Kluwer Arbitration Blog

Decisions of the Swiss Federal Supreme Court in 2020

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This report highlights the most significant arbitration related decisions of the Swiss Federal Supreme Court (the "SFSC") issued in 2020.

Tribunal's Jurisdiction – Scope of Arbitration Agreement

In 2020, the SFSC issued several decisions on the jurisdiction of an arbitral tribunal and on the determination of the objective (*ratione materiae*) and subjective (*ratione personae*) scope of arbitration agreements.

In decision 4A_342/2019 (06.01.2020), the SFSC dealt with the interpretation of arbitration agreements with regard to their **objective scope**. A and B initially negotiated three contractual documents, the Terms of Purchase, the Corporate Agreement, and the Quality Assurance Agreement (QAA). They finally signed only the QAA, which contained an arbitration clause for "contract disputes". Because a dispute arose, B initiated arbitration raising claims that did not arise from the QAA. The tribunal, in a partial award, upheld its jurisdiction over such claims, and A appealed to the SFSC to vacate the award. The SFSC dismissed the appeal. It stated that the interpretation of an arbitration agreement follows the general principles of contract interpretation (discussed here). Where it is established that the parties agreed on the jurisdiction of an arbitral tribunal, there is no reason for a narrow interpretation of the arbitration agreement. In view of the declarations of intent exchanged between the parties, the arbitration clause in the QAA applied to the entire commercial relationship. This was not a question of extending the arbitration clause to other independent contracts, but rather a question of how the arbitration clause could be understood in good faith, *i.e.*, based on the principle of normative interpretation.

In decision 4A_12/2019 (17.04.2020), the SFSC dealt with a dispute arising out of a license agreement in which the licensor A granted the licensee Z the exclusive right to promote, establish and operate seafood bars in airports and train stations around the world. A also authorized Z to grant sub-licenses to its subsidiaries. The agreement contained a clause conferring rights to sub-licensees under Article 112 CO. Z indeed sub-licensed certain rights to its subsidiary. According to the SFSC, the question of whether a claimant or a respondent is a party to an arbitration agreement – a question concerning the **jurisdiction** of an arbitral tribunal – should not be confused with the question of a party's standing to sue or to be sued, which is a matter of substance of the claim. The SFSC dismissed A's appeal to vacate the award confirming the tribunal's jurisdiction. It held that, where an arbitration clause covers disputes relating to damages resulting from a breach of contract,

it does not matter whether the claimant asserts his own damage or that of a third party. In either case, the dispute falls within the scope of such an arbitration clause.

In decision 4A_124/2020 (13.11.2020), the SFSC dealt with the **subjective scope** of an arbitration agreement. The dispute arose from supply contracts (all of which contained identical arbitration clauses) between the supplier B and several buyers (Contracts), concerning the construction of diesel power plants. B contracted out the supply of diesel engines for the power plants to the subcontractor A. After the installation of the diesel engines, several technical problems occurred. After unsuccessful attempts to fix the problems, the buyers refused to fulfill their payment obligations under the Contracts. B then initiated arbitration proceedings against the buyers. The buyers requested that A be included as a party in the arbitration. A contested the jurisdiction of the tribunal. In a partial award, the tribunal affirmed its jurisdiction over A based on normative interpretation of A's behavior according to the principle of good faith.

The SFSC vacated the partial award noting that, in Annex I to one of the Contracts, A was expressly listed as B's subcontractor and as the supplier of diesel engines. Despite A's presence at the conclusion of one Contract, A's participation in various meetings with the buyers, and despite A's various communications with the buyers, A's involvement in the Contracts did not go beyond fulfilling its obligations as defined in A's supply contract entered into with B. Given A's involvement as a subcontractor based on its supply contract with B, the buyers were also not entitled in good faith to understand a letter written on behalf of both, A and B, as an expression of A's intent to agree to the arbitration clause in the Contracts and thus to waive state jurisdiction. On the contrary, in view of the contractual provisions made, the buyers had to be aware that A was not a party to the Contract(s) and was also not bound by the arbitration clause(s) contained therein.

In the decision 4A_618/2019 (17.09.2020), the SFSC made a further clarification with respect to the tribunal's determination of its jurisdiction. In **default proceedings**, where a respondent to an arbitration fails to submit an answer, the arbitral tribunal must review its jurisdiction ***ex officio***. Thereby, the tribunal *may* gather certain additional information and carry out investigative measures with a view to determining whether it is competent to decide the dispute.

Difference Between an Interim and a Partial Award

In decision 4A_300/2020 (24.07.2020), the SFSC addressed the question of when a partial decision, *i.e.* an arbitral decision dealing with only part of the submitted claims, qualifies as a final and when as a preliminary decision.

The underlying dispute arose out of a Gas Sales Purchase Contract entered into by the seller A and the buyers B and C. After A failed to supply gas, B and C filed a claim for damages and terminated the Contract. The tribunal decided that the termination was valid. A appealed against this decision.

The SFSC held that an arbitral decision qualifies as a partial award if it, independently of other claims, definitely adjudicates and concludes the proceedings with respect to a part of what is claimed. In contrast, a decision merely clarifying one or more preliminary issues with regard to the arbitral decision, qualifies as interim award.

In the present case, the question of whether a contract was validly terminated and the amount of damages were closely related. The arbitral tribunal's decision that the termination of the contract

was valid had a decisive influence on the calculation of the owed damages. The two claims were therefore not independent and the contested decision did not qualify as a partial award.

Scope of Res Judicata

In decision 4A_536/2018 (16.03.2020), the SFSC dealt with the principle of *res judicata* in a dispute between a football club and a footballer's agent. In the first arbitration against the club, the claimant agent filed a request for payment of a fee and for a declaratory judgement, declaring that he was entitled to a payment of an additional renumeration. In the second arbitration, the claimant agent requested the payment of the additional renumeration from the club. While the first tribunal denied the agent's right to a declaratory judgment on his entitlement to the additional renumeration, the second tribunal granted his payment request.

The club appealed against the second award arguing, *inter alia*, that it ignored the binding effect of *res judicata* and thus violated the procedural public policy.

The SFSC dismissed the appeal stating that *res judicata* prohibits to question, in a new procedure between the same parties, an identical claim that has been judged in a final decision. The tribunal hearing the new claim is bound by the operative part of the previous decision. While the tribunal's reasoning can be consulted to determine the precise scope of the operative part – particularly when the operative part merely states that the claim is dismissed –, the reasoning is not binding on the tribunal.

The first tribunal declined to address the agent's request for declaratory relief. In the operative part, it dismissed the request. This decision of inadmissibility did not prevent a new claim for payment as the binding effect of that decision is restricted to the question of admissibility that has been discussed and denied.

Right to be Heard and Right to Equal Treatment

In the aforementioned decision 4A_536/2018, the SFSC also addressed the question of when a party can successfully appeal an award arguing that its **right to be heard** has been violated. A tribunal's finding that is obviously inaccurate or contrary to the record is not sufficient to lead to the setting aside of the award since the right to be heard does not guarantee a substantively correct decision and the SFSC's examination of the award is limited to the question of its compatibility with public policy. On the other hand, a tribunal cannot protect itself from a complaint of violation of the right to be heard by inserting in the award a statement that the allegations, arguments, and evidence put forward by the parties have all been taken into account and that the parties have confirmed at the end of the hearing that their right to be heard has been fully respected.

In decisions 4A_62/2020 (30.09.2020) and 4A_384/2020 (10.12.2020), both dealing with appeals against CAS awards, the SFSC recalled that the right to be heard relates mainly to the establishment of facts and that arbitral tribunals are free to assess the legal scope of the facts and may also decide on the basis of legal rules other than those invoked by the parties. Only exceptionally do the parties have the right to be heard on legal questions (previously discussed here). This exception is applied restrictively and cannot be used by the party complaining of errors

in the reasoning of the award to provoke an examination of the application of substantive law.

In decision 4A_156/2020 (01.10.2020), the SFSC dealt with a request to vacate a cost award. The claimants appealed against an award terminating the proceedings and obliging them to pay the respondents fees of approximately EUR 650,000. In the appeal, the claimants argued that their right to be heard as well as the principle of equality of the parties had been violated, *inter alia*, because the Tribunal had failed to grant them an extension of the deadline and had denied them the opportunity to comment on the defendant's unsolicited submission.

The SFSC dismissed the appeal holding that the right to be heard does not imply an absolute right to a double exchange of submissions. More than two months elapsed between the last submission and the rendering of the award. During this time, the claimants could have (i) requested the tribunal for a deadline to file a response, (ii) complained that they were not given the opportunity to file a response, or (iii) filed an unsolicited response. As far as the **right to equal treatment** is concerned, the procedure must be conducted in such a way that each party has the same opportunity to present its case. Like in the case of the complaint of violation of the right to be heard, also here the complainant must not only show that she has been treated unequally compared to the opposing party, but also how the outcome of the proceedings could have been different if the alleged violations had not been committed. Importantly, the party who considers herself to be the victim of a procedural error must **complain** about the error **without delay**, otherwise she is prevented from asserting it in the context of an appeal.

Rules and Limits to New Legal Arguments Before the SFSC

In decision 4A_80/2018 (07.02.2020), the SFSC assessed a partial award rendered in an investment dispute between four European investors and the Czech Republic, dealing with the issues of jurisdiction and liability.

The SFSC held, *inter alia*, that unlike the submission of new facts and evidence, the submission of new legal arguments is in principle admissible in proceedings before it. New legal arguments must be raised within the time limit for appeal and may be supplemented by a new legal opinion, excerpts of doctrine or decisions of foreign judicial authorities, which may at least partially have the character of evidence. A party may also submit a judgment related to the case, to support facts. Foreign court or arbitral decisions are admissible if they were issued before the date of issuance of the disputed award. In international investment protection disputes, decisions rendered in earlier proceedings do not bind tribunals in subsequent investment arbitrations, so that they cannot be considered as a source of arbitration law as such.

In accordance with the above principles, the appellant Czech Republic could not rely on the *Achmea decision* of 6 March 2018 (Case C-284/16), nor on the *Antaris award* (PCA Case No. 2014-01) as they were both rendered after the disputed award. In keeping with its practice, the SFSC determined the meaning of the treaties in question in accordance with the applicable methods of interpretation, taking into account the doctrine, but with complete freedom in relation to other arbitral awards on the subject.

In decision 4A_461/2019 (02.11.2020), the SFSC reaffirmed its position that, in the international investment protection, pre-existing decisions do not constitute actual sources of law according to which an arbitral tribunal would have to act. It dismissed an appeal to vacate an award accepting

the jurisdiction of an arbitral tribunal under the relevant BIT.

Concluding Remarks on the 2020 Decisions

In 2020, the SFSC further clarified its constant jurisprudence. In the much discussed decision 4A_398/2019 (25.08.2020) in the case of athlete Caster Semenya, it dismissed an appeal to set aside the CAS award reiterating that it was compatible with substantive public policy and confirming its considerations made in the procedural order of 29.07.2019 (previously discussed here). In the decision 4A_486/2019 (17.08.2020), the SFSC confirmed that the procedural guarantees of article 6(1) ECHR cannot be invoked directly in the setting aside proceedings.

On 22.12.2020, the SFSC approved the request of Chinese swimmer Sun Yang to set aside CAS decision 2019/A/6148 due to bias of Franco Frattini, one of the arbitrators. The SFSC's decision 4A_318/2020 was published on 15.01.2021 and will be discussed in a separate post.

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This entry was posted on Friday, February 5th, 2021 at 7:42 am and is filed under 2020 In Review, Arbitration Agreement, Consent, Equal Treatment, Good Faith, Interim Award, Interpretation of Contracts, Partial award, Res Judicata, Right to be heard, Switzerland
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