

# Kluwer Arbitration Blog

## Swiss Appeals, Swiss Efficiency

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When it comes to appeals of international arbitral awards Switzerland lives up to its reputation for order and efficiency. A recent victory in defending an appeal here prompts me to comment on the practical effects and consequences of the now well-honed Swiss system for appealing international awards rendered in my small but clearly “arbitration friendly” country.

The appeal arose from an ICC arbitration before three experienced Swiss arbitrators and concerned four very similarly drafted contracts, going back to the early 1990s, for commission arrangements in the obtention of construction contracts in a fairly notorious African country; the contracts were governed by Swiss law, and Geneva was the place of arbitration. The Claimant was an offshore company that demanded many millions of dollars in allegedly unpaid commissions. The end result was that the arbitral tribunal decided that it was not proven that the contracts were illegal or contra bonos mores, but that two of the contracts were statute barred, a minor amount was due on the third, and the Claimant had not performed services that could trigger commissions on the fourth. Respondent was awarded 90% of its costs, with the result of a small net award to Respondent. Most of the rest of the facts are confidential, but they are not essential for the points I wish to make here.

Claimant, who had English counsel, was unhappy with the Award and saw fit to appeal it. The full decision, handed down on 29 March, well illustrates some of the particularities, and difficulties, of appealing an international arbitral award in Switzerland.

### Timing and Efficiency

An Appeal of an arbitral award in Switzerland is a one-shot process to the Swiss Supreme Court (Tribunal fédéral or Bundesgericht) in Lausanne. The appellate brief and its attachments—not just the notice of appeal—must be filed within 30 days of the notification of the arbitral award. This is a very brief deadline given that the appeal must be filed in a Swiss official language and most international arbitrations in Switzerland are in English, and often pleaded by foreign counsel who are not fluent in French or German, (in a typically Swiss pragmatic twist it is not, in practice, required that the Award itself be translated from English, although you will not find that practice set out in the Court’s procedural law or regulation). Subject to the payment of costs-discussed below- the Court sets a deadline for the Appellee to respond, typically about a month. There is rarely, if ever, any oral argument or further briefing and the decision is usually rendered about two months after the reply brief has been submitted. In the case provoking this comment we filed our reply brief on 1 February and the decision was handed down on 15 March. One particularity of

such appeals is that the operative last page of the decision, or *dispositif*, is notified first, and the reasoning of the decision is delivered later—in this case the reasoning was delivered just two weeks after the result was known. By the standards of most popular arbitration venues this is a very rapid and efficient appeals process. For good measure the pendency of the appeal does not, under Swiss law, suspend the effectiveness of the underlying arbitration Award; such suspensive effect is only granted by the Supreme Court on special motion, very few of which motions succeed.

## **Costs**

In the centuries when Switzerland was a poor country and many of its men hired themselves out as foreign mercenaries there arose the expression *kein Kreuzer, kein Schweizer*—no money, no Swiss (the *Kreuzer* being a gold coin); those who have dealt with Swiss courts and administrations know that that spirit is alive today. The Supreme Court, upon receipt of the appeal, requires the appellant promptly to post security for the Court’s costs in the event the appeal is unsuccessful; the deposit in this case was CHF 30,000, which is fairly typical—only when the deposit is made will the Court put the appeal in motion. A further factor is that the appellee may request security for its legal costs in defending the appeal, unless the appellant is from a country that is a party to a bilateral or multi-lateral convention with Switzerland that dispenses them from this requirement. As the Appellant here was an offshore company that, moreover, had not paid the amounts due under the arbitral Award we made a motion for security for costs, which was granted in the amount of CHF 35,000. If the appeal is unsuccessful the Court usually orders that all of the Court costs and security be paid over—which is what happened here. In the rare cases where an appeal is successful Court costs and attorneys fees are awarded against the Appellee. So an appeal of an international award is not a free ride, and should only be undertaken where the party has a strong basis for asserting one of the grounds of appeal that fall with Article 190 of the Swiss Private International Law Act (LDIP) which has governed international arbitration in Switzerland since 1989.

## **Limited Grounds, Limited Chances for Success**

During the more than twenty years that the LDIP has been in force the Supreme Court has built up, and cleaved to, a narrow and restrictive application of the five limitative grounds for appeal (telegraphically: improper appointment of arbitrator(s), jurisdiction, *ultra* or *infra* *petita*, due process, and public policy). Since 2007 the procedural law for such appeals has changed due to advent of the Law of the Supreme Court (LTF in its French abbreviation), but the substance, and most of the practical procedural steps, for appeals of international arbitral awards to the Supreme Court are largely unchanged. In particular, parties seeking to make such appeals are often constrained to shoehorn what is essentially an appeal on the merits into one of the five grounds of appeal permitted by Article 190 of the LDIP; this is rarely successful. My recent case is a good example. The appellant argued that the arbitral tribunal gave impermissibly different interpretations to the separate, but textually identical, contracts in dispute and that this constituted a violation of the principle of *pacta sunt servanda* that amounted to a violation of public policy. The Supreme Court decision emphasized, and strongly reaffirmed, its previous case law that the arbitrator’s contractual interpretation, and the legal consequences that flow from it, cannot be a public policy violation within the meaning of Article 190 (2) (e) of the LDIP; only the refusal of the arbitrator to apply a valid contractual clause, or the arbitrator’s application of a contract clause that does not bind the parties may be constitutive of such a violation of public policy. The decision also made clear that the Supreme Court had reversed its prior case law concerning “intrinsically contradictory awards”, and confirmed that an argument that the Award was “*intrinséquelement contradictoire*” is not a basis for an appeal on public policy grounds. Finally, the decision provided

an occasion for the Supreme Court explicitly to confirm that, even under the new LTF, the appeal of an arbitration award (other than a jurisdictional award) is of a “caractère purement cassatoire”: the Supreme Court is limited to affirming or annulling the Award—it cannot rewrite the award and grant damages, which is what appellant asked for in its appeal.

The bottom line is that appeals of international arbitral awards on the merits are not available in Switzerland—even by the backdoor. Absent a serious jurisdictional or procedural error, the chances of a successful appeal are virtually nil. This has been empirically confirmed in a study by Zurich lawyer Felix Dasser. Dasser’s most recent update found that there have been 229 appeals of arbitral awards under the LDIP, and that only 6.5% have been successful. The ground of appeal with the greatest chance of success—jurisdiction—only had a success rate of 10.1%. I add that experienced arbitrators in Switzerland are very aware of the strictures of Swiss arbitration law, and many live in mortal fear of the embarrassment of being overturned by the Supreme Court; they are very unlikely to draft an Award from which a successful appeal can be taken.

There has been much discussion, including on this blog, of the distention, inefficiency and high cost of arbitration—and I share much of these concerns and have written about them myself. Arbitration appeals in Switzerland cannot be said to be inefficient or overbroad, but if the system works well and rapidly it is also because it is narrow and strict. Parties who truly seek one-stop finality in their arbitral awards are well served here (and foreign arbitral parties can by a writing validly exclude Swiss appeals). By the same token parties must accept that their possibility of appellate redress is most limited, even where they are convinced the arbitrator made an incorrect contractual interpretation or even an “intrinsically contradictory” one.

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