Kluwer Arbitration Blog

2022 Year in Review: Switzerland (Part I: Arbitrator's Independence and Impartiality, Enforcement)

Petra Rihar (Lanter) · Wednesday, February 8th, 2023

This post highlights the most significant arbitration-related developments in Switzerland in 2022 that are of interest to the international arbitration community at large. **Part I** focuses on the topic of arbitrator's independence and impartiality as well as on enforcement of arbitral awards in Switzerland, all from the perspective of the Swiss Federal Supreme Court ('SFSC'). **Part II** focuses on decisions of the SFSC providing useful guidance on the remedy of revision (as in force since January 2021) and on the concept of "treaty shopping". Part II also briefly summarizes the main developments in Swiss legislation and arbitration rules (Supplemental Swiss Rules and CAS Code).

Arbitrator's Independence and Impartiality

a) Replacement Where Objectively Established Circumstances Give the Appearance of Bias

In decision 4A_404/2021 (04.01.2022), the SFSC confirmed its settled case law according to which bias is assumed if, on the basis of all the factual and procedural circumstances, signs are noticeable that are likely to arouse distrust in the impartiality of an arbitrator.

The underlying dispute concerned an arbitrator whose law firm partner had served as an honorary consul to the Philippines (presumably on an honorary basis) but ended his engagement before the arbitration commenced, and according to the appellant, the Philippines was affected by the outcome of the arbitration. The SFSC dismissed the appeal to set aside the award on the grounds of improper composition of the arbitral tribunal (article 190(2)(a) PILA) as it considered the terminated activity as honorary consul not comparable to an ongoing attorney mandate.

The SFSC emphasized that an arbitrator must be independent and impartial in the same manner as a state judge and that failure to comply with this rule results in an irregular appointment within the meaning of article 190(2)(a) of the Swiss Private International Law ('PILA'). When considering whether an arbitrator offers sufficient guarantees, the principles of Article 30(1) of the Swiss Federal Constitution must be applied, taking into account the particularities of arbitration.

According to this decision, an attorney acting as an arbitrator will create an appearance of bias if s/he or a lawyer from the same firm is connected to a party by an ongoing mandate or has repeatedly acted as legal representative on the side of a party, so that some kind of permanent

relationship exists between them. For the replacement of an arbitrator, it is sufficient that objectively established circumstances give the appearance of bias and give rise to concerns about the arbitrator's partiality. By contrast, not every relationship of an economic, professional or personal nature in itself gives rise to the appearance of bias, and the purely individual impressions of one of the parties to the proceedings are not decisive.

b) Allegation of Bias Cannot be Used to Criticize Factual Findings or Legal Assessments

The SFSC followed the same principles and, in decision 4A_462/2021 (07.02.2022), dismissed the appeal against the final award, in which the appellant alleged bias on the part of the chairperson (article 190(2)(a) PILA). The appellant argued that there were serious errors in the reasoning of the final award and that the chairperson had moved from her former law firm to the new law firm whose clients included the group of companies to which the appellant's counterparty belonged.

Emphasizing that a strict standard applies to the assessment of alleged bias, the SFSC held that procedural errors or incorrect substantive decisions can only create an appearance of bias if they are particularly blatant or repeated and constitute a serious breach of the arbitrator's duties. By contrast, the allegation of bias cannot be used to criticize factual findings or legal assessments of the challenged arbitral decision. Regarding the chairperson's move to the new law firm, the SFSC found that it was agreed after the final assessment of the dispute by the arbitral tribunal, i.e., when it was no longer possible to influence the tribunal's decision.

c) Parties Must Search Generally Available Sources of Information Already During the Arbitration

In decision 4A_100/2022 (24.08.2022), the SFSC dealt with a request for revision of an award rendered in 2014. The requesting party asserted that one of the arbitrators was subject to a conflict of interests and requested that the award be annulled on the basis of article 190a(1)(c) PILA and the dispute be referred back to the newly constituted arbitral tribunal, to which the conflicted arbitrator would not belong.

The SFSC first clarified that the new provisions on the remedy of revision of international arbitral awards apply to revision proceedings filed after 1 January 2021, even if the challenged award was made before that date. Pursuant to article 190a(1)(c)PILA, a party may request a revision of an arbitral award if a ground for challenge under article 180(1)(c) PILA (legitimate doubt as to arbitrator's independence or impartiality) was not discovered until after the arbitral proceedings had been completed, despite due diligence, and no other remedy is available.

The SFSC emphasized that the party wishing to challenge an arbitrator must raise the ground for challenge as soon as it becomes aware of it. This rule applies both to grounds for challenge of which the party was actually aware and to those of which it could have become aware had it paid due attention. The objection of irregular composition is forfeited if it is not raised without delay. The revision pursuant to article 190a(1)(c) PILA therefore not only requires that a ground for challenge pursuant to article 180(1)(c) PILA was discovered only after the conclusion of the arbitral proceedings; the requesting party must also show that, despite due diligence, the ground for challenge could not have been discovered and asserted already in the arbitral proceedings.

In this proceeding, the requesting party based its request for revision on the arbitrator's email of 1 November 2013, publicly accessible registers on English court decisions and other available databases.

The SFSC held that the parties are expected to conduct research into generally available sources of information – in particular on the internet – on arbitrators already during the arbitral proceedings in order to identify elements that may reveal a possible risk of dependence or partiality of an arbitrator. The SFSC found that in the present case it had already been clear during the arbitration proceedings that a conflict of interest existed or could arise. The relationship of the arbitrator to the parties to the proceedings should have been clarified and a request for challenge should have been made already then. The SFSC dismissed the request for revision as the requirement under to article 190a(1)(c) PILA was not met.

Enforcement

a) Enforcement of Annulled Arbitral Awards

In decision KSK 21 9 (25.05.2022), the court of last instance of the Canton of Graubünden addressed the question of whether an arbitral award, that was set aside in the country in which it was made while enforcement proceedings were ongoing before the competent Swiss court of first instance, can be enforced. Referring to article V(1)(e) of the New York Convention, the court held that, in principle, the enforcement court is not entitled to review the accuracy of the annulment decision and has no discretion (*Ermessen*) in the question of recognition and enforcement of an annulled arbitral award. What matters is whether the award is binding at the seat of arbitration; it is not if it has been annulled by a court there. Except in exceptional circumstances such as, e.g. (foreign state) abuse of rights or a violation of procedural public policy, annulled arbitral awards are not to be enforced.

b) Enforcement of Cost Awards

Decision 5A_335/2021 (14.09.2022) concerned the enforcement of an award rendered by a tribunal seated in Geneva in arbitration conducted by claimants A and B against the respondent Czech Republic under the aegis of the Permanent Court of Arbitration (PCA). By award of 2 May 2018, the tribunal rendered the following decision:

> *465. The Claimants' claims are dismissed.*
>
> 466. *The Claimants shall pay to the Respondent within 28 days of delivery of this award the sum of US $ 1.75 million and GBP 178,125.50.*
>
> 467. *The arbitration costs are assessed at GBP 714,502.00, and any balance held by the PCA shall be remitted in equal shares to the Parties in accordance with Article 41 (5) of the UNCITRAL Rules.*

In the enforcement proceedings, the Czech Republic was denied enforcement of the cost award because it was not clear from the award whether the claimants were jointly and severally liable for the entire amounts or only for a part each, and the UNCITRAL Arbitration Rules and the Swiss *lex arbitri* did not provide any guidance. The SFSC pointed out that in the enforcement proceedings,

the court examines whether the obligation to pay can be clearly derived from the award. In doing so, it does not have to decide on the material existence of the claim, nor does it have to deal with the material correctness of the award. It does not have to interpret the submitted award and certainly not to supplement it in accordance with an alleged practice. If the submitted award is unclear or incomplete and thus not enforceable, it is up to the tribunal to provide clarification.

Concluding Remarks on Part I

The SFSC regularly addresses issues relating to the enforcement of arbitral awards. In decision 4A_663/2018 (27.05.2019), it held that only blatant disregard of the principle of the arbitrator's independence and impartiality can lead to a refusal of recognition and enforcement of an arbitral award, as the public policy exception must be interpreted restrictively, especially when it comes to the recognition and enforcement of foreign decisions. Related to the admissibility of an attachment over real estate property of a sovereign state in Switzerland on the basis of an arbitral award, the SFSC held in decision 5A_942/2017 / 144 III 411 (07.09.2018) that the requirement of a sufficient connection applied, which presupposed that the legal relationship on which the arbitral award was based and from which the attachment claim arose had a sufficient connection to Swiss territory.

With the same regularity, the SFSC also addresses the issue of the arbitrator's independence and impartiality. The principles set out here are a confirmation and continuation of the case law from previous years, such as the decision 4A_292/2019 (16.10.2019), in which the SFSC dealt with the admissibility of *ex parte* communication between an arbitrator and a party's counsel.

Kluwer Arbitration Blog

2022 Year in Review: Switzerland (Part II: Revision, Treaty Shopping and Legislative Developments)

Petra Rihar (Lanter) · Wednesday, February 8th, 2023

This **Part II** of the 2022 Year in Review: Switzerland post focuses on decisions of the SFSC providing useful guidance on the remedy of revision (as in force since January 2021) and on the concept of "treaty shopping". In addition, Part II briefly summarizes the main developments in Swiss legislation and arbitration rules (Supplemental Swiss Rules and CAS Code).

Remedy of Revision

a) A Waiver of Appeal Can Include a Waiver of Remedy of Revision

In decision 4A_69/2022 (23.09.2022), the SFSC dealt with the issue of scope of a standard waiver of appeal contained in an arbitration clause (with the following wording: "*Awards rendered in any arbitration hereunder shall be final and conclusive […]. There shall be no appeal to any court from awards rendered hereunder*").

The underlying dispute concerned the transfer of de facto control of the energy company INA by the Croatian state to the Hungarian oil and gas company MOL ('MOL') based on the shareholders agreement ('SHA'), the GAS Master Agreement ('GMA') and the First Amendment to the Shareholders Agreement ('FASHA'). In 2014, Croatia initiated UNCITRAL arbitration (PCA No. 2014-15) against MOL claiming that the FASHA and GMA were void *ab initio* due to the bribery of Croatia's Prime Minister in the amount of EUR 10 million.

By award of 23 December 2016, Croatia's claim was dismissed. In February 2017, Croatia filed an appeal against the award with an alternative request for revision. In its decision 4A_53/2017 / 143 III 589, the SFSC declared the appeal and the request for revision inadmissible holding that the above mentioned arbitration clause constituted a valid waiver of appeal within the meaning of article 192 PILA, but leaving open the question of whether the waiver was applicable to the remedy of revision.

Following the final conviction of Croatia's Prime Minister of bribery in July 2022, on 8 February 2022 Croatia filed a request for revision of the award on the basis of article 190a(1)(a) PILA (new material evidence) and article 190a(1)(b) PILA (award influenced by a criminal act).

The SFSC first clarified that the new provisions of PILA also apply to arbitration agreements

concluded before 1 January 2021 and that a waiver of legal remedies in an arbitration agreement concluded before 1 January 2021 can also exclude the right to apply for revision of an award, within the limits of the revised article 192 PILA. The SFSC noted that it is a matter of interpretation whether the waiver clause constitutes a waiver of the right to appeal alone or whether it also covers the application for revision. It held that in the present case the parties used the word "appeal" in its generic sense that encompassed diverse remedies (*Berufung*, *Beschwerde*, *Revision*, etc.) and that they intended to exclude any appeal against possible future awards. It concluded that the waiver clause at issue also precluded revision in so far as it was based on the ground provided for in article 190a(1)(a) PILA and that the revision based on article 190a(1)(a) PILA was not admissible.

As to the limits of the revised article 192(1) PILA (as in force since 1 January 2021), it allows for mandatory revision on the basis of article 190a(1)(b) PILA (award influenced by a criminal act) even if the parties have waived the right to appeal in the arbitration agreement. As this new legal situation also applies to arbitration clauses or arbitral awards of an older date, the SFSC dealt with Croatia's second complaint. The SFSC highlighted that it was irrelevant whether the criminal offence was committed by a party to arbitration or a third party, but that it was essential that there was a causal link between the offence committed and the terms of the award whose revision was sought. The offence must have had an actual influence on the award to the detriment of the party seeking revision. The SFSC emphasized that the arbitral tribunal was not bound by a criminal judgment rendered in the same set of facts and could arrive to a different solution than the decision of the criminal authority. The SFSC dismissed the request for revision on the basis of article 190a(1)(b) PILA holding that that the now enforceable conviction of Croatia's Prime Minister was not sufficient in itself to prove that the outcome of the challenged arbitral award had been influenced by a criminal act.

b) Requirements for Revision on the Basis of New Material Evidence

In decision 4A_464/2021 (31.01.2023), the SFSC dealt with an appeal for annulment of an award on the basis of article 190(2)(e) PILA (incompatible with public policy) submitted together with an alternative request for revision on the basis of article 190a(1)(a) PILA (new material evidence). The SFSC held that, where simultaneously submitted, an appeal takes precedence over a request for revision. After it dismissed the appeal, it dealt with the request for revision. The SFSC recalled the requirements for a successful request for revision on the basis of article 190a(1)(a) PILA (1. the applicant invokes new facts; 2. these facts are relevant to the outcome of the award; 3. these facts existed when the award was rendered; 4. these facts were discovered after the award was rendered; 5. the applicant was unable, despite its diligence, to invoke these facts during the arbitration), but dismissed the request concluding that the appellant failed to demonstrate that it was unable to discover the facts on which it based its request for revision already during the arbitration.

Treaty Shopping

In decision 4A_398/2021 / 148 III 330 (20.05.2022), the SFSC dealt with the appeal of the Republic of Venezuela ('Venezuela') based on article 190(2)(b) PILA against the award of 17 June 2021. In the UNCITRAL arbitration PCA No. 2015-30, Clorox Spain S.L. ('C.S.') sought payment of damages from Venezuela for breach of various provisions of the Spain-Venezuela BIT.

By award of 20 May 2019, the tribunal declared that it lacked jurisdiction to rule on the claim. By decision 4A_306/2019 / 146 III 142 (25.03.2020), the SFSC annulled the award and referred the case back to the tribunal. By award of 17 June 2021, the tribunal declared itself competent to hear the merits of the dispute. In its appeal of 18 August 2021 against the award of 17 June 2021, Venezuela criticized C.S. for having carried out an inadmissible restructuring of its investment for the sole purpose of obtaining BIT protection at a time when a dispute with the host State (i.e. Venezuela) was foreseeable, which constituted an abuse of rights.

C.S. was founded in Spain by the US-American C. and provided with 100% of all shares of the Venezuelan company D. by means of a contribution in kind. This happened at the time when Hugo Chavez announced the creation of a price control authority in Venezuela. While C.S. could be seen as the object of *treaty shopping* by C., which wanted to achieve the best possible legal protection for the investments made, the SFSC reasoned that *treaty shopping* involved drawing a line between legitimate planning to acquire a nationality and treaty *abuse*. While there are legitimate reasons for structuring an investment in such a way that it benefits from the best possible protection, such structuring constitutes an abuse of a treaty when it is carried out at a time when a dispute with the host State is foreseeable. The criterion of foreseeability must meet high standards, whereby the objective standard of a "reasonable investor" must be applied. If, according to this standard, a dispute is foreseeable with a very high probability at the time of structuring an investment, there is a presumption of treaty *abuse*. The SFSC held that the Venezuela failed to show that the restructuring was carried out with a view to a specific dispute at a time when that dispute was foreseeable. The SFSC rejected Venezuela's argument that C.S. was guilty of an *abuse* of the treaty and dismissed the appeal.

New Law and Amended Rules

a) Arbitration of Corporate Disputes

On 1 January 2023, article 697n of the Swiss Code of Obligations ('CO') entered into force, allowing companies incorporated under Swiss law (corporations, by reference also partnerships limited by shares and limited liability companies) to provide for arbitration clauses for corporate disputes in their articles of association. Such arbitration clauses are binding on the company, its governing bodies and its members, as well as the company's shareholders, irrespective of whether the consent was given thereto. Arbitrations based on such arbitrations clauses are subject to the provisions on domestic arbitration (articles 353 et seq. Swiss Civil Procedure Code) and must be seated in Switzerland. The new Article 697n CO is part of a larger reform of Swiss corporate law, adopted in 2020 and enacted in several steps. The reform modernized Swiss corporate law and covered, i.a., share capital, corporate governance, shareholder rights, executive compensation, financial distress and gender representation.

As a supplement to article 697n CO, the Swiss Arbitration Centre issued new Supplemental Swiss Rules for Corporate Law Disputes (Supplemental Swiss Rules) to supplement the Swiss Rules for the purpose of administering and conducting arbitration proceedings in relation to corporate law disputes.

b) Amendments to CAS Code

On 1 November 2022, the amended CAS Code for Sports Arbitration, which applies to

proceedings before the Court of Arbitration for Sport (CAS), entered into force. The amendments are not substantial and include, i.a., an increase in the number of arbitrators on the CAS list from 150 to 300, amended provisions on the Appeal Arbitration Procedure, and the fact that the President of the Appeal Arbitration Division must now take into account the criterion of diversity in addition to the criteria of expertise, availability, equality and turnover when selecting sole arbitrators and presidents of panels.

Concluding Remarks on the 2022 Developments

In 2022, in addition to the welcome clarifications on the revised provisions of PILA, the SFSC has confirmed its established case law, namely that: (i) the revised article 178(1) PILA does not require that an arbitration agreement be signed (formal validity) and that the parties' intention to conclude an arbitration agreement is subject to the rules of contract interpretation (substantive validity of an arbitration agreement) (decision 4A_460/2021 (03.01.2022)), (ii) any violations of procedural rights must be complained about by the parties without delay (decision 4A_332/2021 (06.05.2022)), (iii) the objection of lack of jurisdiction of the arbitral tribunal – also when raised with respect to the relief sought by way of counterclaim – must be raised before entering into the merits of the case (Article 186(2) and Article 190(2)(b) PILA)(decision 4A_214/2022 (26.10.2022)). In the decision 4A_406/2021 (14.02.2022), the SFSC confirmed that, if the appeal to the CAS is not filed within the time limit, it is not the jurisdiction (*ratione temporis*) of the arbitral tribunal that is at issue, but the (in)admissibility of the appeal.
