsverfahren* (Dike Verlag 2010), 64, 106 et seq.
42. BGE 119 II 68; BGE 122 III 252.; *see also* Guldener, *supra* n. 40, at 106; Hoffmann-Nowotny, *ibid.*, at 125 et seq.; Baumgartner/Dolge/Markus/Spühler, *supra* n. 40, at 74 et seq.
43. BGE 141 III 294; BGer 25.11.2020, 4A 440/2020; BGer 10.12.2019, 4A 484/2018; BGer 22.09.2015, 4A 93/2015.
44. BGE 137 III 32; BGE 122 III 249; BGE 119 II 68.
45. Guldener, *supra* n. 40, at 106; Baumgartner/Dolge/Markus/Spühler, *supra* n. 40, at 74; BGE 141 III 294; BGE 137 III 32; BGE 136 III 486; BGE 135 V 373; BGE 131 III 153; BGE 128 III p. 50.
46. Hoffmann-Nowotny, *supra* n. 41, at 64 et seq., 71 et seq., 84, 87, pp. 115 et seq., 366.
47. Hoffmann-Nowotny, *supra* n. 41, at 114.
48. *See also* BGer 25.09.2006, 4P 104/2006; Baumgartner/Dolge/Markus/Spühler, *supra* n. 40, at 74; Oskar Vogel, *Besprechung von BGE 122 III 249*, ZBJV 132 (1996), 766. The German words used in this context are 'doppelrelevante Tatsachen'. In legal doctrine the notion is sometimes translated as 'doubly pertinent facts' or 'facts of double pertinence'. *See, e.g.*, Poudret/Besson, *infra* n. 54, at 389.

It may be noted that the Swiss procedural law principle emanates from German law.[49] The corresponding German procedural law principle – which always seems to have been denoted as the 'theory of doubly relevant facts' – also deals with situations involving doubly relevant ultimate facts. Already in 1900, it was considered to follow from the German principle that when a court was determining its jurisdiction, the claimant never had to prove the existence of the obligation or contract in dispute. The opposite was considered to apply with regard to an agreement on the place of performance.[50] The latter does not constitute a doubly relevant ultimate fact.

The Swiss theory of doubly relevant facts seems to involve a requirement that the facts are presented with certain plausibility. More specifically, it is considered sufficient that the doubly relevant ultimate facts – when identifying the matter in dispute – are presented with a certain degree of plausibility.[51]

[C] The Doctrine of Assertion and Arbitration

In Swedish legal doctrine, the doctrine of assertion is considered applicable in arbitration.[52] In NJA 2008 p. 406,[53] the Supreme Court explicitly held that it is an established general principle under Swedish law that the arbitral tribunal when it rules on its competence, on the basis of section 2 of the Swedish Arbitration Act, shall apply the doctrine of assertion. The *Petrobart* case concerned arbitration based on statutory law and the legal qualification of the facts in question. The Supreme Court's reasoning, however, suggests that the case is relevant also to commercial arbitration.

As concerns Swiss law, it follows clearly from both legal doctrine and case law that the theory of doubly relevant facts is not applicable in arbitration.[54] The reason for

49. Baumgartner/Dolge/Markus/Spühler, *supra* n. 40, at 74.
50. Paul Mayer, *Zur Lehre vom Gerichtsstande des Erfüllungsortes*, Zeitschrift für deutschen Zivilprozeß Bd 14 (1890), 250; Julius Petersen, *Ueber den Beweis der Thatsachen welche die Zuständigkeit des Gerichts begründen*, (Gruchot) Beiträge zur Erläuterung des Deutschen Rechts 37 (1893), 11, 17 et seq.
51. Berger/Kellerhals, *infra* n. 54, at 120 et seq.; BGE 135 V 373; BGE 131 III 153; BGE 128 III p. 50.
52. Heuman, *supra* n. 2, at 76 et seq, *supra* n. 2, JT 2017-18, 899 et seq.; Lindskog, *supra* n. 1, at 195 et seq.
53. Also referred to by the Supreme Court as Petrobart. Högsta domstolen, *supra* n. 3.
54. Hoffmann-Nowotny, *supra* n. 41, at 95 et seq.; Maurice Courvoisier, Nadja Jaisli Kull, in *Basler Kommentar, Internationales Privatrecht* (4th ed. Helbing Lichtenhahn Verlag 2021), Art 186 N 120; Bernhard Berger, Franz Kellerhals, *International and Domestic Arbitration in Switzerland* (3rd ed. Stämpfli Publishers 2015), 120 et seq.; Jean-Francois Poudret, Sebastian Besson, *Comparative Law of International Arbitration* (2nd edn Sweet & Maxwell 2007), 389; BGE 128 III 50; BGE 121 III 495; BGer 19.01.2006, 4P 298/2005; BGer 09.03.2005, 4P 226/2004. In BGer 07.09.2006, 4P 114/2006, however, the opposite was held. Here, the Swiss Federal Tribunal referred to four cases, all involving the theory of doubly relevant facts, but none of these concerned arbitration. It can also be noted that the case did not concern the question of identifying the matter in dispute, but rather the matter of jurisdiction *ratione temporis* in an investment dispute. The question at hand was whether the facts constituting the cause of action of the claim were within the jurisdiction *ratione temporis* of the tribunal. From the case, however, it follows that the alleged facts were not in dispute, and hence did not have to be proven. That means that the question of whether or not to apply the theory of doubly relevant facts did in fact not arise. Subsequently, the Swiss Federal Tribunal analysed the cause of action and concluded that the opinion of the defendant regarding the basis of the claim was incorrect.

the legal position is that it shall not be possible to force a party to submit to arbitration where there is no binding arbitration agreement as to the raised claim.[55] The reason is clearly framed in Swiss case law and consistently approved and welcomed by legal doctrine.[56]

As stated above, the application of the doctrine of assertion in arbitration has been extensively debated in Swedish legal doctrine. However, the reason against an application identified in Swiss law is not specifically addressed. Nor is the question of why the doctrine of assertion is considered applicable in arbitration justified or developed in any detail. In the latter regard, it may, therefore, be assumed that the *rationes* of the doctrine of assertion captured above – emanating from the importance of separating questions of procedural requirements from questions of the merits of a dispute – have been decisive.

[D] Discussion

As stated above, the question of identifying the matter in dispute significant to arbitral jurisdiction raises questions of fact and questions of law. As indicated at the outset of this chapter, identifying the matter in dispute in a way which does not permit a compromise with the intention of the parties as expressed in the arbitration agreement, comes to a head where the parties agree that there are various binding contracts between them, but disagree on which of the contracts the matter in dispute concerns. This situation entails that the question of fact – the existence of the contract in question – is not always the most crucial issue when identifying the matter in dispute; instead the crucial point is the relevant question of law. In other words, whether the circumstances in dispute pertain to the host contract or a contract covered by the invoked arbitration agreement.

As to the question of fact, a result of the doctrine of assertion being considered applicable in arbitration would be that an alleviation of the standard of proof is granted when the arbitral tribunal identifies the matter in dispute significant to its competence. Thus, of the party's burden of proof remains a requirement that doubly relevant ultimate facts are presented with a certain degree of plausibility and that ultimate facts of single relevance must be proven. An application of the doctrine of assertion means that an assertion that the contract in question exists is decisive. The arbitral tribunal shall base the identification of the matter in dispute on such an assertion.

Applying the doctrine of assertion to questions of law means that the arbitral tribunal shall base the identification of the matter in dispute, significant to its competence, on the claimant's assertion that the circumstances in dispute pertain to the host contract or a contract covered by the invoked arbitration agreement. Where the parties agree that there are various binding contracts between them but disagree on

55. BGE 128 III p. 50; BGE 121 III 495; BGer 19.01.2006, 4P 298/2005; BGer 09.03.2005, 4P 226/2004.
56. BGE 128 III p. 50; BGE 121 III 495; BGer 19.01.2006, 4P 298/2005; BGer 09.03.2005, 4P 226/2004; Poudret/Besson, *supra* n. 54, at 389; Berger/Kellerhals, *supra* n. 54, at 120.

which of the contracts the matter in dispute concerns, a mere assertion in that regard is sufficient.

How is the question of identifying the matter in dispute significant to arbitral jurisdiction dealt with in the legal systems of Switzerland and England introduced above? As according to Swiss law, the theory of doubly relevant facts is not applicable in arbitration, all facts relevant when identifying the matter in dispute have to be proven.[57] That is, the claimant has to prove that the alleged contract exists. No alleviation of the standard of proof is consequently accorded in that regard. That also applies where the existence of the contract is doubly relevant.[58] This means that the arbitral tribunal when identifying the matter in dispute has to examine all relevant facts with a full power of review.[59] Also, under English law, all facts relevant to the competence shall be examined by the arbitral tribunal with a full power of review.[60]

Under Swiss law, the arbitral tribunal shall examine all questions of law relevant to the jurisdiction.[61] The relevant questions shall be examined comprehensively.[62] The Swiss Federal Tribunal has explicitly held that if the arbitral tribunal fails to do so, the award can be set aside according to section 190(2)(b) of the Swiss Federal Statute on Private International Law (PILA).[63,64] English law mainly corresponds to Swiss law.[65] This means that, in order to identify the matter in dispute, the arbitral tribunal shall examine whether the circumstances in dispute pertain to the host contract or the other

57. BGE 128 III 50; BGE 121 III 495; BGE 19.01.2006, 4P 298/2005; BGer 09.03.2005, 4P 226/2004. *See also* Poudret/Besson, *supra* n. 54, at 389.
58. *See* Poudret/Besson, *supra* n. 54, at 389.
59. BGE 128 III 50; BGE 121 III 495; BGE 19.01.2006, 4P 298/2005; BGer 09.03.2005, 4P 226/2004. *See also* Poudret/Besson, *supra* n. 54, at 389; Courvoisier/Jaisli Kull, *supra* n. 54, Art. 186 N 120; Berger/Kellerhals, *supra* n. 54, at 246, 249 et seq.
60. *See AOOT Kalmneft v. Glencore International and Berkeley* [2002] 1 Lloyd's Rep. 128.
61. Courvoisier/Jaisli Kull, *supra* n. 54, Art. 186 N 120; Berger/Kellerhals, *supra* n. 54, at 249.
62. Courvoisier/Jaisli Kull, *supra* n. 54, Art. 186 N 120; Berger/Kellerhals, *supra* n. 54, at 249, 257. *See also* BGer 27.10.2021, 4A 461/2021; BGer 07.05.2021, 4A 27/2021.
63. *Bundesgesetz über das Internationale Privatrecht*, SR 291.
64. BGer 09.03.2005, 4P 226/2004. Section 190 of PILA is worded:

> (1) The award is final from the time when it is communicated.
> (2) An arbitral award may be set aside only:
> (a) where the sole member of the arbitral tribunal was improperly appointed or the arbitral tribunal improperly constituted;
> (b) where the arbitral tribunal wrongly accepted or denied juris- diction;
> (c) where the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims;
> (d) where the principle of equal treatment of the parties or their right to be heard in an adversary procedure were violated;
> (e) where the award is incompatible with public policy.
> (3) As regards preliminary awards, setting aside proceedings may only be initiated on the grounds of the above paragraphs 2 (a) and 2 (b); the time-limit runs from the communication of the award.
> (4) The deadline for filing the appeal amounts to 30 days from the award being communicated. (Translated in *Federal Act on Private International Law (Bundesgesetz über das Internationale Privatrecht, SR 291)*, Fedlex, The publication platform for federal law (Status as of 1 July 2022)).

65. *See* David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd ed. Sweet & Maxwell 2015), 146.

contract comprehensively. Thus, the arbitral tribunal shall examine the questions of law that are relevant when identifying the matter in dispute with a full power of review.

The arbitral tribunal's examination of the question of whether the dispute concerns the host contract or a contract covered by the invoked arbitration agreement with a full power of review conceivably contributes significantly to the realisation of the scope of the arbitration agreement. At the same time, however, the examination may imply that the arbitral tribunal takes a stance regarding parts of the substantive matter. That the arbitral tribunal has to consider the merits of a dispute in order to determine its competence results in several disadvantages from a procedural law and procedural economy perspective. Even if the parties agree that there are various binding contracts between them, the question of law relevant when identifying the matter in dispute may require complex considerations as to a matter which the arbitral tribunal, or another forum, may have to examine finally when determining the merits of the dispute. In addition, the determination of the jurisdiction may normally be challenged. Taking a position on the substantive matter further implies that the determination of the jurisdiction anticipates the examination of the merits. Yet, the anticipation would, in many cases, depending on the substance of the claim, be limited to parts of the substantive matter.

An application of the Swedish doctrine of assertion in the situation where the parties agree that there are various binding contracts between them but disagree on which of the contracts the matter in dispute concerns means that a party's assertion in the relevant respect is sufficient for jurisdiction. If the assertion is not correct, an application of the doctrine may imply that a party is, in effect, forced into arbitration. The arbitral tribunal will consider that it has competence concerning a contract not containing or covered by the invoked arbitration agreement. Indeed, that would not be in line with the intention of the parties – as expressed in the arbitration agreement – regarding what disputes are to be submitted to arbitration. In fact, the matter in dispute is not covered by the scope of the arbitration agreement. This means that there is no ground for arbitral jurisdiction regarding the claim in question. Ultimately, it could thus be called into question whether an application of the doctrine of assertion in arbitration complies with the right of access to court.

To the extent the identity of the matter in dispute is conclusive to the jurisdiction, an application of the doctrine of assertion with the described possible outcome conceivably means that the arbitral tribunal will consider itself competent in more cases compared to Swiss and English law. This in turn can be assumed to result in more cases of rejecting awards. The res iudicata effect then implies an advantage for the respondent from a legal certainty perspective. A full power of review according to Swiss and English law conceivably means that the arbitral tribunal, to a greater extent, will dismiss the case after examining the relevant questions of law within the frames of the jurisdiction proceedings.

§12.03 THE *BELGOR* CASE

Is the rather recent *Belgor* case of importance to the arbitral jurisdiction factor concerning the identity of the matter in dispute? The *Belgor* case pertains to the arbitral jurisdiction factor concerning the scope of the arbitration agreement, in respect of which it suggests a liberal approach.[66] Moreover, *Belgor* may be understood as providing authority for a one-forum presumption. Here, a statement made by the Supreme Court may be understood to mean that the arbitration agreement, like other contracts, in case of doubt, can be assumed to aim at a reasonable solution, implying a one-forum solution (in arbitration). In the *Belgor* case, the scope of the arbitration agreement was extended to disputes concerning other contracts.

In addition, however, *Belgor* seems to have introduced a new principle of procedural law. The principle applies when the arbitral tribunal's determination of its competence is challenged, and it entails a presumption that the examination, including both questions of law and questions of fact, is correct.

The Supreme Court made a statement in the legal points of departure concerning the significance of the arbitral tribunal's examination of the competence in relation to the court's assessment in setting aside proceedings and reasoned as follows.

> When a court in setting aside proceedings shall revise the arbitral tribunal's determination on the jurisdiction, it should be taken into account that the arbitral tribunal is normally best positioned to examine its jurisdiction. This suggests that the starting point for the court's determination should be that the arbitral tribunal's interpretation and evaluation of evidence is correct. With those starting points, it shall, in the setting aside proceedings, be examined whether the challenging party has established that the arbitral tribunal has made an incorrect assessment of the scope of the arbitration agreement. As to the former, the Supreme Court referred to NJA 2003 p. 379.[67]

The statement by the Supreme Court may be understood to mean that since the arbitral tribunal is normally best positioned to examine its jurisdiction, it should be presumed that its examination of the jurisdiction, including both questions of law and questions of fact, is correct.[68] On that basis, the court's examination should be limited to the question of whether the challenging party has established that the arbitral tribunal's examination was incorrect.

The Supreme Court's statement pertains to two issues. The first pertains to the court's review as such of the arbitral tribunal's assessment of the competence, and thus the examination which the court shall make in the setting aside proceedings. Upon a challenge in accordance with section 34 or 36 of the Swedish Arbitration Act, the Court

66. Concerning the question whether a liberal or restrictive approach applies to the assessment of the scope of an arbitration agreement, the Swedish legal position is less clear and less consistent compared to other legal systems. Before *Belgor*, the Swedish approach has changed from rather extensive to more restrictive.
67. Also referred to by the Supreme Court as *Fruits et Légumes.* Högsta domstolen, *supra* n. 3.
68. *See also* Lars Heuman, *Har det skett en omsvängning eller omläggning av praxis från restriktiv till extensiv tillämpning av skiljeavtal?*, SvJT 2019 p. 546; Lindskog, *supra* n. 1, at 306 et seq., 932 footnote 3676.

of Appeal, and if leave to appeal is granted, the Supreme Court, in principle, examines both questions of fact and law relevant to the jurisdiction.[69] This means, *inter alia,* that applicable rules on burden and standard of proof shall be considered.[70] As to the standard of review, a review for error may be considered inherent in the Swedish legal system.[71] The second issue, to which the Supreme Court's statement pertains, is related to the grounds for setting aside an award. Significant in that respect is the non-statutory principle, according to which a challenging party shall prove that there are grounds for setting aside an award.[72] In other words, that the arbitral tribunal has, in some way, committed an irregularity in the relevant respects. This issue consequently relates to the respects in which the arbitral tribunal's determination is incorrect and to the burden of proof in that regard. It is an issue distinct from, but connected to, the first issue. The common denominator is the error/irregularity.

From the Supreme Court's statement, understood in the way described above, it seems to follow that the court's review for error of the arbitral tribunal's assessment of the competence is replaced by a presumption that the examination, including both questions of law and questions of fact, is correct.[73] After the legal points of departure, the Supreme Court first described the arbitral tribunal's assessment of its competence. Thereafter, the Supreme Court merely concluded that Belgor had not established that the arbitral tribunal's assessment was incorrect. These considerations may thus be understood to imply that the arbitral tribunal's assessment was presumed to be correct and that Belgor's arguments did not rebut the presumption.

The presumption that the arbitral tribunal's examination of the jurisdiction is correct, as such, probably has no effect on the arbitral jurisdiction factor concerning the identity of the matter in dispute. However, the presumption may conceivably amplify the importance of a party's assertion that the matter in dispute concerns the host contract or another contract/matter covered by the scope of the arbitration agreement.[74] In that sense, the presumption interacts with the doctrine of assertion. This would in turn increase the risk, in the way described above, of the arbitral jurisdiction being based on an assertion which is in fact not correct. And thus, the arbitral tribunal is considered competent concerning a contract not containing or covered by the invoked arbitration agreement. Thus, the interaction would conceivably contribute to

69. Lars Welamson, *Rättegång VI* (3rd edn Norstedts Juridik 1994), 149; Per Olof Ekelöf, Henrik Edelstam, *Rättsmedlen*, (12th ed. Iustus Förlag 2008), 149 et seq. *See also* Heuman, *supra* n. 8, JT 2009-10, 349 et seq.
70. *See* Per Olof Bolding, *Skiljedom, Studier i rättspraxis beträffande svensk skiljedoms giltighet och verkställbarhet* (P A Norstedt & Söners Förlag 1962), 64 et seq.; Heuman, *supra* n. 3, at 591 et seq, and *supra* n. 8, JT 2009-10, 336; Lindskog, *supra* n. 2, at 99 footnote 356, 343 footnote 1388, 932 footnote 3676, 1251 footnote 4906. As to the corresponding review in enforcement proceedings, *see* Lindskog, *supra* n. 2, at 99 footnote 356, 1251 footnote 4906, 1271 footnote 4965.
71. *See* Ekelöf/Edelstam, *supra* n. 69, at 11 et seq., 15 et seq. As to challenge proceedings under Section 36 of the Swedish Arbitration Act, *see*, *e.g.*, Heuman, *supra* n. 3, at 535 et seq.
72. Heuman, *supra* n. 3, at 591, and *supra* n. 8, JT 2011-12, 662.
73. *See also* Madsen, *supra* n. 8, Dispute Resolution in Business Law, 94.
74. Likewise, the presumption may be assumed to amplify the presumption in favour of a one-forum solution introduced in the Belgor case. *See also* Heuman, *supra* n. 68, at 546 et seq.

a compromise with the intention of the parties as expressed in the arbitration agreement regarding what disputes are to be submitted to arbitration.

§12.04 THE MODEL LAW AND IDENTIFYING THE MATTER IN DISPUTE

During the preparation of the Swedish Arbitration Act, it was decided not to adopt the Model Law (as a model) but to consider its provisions in all relevant parts.[75] This justifies the question of whether and how the arbitral jurisdiction factor concerning the identity of the matter in dispute is governed by the Model Law.

Article 16 of the Model Law contains the principle of competence-competence, providing that the arbitral tribunal may rule on its own jurisdiction. However, the question of how to identify the matter in dispute is a procedural law issue not governed by the Model Law. Procedural law is fundamental to arbitration, particularly to the question of arbitral jurisdiction.[76] In principle, procedural law is national, which then leads to the legal system of the seat of arbitration.[77] That is a consequence of the concept of *lex arbitri*.[78]

The purpose of the Model Law is closely connected to party autonomy.[79] According to Fortese, the goal of the Model Law is to facilitate the resolution of disputes by encouraging and safeguarding party autonomy in international trade.[80] In line with that, Fortese refers to 'the arbitrators' overarching duty to enforce the parties' agreement and ensure efficiency'.[81]

An application of the doctrine of assertion, with the possible outcome that the arbitral tribunal bases its competence on an assertion which is in fact not correct, implying a deviation from the intention of the parties – as expressed in the arbitration agreement – regarding what disputes that are to be submitted to arbitration, cannot be considered to be in line with the principle of party autonomy. And thus not with the Model Law.

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75. Government Bill 1998/99:35, p. 47; Heuman, *supra* n. 2, at 44.
76. *See, e.g.*, Howard Holtzmann, Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary* (Kluwer Law and Taxation Publishers 1994), 6 et seq.; European Parliament, Directorate General for internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Instruments and Practice of Arbitration in the EU – Study, 2014, pp. 21 et seq.
77. *See* Holtzmann & Neuhaus, *ibid.*, at 6 et seq.
78. Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010), 20; European Parliament, Directorate General for Internal Policies, Legal Instruments and Practice of Arbitration in the EU, *supra* n. 76, at 21. Here, the concept of *lex arbitri* refers to the arbitral tribunal's equivalent of the national judges' *lex fori.* The concept thus establishes an exclusive correlation between a specific arbitration and a single national legal system and its procedural law. Gaillard, *ibid.*, at 20; European Parliament, Directorate General for Internal Policies, Legal Instruments and Practice of Arbitration in the EU, *supra* n. 76, at 21.
79. *See* General Assembly Resolution 40/72, Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, 40 GAOR Supp No. 53, A/40/53, p. 308 (adopted 11 December 1985).
80. Fabricio Fortese, Early Determination of Arbitral Jurisdiction, Balancing efficacy, efficiency, and legitimacy of arbitration (Universitetsservice US-AB, Stockholm, 2022), 247 et seq.
81. Fortese, *ibid.*, at 231 et seq.

§12.05 CONCLUSION

An application of the Swedish doctrine of assertion when identifying the matter in dispute significant to the competence of the arbitral tribunal conceivably contributes to implementing the scope of the arbitration agreement to a lesser extent than legal systems providing for a full power of review. The Swedish approach may even result in a situation whereby a party is forced into arbitration. Implications of the doctrine of assertation may simultaneously jeopardise party autonomy and be in conflict with the right of access to court.

The *Belgor* case seems to have introduced a presumption applicable when the arbitral tribunal's determination of its competence is challenged, implying that the tribunal's examination is correct. The presumption may conceivably interact with the doctrine of assertion in a way which would permit a compromise with the intention of the parties as expressed in the arbitration agreement regarding what disputes are to be submitted to arbitration.

The question of identifying the matter in dispute significant to the competence of the arbitral tribunal is a procedural law issue not governed by the Model Law. It may be discussed whether an application of the Swedish doctrine of assertion can be considered to be in line with the Model Law, to which the principle of party autonomy is essential.