Decisions of the Swiss Federal Supreme Court in 2018: Part I

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Petra Rihar (Morad, Bürgi & Partner)

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This is the 1st part of the report highlighting the most significant arbitration-related decisions of the Swiss Federal Supreme Court (the "Supreme Court") published in 2018.

Consent to Arbitrate

In two decisions, the Supreme Court dealt with the **validity of an arbitration agreement** under Swiss law. It set aside both awards – two of rather rare cases in which an appeal was granted.

In the decision 4A_150/2017 of 4 October 2017, published on 19 January 2018, the Supreme Court set aside a partial award, holding that the parties did not consent to submit to arbitration. The dispute arose between two insurance companies which, in the context of a reinsurance arrangement, entered into several agreements. Whilst the other agreements contained an arbitration clause, the retrocession agreement, on which the claim was based, provided for jurisdiction of state courts. Confirming the **principle of consent** in arbitration, the Supreme Court held that the interpretation of an arbitration agreement follows the general principles of contract interpretation, the decisive factor being the concurrent actual will of the parties. Where no such concurrent actual will exists, the agreement must be interpreted according to the principle of trust. When interpreting an arbitration agreement, it must also be borne in mind that the renunciation of a state court severely restricts the possibilities to appeal. Consequently, the will to depart from the state court jurisdiction cannot be easily assumed and must be clearly expressed by the parties.

Following the same principles, in the decision 4A_432/2017 of 22 January 2018, published on 26 February 2018, the Supreme Court set aside a CAS award. The dispute arose from an exclusive brokerage agreement between a footballer and his agent, who sued the footballer for payment of brokerage compensation. Whilst the dispute resolution clause in the brokerage agreement contained a reference to AFA and FIFA as "national and international bodies", it contained no mention of an arbitral tribunal, but rather submitted the parties to the jurisdiction of the state courts in the "Comercial de Capital Federal, Republica Argentina". Applying the principle of trust, the Supreme Court found that the tribunal had wrongly declared itself competent to decide the dispute as the dispute resolution clause did not contain a clear expression of the parties' will to derogate from the state court jurisdiction.

The Scope of an Arbitration Agreement

In the decision 4A_583/2017 of 1 May 2018, published on 6 June 2018, the Supreme Court dealt with the **objective scope of an arbitration agreement** contained in a mandate agreement dated 2 July 1997 ("Mandate"), in a dispute between a foundation and an attorney. Whilst the foundation requested the return of a share certificate, the attorney claimed retention right on the certificate to secure outstanding payments under the Mandate and under other agreements. In an interim award, the tribunal affirmed its jurisdiction to hear all claims for outstanding payments as well as the request for the return of the share certificate. The attorney appealed against this award arguing that the tribunal was competent to assess his claim for outstanding payments under the Mandate, but not his claims not having their basis in the Mandate. The Supreme Court found that the parties did not actually agree on the objective scope of the arbitration agreement. It, therefore, interpreted the agreement in accordance with the principle of trust, thereby assuming that the parties did not want a division of legal process, but rather a comprehensive jurisdiction of the arbitral tribunal. The Supreme Court held that the jurisdiction of a tribunal competent for disputes arising out of a contract also included the assessment of the opposing party's retention claims, provided that these claims had a sufficiently close connection with the object of retention, i.e. the share certificate. It was thus not necessary that the retention claims had their basis in the Mandate.

When deciding on the validity of an arbitration clause, the Supreme Court requires a clear expression of the parties' will to derogate from the state court jurisdiction. Once the validity of the arbitration agreement is established, the Supreme Court's approach is more liberal. When deciding on the objective scope of an arbitration agreement, it tends to assume a comprehensive jurisdiction of the tribunal.

Substance over Form

In the decision 4A_136/2018 of 30 April 2018, published on 6 June 2018, the Supreme Court dealt with the question of whether an interim decision titled as "Verfügung" (corr. to procedural order) should be challenged in the same way as an interim award. The issue arose from a dispute brought before a tribunal under the DIS Arbitration Rules. During the proceedings, the claimant challenged both the chairman and the arbitrator nominated by him for lack of impartiality. After the tribunal rejected the challenge in a "Verfügung", the proceedings continued and ended with an award that was detrimental to the claimant. Subsequently, the claimant appealed before the Supreme Court requesting that the award be set aside, and the case be referred back to a newly appointed arbitral tribunal. Confirming the **"substance over form" approach**, the Supreme Court held that interim decisions of a tribunal on its jurisdiction or its composition – including an alleged bias of the arbitrators – are not only subject to an independent appeal but must also be directly challenged within 30 days upon notification, as the objections raised will otherwise forfeit and cannot be brought before the Supreme Court in an appeal against the final award.

The parties are well advised to promptly study the content of an arbitral decision – regardless of its title – and examine whether it can or must be challenged in order not to forfeit the grounds of appeal.

Anticipatory Assessment of Evidence

In the decision 4A_550/2017 of 1 October 2018, published on 18 December 2018, the Supreme Court dealt with the anticipatory assessment of evidence. The issue arose in a dispute brought before a tribunal under the Swiss Rules. In the award, the respondent was ordered to pay to claimant USD 1.5 Mio. on the basis of a contract which was – according to the respondent – invalid because it did not express the true will of the parties. The respondent challenged the award before the Supreme Court arguing that he was denied his right to be heard as the tribunal had ignored a number of arguments and evidence presented by the respondent. The Supreme Court dismissed the appeal, confirming the **tribunal's right to an anticipatory assessment of evidence**. It held that a tribunal is allowed to

refrain from assessing all evidence presented by the parties if (i) the presented evidence is unfit to support the alleged facts, or (ii) the fact to be proved is already sufficiently established by other evidence and the tribunal, by making an early assessment, reaches the conclusion that the additional evidence would not lead to different results with respect to the disputed facts.

This principle was again confirmed in the decision 4A_65/2018 of 11 December 2018, published on 27 December 2018, concerning an investor-state dispute brought before a tribunal under the UNCITRAL Arbitration Rules. Before the Supreme Court, the appellant Republic of India alleged, i.a., a violation of its right to be heard as it did not obtain permission to present a preparatory work for a bilateral investment treaty, which allegedly supported its position that the BIT relevant in the case at hand did not to protect indirect investments. As the preparatory work not only related to a treaty different from the relevant BIT, but was also presented late, the Supreme Court found that, due to the delay in invoking evidence that was not decisive in the case at hand, the appellant's right to be heard had not been violated. It pointed out that not only did tribunals have a right to an anticipatory assessment of evidence, but also that a party's right to have the presented evidence assessed must be exercised in a timely manner and in the agreed form.

Tribunal Appointed Expert

In the decision 4A_505/2017 of 4 July 2018, published on 6 September 2018, the Supreme Court dealt with the question whether a tribunal may, based on the results of its anticipatory assessment of the previously presented evidence, subsequently unilaterally reduce the scope of the tribunal appointed expert's mandate concerning technical issues. The reduction of the mandate's scope by the tribunal resulted in the exclusion of the counterclaims from the expert's analysis. The Supreme Court held that the tribunal was entitled to reduce the scope of the expert's mandate since (i) in the relevant agreement signed by all parties, the tribunal had expressly reserved the right to adapt the scope of the expert's mandate, and (ii) the tribunal's anticipatory assessment of evidence previously presented (including a witness hearing) showed that the counterclaims would be dismissed based on legal considerations, irrespective of the expert's findings.

The 4A_505/2017 decision also confirms the established requirements regarding the **parties' right to a tribunal appointed expert**. Such right exists, if: (i) the party expressly requested the appointment of an expert, (ii) in the agreed form and in a timely manner, (iii) she advanced the costs of the expertise, (iv) the expert evidence relates to relevant facts, and (v) it is necessary and capable of proving such facts. The requirements (iv) and (v) are met, e.g., where the facts are of a technical nature or otherwise require special knowledge and the arbitrators themselves do not have such knowledge (see also Kluwer Arbitration Blog of 9 August 2011).