Kluwer Arbitration Blog

Decisions of the Swiss Federal Supreme Court in 2019 – Part I

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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") issued in 2019.

Arbitrability

In the decisions 4A_244/2019 and 4A_246/2019 of 12 December 2019, the Supreme Court dealt with the issue of **arbitrability**. In two arbitrations brought before a tribunal under the UNCITRAL Arbitration Rules (PCA Case No. 2015-34 and PCA Case No. 2015-35), Ukrainian companies ("Claimants") argued that the Russian Federation ("RF") had taken measures in connection with the integration of the Crimean peninsula in 2014 which affected the Claimants' assets (petrol stations, storage facilities and office premises) and led to their expropriation. In two awards dated 12 April 2019, the tribunal found that RF expropriated the investments made by the Claimants in violation of Article 5 of the 1998 Investment Protection Agreement (the "ISA 1998"), for which it owed a compensation.

RF appealed against the awards arguing that the dispute was not arbitrable and the awards should be annulled. By holding that the dispute fell under ISA 1998 and that the Claimants had made an investment in Russia, the tribunal had assumed that, as of 21 March 2014, the Crimea had changed its status and was no longer Ukrainian territory. However, the status of the Crimea was a question that could not be determined by the Claimants or by one party to the ISA 1998 on its own. Rather, only the contracting states could determine the extent of their mutual obligations by way of a formal amendment of ISA 1998. The tribunal had thus decided a question which was neither freely determinable nor arbitrable.

The Supreme Court held that the subject of the arbitration was not the status of the Crimea in relation to ISA 1998 or its status under international law, but rather the claim for compensation for the alleged expropriation of the Claimants' investments, *i.e.*, a pecuniary claim within the meaning of Article 177 PILA. Therefore, the awards were neither void nor contestable.

An award of a tribunal seated in Switzerland can be appealed against, if the tribunal, due to lack of arbitrability, should have, but did not decline its jurisdiction. In case of an appeal, when reviewing the issue of arbitrability, the Supreme Court applies the same law, *i.e.* the Swiss *lex arbitri*. By contrast, in recognition and enforcement proceedings under Article V(2)(a) NYC, the courts of the

state in which an award is to be enforced, apply their own laws, *i.e. lex fori executionis*, when deciding on the arbitrability of the dispute.

Extension of Arbitration Agreement to Non-Signatories

In the decision 4A_636/2018 of 24 September 2019, the Supreme Court dealt with the issue of whether a state was bound by an arbitration clause signed by a state-owned entity. A Turkish joint-venture A, consisting of two Turkish companies B and C entered into an agreement ("Agreement") with a state-owned Libyan entity D in order to realize a large infrastructure project. In 2011, as 70% of the project were completed, A, B and C suspended their work due to riots. Subsequently, they filed an arbitration claim against D as well as against the state of Libya. In a partial award, the tribunal, by reference to the *Westland* decision (P 1675/1987), found the claim against Libya, a non-signatory, inadmissible due to lack of jurisdiction. A, B and C appealed against this decision.

The Supreme Court dismissed the appeal stating that, under the Swiss *lex arbitri*, entities established under public law and founded by the state are considered to be legally independent. Arbitration agreements concluded by such entities cannot be extended to the states that control them, if they did not sign the respective agreement. With reference to its case law on Article 178 PILA, the Supreme Court stated that there are constellations, where an arbitration clause can be binding on persons who did not sign it, namely in the case of (i) an assignment of claims, (ii) an assumption of debt, (iii) a transfer of contract, and (iv) a contractual interference. In the last mentioned situation, a third party who continuously and repeatedly interferes in the performance of a contract containing an arbitration clause is treated as having joined the contract and submitted to the arbitration clause if she indicates her will expressly or gives the impression under the principle of good faith to be a party to the arbitration clause.

The Supreme Court concluded that A, B and C failed to show any circumstances from which they could have concluded that Libya had acceded to the arbitration clause by interfering in the execution of the Agreement.

The extension of an arbitration clause due to **contractual interference** was also discussed in the decision 4A_646/2018 / 145 III 199 of 17 April 2019. In 2009, a Slovenian company A entered into a distribution agreement ("Agreement"), valid until 31 December 2014, with a Swiss company BAG. The Agreement contained an arbitration clause providing for arbitration in Ljubljana and Slovenian laws applicable to the resolution of the dispute. With the consent of all parties involved, the Agreement was being performed by BAG's sister company BSA until the end of 2015. Subsequently, A filed a claim for payments against BSA before the state court. BSA objected the claim, stating that the court lacked jurisdiction due to the arbitration clause contained in the Agreement. The state court found A's claim against BSA inadmissible and, pursuant to Article II(3) NYC, referred the parties to arbitration. A appealed to the Supreme Court to vacate the lower court's decision.

The Supreme Court dismissed the appeal stating that Article II(2) NYC, like Article 178(1) PILA, requires that the arbitration agreement is signed by the (original) parties at the time the agreement is concluded. While the formal requirement only applies to the declarations of intent of the (original) parties to the arbitration agreement, the binding of third parties is governed by the applicable substantive law. This differentiation regarding the form requirement applies under

Article 178(1) PILA and under Article II(2) NYC. Which third parties are bound by an arbitration agreement is a question of contract interpretation, the decisive factor being the concurrent actual will of the parties. The effect of BSA's contractual interference did not concern the formal requirements of the arbitration agreement, but must be assessed in accordance with the applicable substantive law.

Violation of the Right to be Heard Must be Relevant to the Outcome

In the decision 4A_424/2018 of 29 January 2019, while acknowledging that the appellant athlete's right to be heard had been infringed, the Supreme Court refused to set aside a CAS-award ordering the athlete's suspension from the date of the award. The athlete appealed to the Supreme Court arguing that her right to be heard had been violated regarding the starting point of the suspension. The panel, when deciding on the starting point, took into account facts subsequent to the hearing, without giving her an opportunity to express her views on them.

The Supreme Court held that, by assessing the interests of the athlete and the results she had obtained after the hearing, without first giving her the opportunity to make a statement on this issue, the panel infringed the athlete's right to be heard. However, there was no evidence that the violation of the athlete's right to be heard could have had any bearing on the panel's decision.

A false or arbitrary reasoning is not in itself sufficient to cause an award to be set aside. For an award to be set aside for violation of the right to be heard, a party must show that the arguments or evidence presented but not considered by the tribunal were relevant for the outcome of the dispute. If it is not clear what effect the violation of the right to be heard had on the proceedings, the challenged award will not be set aside.

Violation of Substantive Public Policy Must Lead to a Manifestly Unjust Result

In the decision 4A_318/2018 of 4 March 2019, the Supreme Court refused to set aside a CAS-award sanctioning a footballer with an ineligibility of 14 months. The sanctioned athlete did not contest having committed an anti-doping rule violation and, when fixing the suspension, the panel held that under the applicable regulations a shorter duration of the suspension was not possible. The athlete appealed against the award arguing, i.a., that the suspension was contrary to substantive public policy as it infringed his right to pursue his professional activity and seriously affected his reputation.

The Supreme Court held that the plea of incompatibility with substantive public policy was unfounded as, in matters of disciplinary sanctions imposed on athletes, when an appeal is based on the violation of the substantive public policy, the Supreme Court only intervenes, if an award leads to a manifestly unjust result or a shocking unfairness.

The Supreme Court reaffirmed its case law in procedural order 4A_248/2019 of 29 July 2019. A CAS-award obliged the athlete Caster Semenya to take medication reducing her testosterone level pursuant to DSD-regulations ("DSD-R"). While acknowledging that DSD-R created a differentiation based on sex and certain innate biological characteristics, the panel considered such discrimination necessary, reasonable and proportionate means to ensure fair competition in female

athletic events. Semenya appealed against the award, together with an *ex parte* request for suspension of DSD-R and a stay of the execution of the award, arguing, i.a., that the DSD-R was contrary to substantive public policy as it violated the principle of the prohibition of discrimination, her personality rights and human dignity.

The Supreme Court held that the European Convention on Human Rights was not directly applicable to arbitration and it was rather unlikely that an infringement of personality rights or human dignity would be contrary to public policy. For an award to be set aside, it is not sufficient that the tribunal's reasoning violates public policy; it is the result of the award that must be incompatible with public policy.

This entry was posted on Sunday, February 9th, 2020 at 9:32 am and is filed under Arbitrability, Arbitration, Arbitration Proceedings, Domestic Courts, Non-signatory, Public Policy, Right to be heard
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