

Kluwer Arbitration Blog

2022 Year in Review: Switzerland (Part I: Arbitrator's Independence and Impartiality, Enforcement)

Petra Rihar (Lanter) · Wednesday, February 8th, 2023

This post highlights the most significant arbitration-related developments in Switzerland in 2022 that are of interest to the international arbitration community at large. **Part I** focuses on the topic of arbitrator's independence and impartiality as well as on enforcement of arbitral awards in Switzerland, all from the perspective of the Swiss Federal Supreme Court ('SFSC'). **Part II** focuses on decisions of the SFSC providing useful guidance on the remedy of revision (as in force since January 2021) and on the concept of "treaty shopping". Part II also briefly summarizes the main developments in Swiss legislation and arbitration rules (Supplemental Swiss Rules and CAS Code).

Arbitrator's Independence and Impartiality

a) Replacement Where Objectively Established Circumstances Give the Appearance of Bias

In decision [4A_404/2021](#) (04.01.2022), the SFSC confirmed its settled case law according to which bias is assumed if, on the basis of all the factual and procedural circumstances, signs are noticeable that are likely to arouse distrust in the impartiality of an arbitrator.

The underlying dispute concerned an arbitrator whose law firm partner had served as an honorary consul to the Philippines (presumably on an honorary basis) but ended his engagement before the arbitration commenced, and according to the appellant, the Philippines was affected by the outcome of the arbitration. The SFSC dismissed the appeal to set aside the award on the grounds of improper composition of the arbitral tribunal ([article 190\(2\)\(a\)](#) PILA) as it considered the terminated activity as honorary consul not comparable to an ongoing attorney mandate.

The SFSC emphasized that an arbitrator must be independent and impartial in the same manner as a state judge and that failure to comply with this rule results in an irregular appointment within the meaning of [article 190\(2\)\(a\)](#) of the Swiss Private International Law ('PILA'). When considering whether an arbitrator offers sufficient guarantees, the principles of Article 30(1) of the Swiss Federal Constitution must be applied, taking into account the particularities of arbitration.

According to this decision, an attorney acting as an arbitrator will create an appearance of bias if s/he or a lawyer from the same firm is connected to a party by an ongoing mandate or has repeatedly acted as legal representative on the side of a party, so that some kind of permanent

relationship exists between them. For the replacement of an arbitrator, it is sufficient that objectively established circumstances give the appearance of bias and give rise to concerns about the arbitrator's partiality. By contrast, not every relationship of an economic, professional or personal nature in itself gives rise to the appearance of bias, and the purely individual impressions of one of the parties to the proceedings are not decisive.

b) Allegation of Bias Cannot be Used to Criticize Factual Findings or Legal Assessments

The SFSC followed the same principles and, in decision [4A_462/2021](#) (07.02.2022), dismissed the appeal against the final award, in which the appellant alleged bias on the part of the chairperson ([article 190\(2\)\(a\)](#) PILA). The appellant argued that there were serious errors in the reasoning of the final award and that the chairperson had moved from her former law firm to the new law firm whose clients included the group of companies to which the appellant's counterparty belonged.

Emphasizing that a strict standard applies to the assessment of alleged bias, the SFSC held that procedural errors or incorrect substantive decisions can only create an appearance of bias if they are particularly blatant or repeated and constitute a serious breach of the arbitrator's duties. By contrast, the allegation of bias cannot be used to criticize factual findings or legal assessments of the challenged arbitral decision. Regarding the chairperson's move to the new law firm, the SFSC found that it was agreed after the final assessment of the dispute by the arbitral tribunal, i.e., when it was no longer possible to influence the tribunal's decision.

c) Parties Must Search Generally Available Sources of Information Already During the Arbitration

In decision [4A_100/2022](#) (24.08.2022), the SFSC dealt with a request for revision of an award rendered in 2014. The requesting party asserted that one of the arbitrators was subject to a conflict of interests and requested that the award be annulled on the basis of [article 190a\(1\)\(c\)](#) PILA and the dispute be referred back to the newly constituted arbitral tribunal, to which the conflicted arbitrator would not belong.

The SFSC first clarified that the new provisions on the remedy of revision of international arbitral awards apply to revision proceedings filed after 1 January 2021, even if the challenged award was made before that date. Pursuant to [article 190a\(1\)\(c\)](#) PILA, a party may request a revision of an arbitral award if a ground for challenge under [article 180\(1\)\(c\)](#) PILA (legitimate doubt as to arbitrator's independence or impartiality) was not discovered until after the arbitral proceedings had been completed, despite due diligence, and no other remedy is available.

The SFSC emphasized that the party wishing to challenge an arbitrator must raise the ground for challenge as soon as it becomes aware of it. This rule applies both to grounds for challenge of which the party was actually aware and to those of which it could have become aware had it paid due attention. The objection of irregular composition is forfeited if it is not raised without delay. The revision pursuant to [article 190a\(1\)\(c\)](#) PILA therefore not only requires that a ground for challenge pursuant to [article 180\(1\)\(c\)](#) PILA was discovered only after the conclusion of the arbitral proceedings; the requesting party must also show that, despite due diligence, the ground for challenge could not have been discovered and asserted already in the arbitral proceedings.

In this proceeding, the requesting party based its request for revision on the arbitrator's email of 1 November 2013, publicly accessible registers on English court decisions and other available databases.

The SFSC held that the parties are expected to conduct research into generally available sources of information – in particular on the internet – on arbitrators already during the arbitral proceedings in order to identify elements that may reveal a possible risk of dependence or partiality of an arbitrator. The SFSC found that in the present case it had already been clear during the arbitration proceedings that a conflict of interest existed or could arise. The relationship of the arbitrator to the parties to the proceedings should have been clarified and a request for challenge should have been made already then. The SFSC dismissed the request for revision as the requirement under to [article 190a\(1\)\(c\) PILA](#) was not met.

Enforcement

a) Enforcement of Annulled Arbitral Awards

In decision [KSK 21 9](#) (25.05.2022), the court of last instance of the Canton of Graubünden addressed the question of whether an arbitral award, that was set aside in the country in which it was made while enforcement proceedings were ongoing before the competent Swiss court of first instance, can be enforced. Referring to article V(1)(e) of the New York Convention, the court held that, in principle, the enforcement court is not entitled to review the accuracy of the annulment decision and has no discretion (*Ermessen*) in the question of recognition and enforcement of an annulled arbitral award. What matters is whether the award is binding at the seat of arbitration; it is not if it has been annulled by a court there. Except in exceptional circumstances such as, e.g. (foreign state) abuse of rights or a violation of procedural public policy, annulled arbitral awards are not to be enforced.

b) Enforcement of Cost Awards

Decision [5A_335/2021](#) (14.09.2022) concerned the enforcement of an award rendered by a tribunal seated in Geneva in arbitration conducted by claimants A and B against the respondent Czech Republic under the aegis of the Permanent Court of Arbitration (PCA). By award of 2 May 2018, the tribunal rendered the following decision:

465. The Claimants' claims are dismissed.

466. The Claimants shall pay to the Respondent within 28 days of delivery of this award the sum of US \$ 1.75 million and GBP 178,125.50.

467. The arbitration costs are assessed at GBP 714,502.00, and any balance held by the PCA shall be remitted in equal shares to the Parties in accordance with Article 41 (5) of the UNCITRAL Rules.

In the enforcement proceedings, the Czech Republic was denied enforcement of the cost award because it was not clear from the award whether the claimants were jointly and severally liable for the entire amounts or only for a part each, and the UNCITRAL Arbitration Rules and the Swiss *lex arbitri* did not provide any guidance. The SFSC pointed out that in the enforcement proceedings,

the court examines whether the obligation to pay can be clearly derived from the award. In doing so, it does not have to decide on the material existence of the claim, nor does it have to deal with the material correctness of the award. It does not have to interpret the submitted award and certainly not to supplement it in accordance with an alleged practice. If the submitted award is unclear or incomplete and thus not enforceable, it is up to the tribunal to provide clarification.

Concluding Remarks on Part I

The SFSC regularly addresses issues relating to the enforcement of arbitral awards. In decision [4A_663/2018](#) (27.05.2019), it held that only blatant disregard of the principle of the arbitrator's independence and impartiality can lead to a refusal of recognition and enforcement of an arbitral award, as the public policy exception must be interpreted restrictively, **especially when it comes to the recognition and enforcement of foreign decisions**. Related to the admissibility of an attachment over real estate property of a sovereign state in Switzerland on the basis of an arbitral award, the SFSC held in decision [5A_942/2017 / 144 III 411](#) (07.09.2018) **that the requirement of a sufficient connection applied**, which presupposed that the legal relationship on which the arbitral award was based and from which the attachment claim arose had a sufficient connection to Swiss territory.

With the same regularity, the SFSC also addresses the issue of the arbitrator's independence and impartiality. The principles set out here are a confirmation and continuation of the case law from previous years, such as the decision [4A_292/2019](#) (16.10.2019), in which **the SFSC dealt with the admissibility of *ex parte* communication between an arbitrator and a party's counsel**.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



This entry was posted on Wednesday, February 8th, 2023 at 8:39 am and is filed under [2022 in Review](#), [Federal Supreme Court of Switzerland](#), [Switzerland](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.