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

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This is the 2nd part of the report highlighting the most significant arbitration-related decisions of the Swiss Federal Supreme Court (the "Supreme Court") published in 2018.

Jura Novit Arbiter

In the decision 4A_525/2017 of 9 August 2018, published on 26 September 2018, the Supreme Court dealt with the principle of *jura novit arbiter*, controversial in a dispute resulting from a construction contract governed by Algerian law, between an Algerian public company and a constructor Canadian company. Applying the principle of equity and a contractual clause that was, according to the tribunal, not strictly applicable, the tribunal ruled that the constructor had to pay damages for the unjustified presence at the construction site. The constructor appealed to the Supreme Court arguing that its right to be heard was violated since the tribunal applied the rules of equity as an autonomous source of law under Algerian law, although no arguments based on equity had been advanced by either party, and the applied contractual clause did not concern the type of delay referred to in the counterclaim.

Referring to the principle of ***jura novit arbiter***, the Supreme Court held that the right to be heard relates mainly to the establishment of facts and not of law. As the arbitral tribunals freely determine legal provisions applicable to the dispute, they may also decide on the basis of rules of law other than those invoked by the parties. The parties' right to be heard becomes relevant and the parties must receive an opportunity to comment only in exceptional cases, namely if (i) the arbitral tribunal intends to base its decision on a legal norm that was not raised during the proceedings, (ii) the relevance of which could not be assumed by the parties, and the application of the norm thus comes as a surprise. The Supreme Court found that the notion of equity was used in different provisions of Algerian law and had been mentioned repeatedly during the arbitration. The appellant could thus not reasonably argue that it could not expect the tribunal to use considerations of equity to decide the dispute. The same was true for the contractual clause referred to by the tribunal by analogy, which was not only known to the parties, but had also been invoked by one of them in support of another claim.

The principle of ***jura novit arbiter*** was also applied in the decision 4A_338/2018 of 28 November 2018, published on 21 December 2018. In a domestic arbitration, a Swiss company alleged that FIFA had infringed the company's contractual rights to purchase World Cup tickets. The tribunal rendered a decision in favor of the company. FIFA appealed to the Supreme Court arguing, i.a., that its right to be

heard was violated since the tribunal applied one specific provision of Swiss law although neither party claimed that this provision was relevant. The Supreme Court held that the argument was inadmissible, noting that FIFA failed to explain why it could not have assumed the relevance of said provision and why its application by the tribunal came as a surprise.

Jura novit curia/arbiter, an established principle of Swiss procedural law, has two aspects, (i) the determination of the applicable law and (ii) the ex officio application of the determined law to the case.

Res Judicata

In the decision 4A_247/2017 of 18 April 2018, published on 6 June 2018, the Supreme Court dealt with the principle of *res judicata*. The dispute arose out of two loan agreements providing for the application of Swiss law and each including an arbitration clause. The dispute was first brought before and decided by state courts of Russia and the BVI. It was subsequently brought before a tribunal seated in Zurich. The tribunal's award was appealed against before the Supreme Court.

Confirming its prior case law, the Supreme Court held that the **principle of *res judicata*** governs, i.a., the relationship between a Swiss arbitral tribunal and a foreign state court. If a party files a claim before a tribunal seated in Switzerland, identical to the one already subject of a judgment rendered between the same parties in another territory, the arbitral tribunal – in order not to expose itself to a claim of violation of procedural public policy – must declare the claim brought before it inadmissible insofar as the foreign judgment is capable of being enforced in Switzerland. The Russian state court had rendered its judgment disregarding the objection of lack of jurisdiction raised before it, without, at the same time, finding that the arbitration agreement was null and void, inoperative or incapable of being performed. As a consequence, the decision of the Russian state court was not enforceable in Switzerland and did not have the *res judicata* effect in the Swiss arbitration. The tribunal did therefore not violate the procedural public policy when rendering the award.

Under Swiss law, *res judicata* applies where (i) the parties and (ii) the subject matter are identical. It affects the operative part of the decision, but not the reasons on which it is based. It applies, without restriction, if a Swiss state court or tribunal is called upon, but a Swiss court decision or award exists. It applies, under the precondition of enforceability, where a Swiss court or tribunal is called upon, but a foreign court decision or award already exists.

Costs

In two decisions, one of them being the decision 4A_338/2018 (cited above), the Supreme Court dealt with the appeals against **arbitral cost decisions**. It held – in both cases – that the allocation of costs is a question of procedural law and not of substantive law.

In the decision 4A_450/2017 of 12 March 2018, published on 1 May 2018, a cost decision of a sole arbitrator was appealed against, based on the alleged violation of the principle of equal treatment. The dispute concerned the interpretation of a termination clause in a contract. The arbitrator issued a final award and agreed with the respondent on the disputed point. Claimant appealed before the Supreme Court arguing, i.a., that the arbitrator, by awarding costs exclusively to the respondent, although, by his own statement, no party was fully successful with its claims, violated the principle of equal treatment of the parties. The Supreme Court held that the principle of equal treatment can be invoked during the evidentiary phase, however not in later stages of the arbitral proceedings, and is

not affected by the assessment of evidence or the application of law during the deliberations or when deciding on costs.

As a rule, in international arbitrations, the cost decisions may be challenged on the grounds listed in article 190(2) PILA, in particular if the tribunal lacked jurisdiction to decide on costs (article 190(2) lit. b) or if its decision went beyond the claims submitted (article 190(2) lit. c). Unlike in Swiss domestic arbitrations, in international arbitrations, the arbitrators' fees and expenses cannot be challenged with the argument that they are manifestly excessive.

Success Fee

In the decision 4A_125/2018 of 26 July 2018, published on 29 August 2018, the Supreme Court dealt with the question of **admissibility of a success fee** in arbitration. The question arose in a dispute between a Portuguese client company and a Zurich law firm (representing the company in two ICC arbitrations) regarding the amount invoiced by the law firm for its work. With respect to the law firm's remuneration, the parties agreed on a combination of a reduced hourly fee and a success fee. The dispute was brought before a sole arbitrator who found that the success fee arrangement was valid. The company challenged the award.

The Supreme Court confirmed that a success fee ("*pactum de palmario*") was admissible under Swiss law. However, due to its restricted scope of review under article 190(2) PILA, it did not examine the admissibility parameters under domestic Swiss law. Instead, it validated the sole arbitrator's explicit departure from the domestic requirements holding that Swiss public policy was not violated by the sole arbitrator's confirmation of a success fee owed to the law firm by its client (see also Kluwer Arbitration Blog of 7 October 2018).

Enforcement

In the decision 5A_942/2017 / 144 III 411 of 7 September 2018, published on 27 September 2018, the Supreme Court dealt with the admissibility of an **attachment over real estate property of a sovereign state** in Switzerland. The attachment order proceedings were commenced by a UK company against the Republic of Uzbekistan, based on an award in favor of the UK company, rendered under the UNCITRAL Arbitration Rules by a tribunal seated in Paris.

With reference to article III of the New York Convention, the Supreme Court held that, for attachment of assets of a foreign state located in Switzerland in cases where the foreign state has acted "*iure gestionis*", the requirement of a sufficient connection applies. It presupposes that the legal relationship on which the arbitral award is based and from which the attachment claim arises has a sufficient connection to Swiss territory. This requirement is fulfilled if (i) the legal relationship was established or is to be fulfilled in Switzerland, or (ii) the foreign state has undertaken acts thereby establishing a place of performance in Switzerland. By contrast, for an attachment to be granted it is not sufficient that assets are located in Switzerland or the claim has been awarded by a tribunal seated in Switzerland.