Decisions of the Swiss Federal Supreme Court in 2019 – 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") issued in 2019.

Ne Eat Arbiter Extra Petita

In the decision 4A_294/2019 / 4A_296/2019 of 13 November 2019, the Supreme Court dealt with an *extra petita* appeal against an ICC-award. The dispute arose from an agreement between A (Claimant) and B and C (Respondents) regarding the supply of 60 armored vehicles. After various disagreements, A, who was tasked to develop, design, manufacture and supply the vehicles, commenced an arbitration and submitted, *i.e.*, the following request:

> *"… 3. The Tribunal shall declare Respondents, severally and jointly, liable to compensate Claimant for any and all damages incurred as a result of Respondents' contractual breaches resulting in Claimant's partial avoidance of the 4×4 Armored Tactical Vehicle Contract dated 25 January 2015, as amended …".*

In section a. of the award, the Tribunal declared that:

> *"… ii. The Respondents are jointly and severally liable to compensate the Claimant in the amount of USD 1,605,521.37, for damages incurred as a result of the Respondents' contractual breaches of the Agreement / Amended Agreement; …".*

A appealed, *i.e.*, against section a.ii. of the award arguing that the arbitral tribunal had decided on points of dispute which had not been submitted to it. While A had sought a declaration that the defendants were jointly and severally liable for the damage arising from the breaches of contract, the tribunal ordered the Respondents to pay damages under joint and several liability.

The Supreme Court upheld the appeal stating that the tribunal, instead of deciding on A's request for a declaratory judgment, decided on a request for performance which A had not made in the arbitration. By doing so, the tribunal went beyond A's requested relief.

By contrast, the principle of *ne extra petita* is not violated where a tribunal, without granting more or something else than requested, relies on different legal reasons than those argued by the parties (*iura novit arbiter* previously discussed here on the blog).

Impartiality and Independence

In the decision 4A_292/2019 of 16 October 2019, the Supreme Court dealt with the admissibility of ***ex parte* communication** between an arbitrator and a party's counsel. A dispute between a claimant Turkish company B and a respondent Swiss Company A was to be solved in an ad hoc arbitration. Addressing the competent court, B requested the appointment of L as co-arbitrator. A opposed this nomination stating the L had previously worked in the same law firm as B's counsel. The court nominated L as arbitrator stating that this fact does not compromise L's independence and impartiality. The court further nominated E as the second co-arbitrator. Subsequently, both co-arbitrators nominated S as chairman. Two days after his appointment and four days before the constitution of the tribunal, L had a 12-minute telephone conversation with B's counsel. According to tribunal's explanation, L had called B's counsel to inquire whether the contract contained a choice of law clause, with the purpose of enabling the two co-

arbitrators to choose a suitable chairman. L had made the telephone call with the prior consent of the co-arbitrator and had subsequently informed the chairman of the call. The arbitration ended with an arbitral award in favor of B. A challenged the award on the basis of irregular constitution of the tribunal due to L's lack of impartiality and independence.

The Supreme Court dismissed the appeal stating that unilateral contacts between a party's counsel and an arbitrator are not generally forbidden. Having regard to paragraph 8 (a) and (b) of the IBA-Guidelines on Party Representation, it is acceptable to contact a potential arbitrator in order to determine her availability or to discuss the appointment of a chairperson. However, following the appointment of the chairperson, unilateral contacts are in principle inadmissible. L's telephone conversation served the purpose of selecting a suitable chairperson, since the state court's appointment decision did not contain any information on a possible choice of law and the question was likely to influence the choice of a chairman. Viewed objectively and in the light of all circumstances, L.'s actions did not create an appearance of bias.

Recognition and Enforcement

The **impartiality and independence** was further discussed in the decision 4A_663/2018 of 27 May 2019, concerning the recognition and enforcement of two ICC-awards. The ICC-arbitrations were initiated by B, a Swiss Company belonging to the C Group, against A, the appellant in the case at hand. Chairman in both ICC-proceedings was F, a partner in the US law firm GLLP. After the awards, both in favor of B, were rendered, A challenged F's impartiality. The challenge was based on the fact that, during the ongoing arbitration, fees in the amount of USD 6.5 million were paid to GLLP by a company of the C Group. However, the client of GLLP was the US Department of Energy ("DOE") and not the company of the C Group. GLLP advised DOE in connection with the granting of a loan to C Group and the C Group paid the relevant fees based on an agreement with DOE.

B successfully applied for recognition and enforcement of the awards in Switzerland. Referring to Article V(2)(b) NYC, A appealed against the recognition arguing that it was contrary to the Swiss public policy.

The Supreme Court dismissed the appeal holding that, whether F is to be regarded

as biased, must be analyzed objectively and in the light of all circumstances. F's conduct was careless, as he inadequately entered the details of the parties to the proceedings into the conflict of interest system before accepting the mandate. The significant fees paid to GLLP by a company belonging to the same group as one of the parties to the arbitration were also critical. However, this was not sufficient to refuse the exequatur of the awards. The public policy exception must be interpreted restrictively, especially when it comes to the **recognition and enforcement of foreign decisions**. Only blatant disregard of the principle of independence and impartiality can lead to a refusal. In the field of international arbitration, it is mainly facts that clearly belong on the red list of the IBA Guidelines on Conflicts of Interest.

Principle of Good Faith in the Phase of Award Notification

In the decision 4A_264/2019 of 16 October 2019, the Supreme Court dealt with the parties' obligation to immediately give notice of any procedural errors. After the conclusion of an ICC-arbitration obliging the respondent A to make a payment to the claimant B, the award was delivered to A's counsel by courier on 23 October 2018, after receiving a copy of the award by email on 22 October 2018. On the basis of the email copy, A filed a request for interpretation of the award. Subsequently A discovered at an undisclosed date that several pages, including the dispositive part and the signature page, were missing from the original award delivered by courier. A's counsel reported this to the ICC-Secretariat by email on 8 April 2019, requesting that a complete original of the award be sent to him; he received it on 29 April 2019.

In her appeal of 29 May 2019, A requested that the final award, notified to A by courier on 23 October 2018, be declared null and void and the matter referred back to the ICC for rectification so that a new complete original would be delivered to A.

The Supreme Court held that the appeal was not admissible. A knew that an award had been issued and realized that the ICC-Secretariat wanted to send her this award. She was able to see that at least a part of the document and the signature were missing, simply by inspecting the document. She was not only in a position, but also obliged – in good faith and applying due attention – to report the

incompleteness of the award to the ICC-Secretariat immediately upon receipt of the original and demand the delivery of a complete document. After failing to do so, A forfeited her right to a new, proper service of a complete original. Whereas a timely request for service of a complete original could have been regarded as the triggering event for the statutory 30-day time limit, the fact that A failed to make such a request in due time resulted in the expiry of the time limit for challenging the award.

The principle of good faith also applies to parties to international arbitrations seated in Switzerland. According to the principle of good faith, the parties must immediately give notice of procedural errors. They forfeit the possibility of contesting the decision if they do not give the deciding instance the opportunity to remedy such errors in due time.

Appointment of Arbitrator Not Subject to Appeal

In decision 4A_146/2019 of 6 June 2019, the Supreme Court addressed the question whether a decision by which an arbitration organization appointed an arbitrator can be challenged before it.

Supreme Court held that a decision taken by a private body, such as the ICC or the CAS, to appoint an arbitrator – on the basis of the rules of the arbitration institution – does not constitute an award and is therefore not subject to direct appeal to the Supreme Court. Consequently, the appointment of the arbitrator can only be reviewed in the context of an appeal against the first challengeable award made by that arbitrator.

Conclusion

In its decisions issued in 2019, the Supreme Court has confirmed its constant arbitration-friendly jurisprudence. In some decisions, the Supreme Court further developed its case law by clarifying its earlier statements. This was particularly the case with regard the exact requirements that need to be met for it to intervene (*see*, in particular, 4A_424/2018, 4A_318/2018 and 4A_248/2019). In one decision, the Supreme Court extended its settled case law on PILA to situations where NYC

applies (see 4A_646/2018 / 145 III 199).