

# Kluwer Arbitration Blog

## Bad faith claims in challenge proceedings and counsel's liability for costs

Alexandre Mazuranic (Schellenberg Wittmer) · Monday, October 27th, 2014 · Schellenberg Wittmer

Has the number of bad faith challenges against arbitral awards increased? Is there a need to better control parties and their counsel, and to sanction them should they not play by the rules?

The topic was discussed earlier this year at a seminar organized in Stockholm by the Swedish Arbitration Association.<sup>1)</sup> The debate was prompted by discussions in Sweden<sup>2)</sup> on how to make court proceedings for the challenge of awards more time-and-cost efficient in view of the “increasing” number of challenges and of the high rate of dismissals (90-95%),<sup>3)</sup> as well as by recent decisions of the Svea Court of Appeal making counsel liable for costs on the basis that the challenges brought were patently unfounded.<sup>4)</sup>

This issue arises in other jurisdictions, too. For instance, US courts have imposed monetary sanctions to counsel for bringing frivolous claims frustrating the enforcement of awards (see e.g. *Enmon v. Prospect Capital Corp.*, where counsel was imposed a USD 354,000 monetary sanction).<sup>5)</sup>

Although Swiss law provides for sanctions in case of bad faith conduct in proceedings before the Swiss Federal Tribunal (the court tasked with ruling on challenges of international arbitral awards in Switzerland), their application in challenges of award is unheard of, or at a minimum very, very exceptional.

It is first important to provide some background information on challenge proceedings in Switzerland. According to the most recent statistics for Switzerland,<sup>6)</sup> 435 challenges were brought before the Swiss Federal Tribunal between 1989 (the date of enactment of the current arbitration law) and 2013, of which 331 only reached a decision on the merits (61 were dismissed for lack of admissibility and 43 were withdrawn). Out of these 331 decisions, only 25 set aside partially or completely the award. Hence, only 7.5% of the challenges were successful between 1989 and 2013 (the ratio appears to be similar in Sweden). In the last years, the Swiss Federal Tribunal has rendered 35 decisions on arbitration per year on average, although there are many more awards rendered in Switzerland each year.

The Swiss Federal Tribunal has on occasion defined what constitutes bad faith or reckless conduct in proceedings pending before it, although not in proceedings regarding the challenge of an award.

Such behaviour may include a party not describing and motivating its case as required by law, or filing a submission after expiry of the time limit.<sup>7)</sup> Legal scholars also apply the notion of reckless behaviour to a party arguing facts that it knows are not true or making an argument that completely ignores an undisputed factual element.<sup>8)</sup>

In light of the above, it is not surprising that there are no known cases of sanctions for bad-faith challenges of an award.

Nonetheless, the Swiss Federal Tribunal has weapons to deal with bad-faith behaviour that are similar to those of courts in most other jurisdictions.

First, the federal judges may order the unsuccessful party to bear the court costs. These costs are based on a scale established on the amount in dispute and capped at CHF 100,000, unless exceptional circumstances justify higher fees.<sup>9)</sup>

Second, the federal judges may order the unsuccessful party to bear the other party's costs. The costs owed to the party who won are determined on the basis of the amount in dispute and not the costs actually borne by that party, and they are capped at 1% of the amount in dispute (in case of an amount in dispute exceeding CHF 5 million).<sup>10)</sup>

The upper limit of the parties' costs may appear at first sight to be low, but one has to bear in mind that challenge proceedings in Switzerland are quick and somewhat straightforward. The entire proceedings last on average 5-6 months. There are between 1 and 2 rounds of written submissions only, after which the Swiss Federal Tribunal renders its award. There is no hearing, no full review of the facts, no oral pleading. The procedure is in writing. This, in addition to the efficiency and experience of the Swiss federal judges, is probably the main reason for the short duration of the proceedings. In contrast, challenge proceedings in other jurisdictions—like in Sweden—may last a year or more and will generally include an evidentiary hearing with witnesses (and possibly arbitrators). This naturally increases not only the duration of the proceedings, but also the costs related thereto.

Third, the Swiss Federal Tribunal may also order the unsuccessful party's counsel—and not only the party itself—to bear the above costs.<sup>11)</sup> This factor also constitutes good ground for counsel not to frivolously challenge awards rendered in Switzerland.

Fourth, Swiss Federal Judges may also impose a fine on counsel, although the amount seems insignificant when compared to the US case referred to above (the amount is capped at CHF 2,000, CHF 5,000 in case of repetition), or they may notify the bar's oversight committee of the lawyer's conduct.

A fifth element—one that is often considered by counsel when determining whether to challenge an award or not—is related to the reputation of the counsel. The Swiss Federal Tribunal has a sophisticated understanding of arbitration and renders good decisions (with a handful of questionable decisions which usually generate great debate within the arbitration community). Counsel experienced in arbitration will therefore think twice before filing a challenge against an award and will probably file it only when they are convinced that there is some chance of success (which, considering the success rate, is not often). This may also explain why bad faith conduct is not that common in challenge proceedings in Switzerland.

In conclusion, although there are no statistics regarding what one may consider a bad faith challenge of an award, it would appear that most of the challenges in Switzerland do not fall in that category, or to the very least, have not been considered as such by the Swiss Federal Tribunal, which has rarely, if ever, ordered any sanction. Should there be, however, a change in parties' conduct (or that of their counsel), the Swiss Federal Tribunal is well equipped to deal with this situation.

As a final word, it is worthwhile noting that although the sanctions described above are not governed by the Swiss arbitration law (i.e. Chapter 12 of the Swiss Private International Law Act), the current revision process of the Swiss Arbitration law has no intention to modify or reinforce the sanctions currently available, thus implicitly acknowledging that the solutions in place are deemed to be sufficient.

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The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with one figure in the center being magnified by a magnifying glass. The background is accented with horizontal lines in blue and green.

References

- ?1 Seminar of the Swedish Arbitration Association organised in Stockholm on 13 May 2014.
- ?2 Earlier this year, the Swedish government formed a special committee to consider whether a revision of the Swedish Arbitration Act was required.
- ?3 Between 1 January 2004 and 31 May 2014, 191 challenges of awards were brought before the Swedish Courts of Appeal.
- ?4 Decisions of the Svea Court of Appeal in cases No T 6147-10 dated 28 March 2013 and No T 6123-12 dated 22 April 2013.
- ?5 *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 149(2nd Cir. 2012).
- ?6 Statistical data provided by the Swiss Federal Tribunal in its yearly *Rapport de gestion*, published at [www.bger.ch](http://www.bger.ch); Felix Dasser, *Challenges of Swiss arbitral awards – Selected statistical data as of 2013*, 27 April 2014, published on <https://www.arbitration-ch.org/pages/en/asa/news-&-projects/details/974.challenges-of-swiss-arbitral-awards-%E2%80%93-selected-statistical-data-as-of-2013.html>.
- ?7 Decision of the Swiss Federal Tribunal dated 4 February 2010 in the matter 2C\_744/2009; decision of the Swiss Federal Tribunal dated 10 July 2007 in the matter 1B\_116/2007.
- ?8 Yves Donzallaz, *Loi sur le Tribunal fédéral, Commentaire*, Berne 2008, para. 484.
- ?9 Article 65(5) of the Swiss Law on the Federal Tribunal (RS 173.110).
- ?10 Article 68 of the Swiss Law on the Federal Tribunal (RS 173.110) and Article 8 of the Regulation on the tariff of judicial fees of the Federal Court (RS 173.110.210.1).
- ?11 This is provided for under Articles 66(3) and 68(4) of the Swiss Law on the Federal Tribunal (RS 173.110).

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