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Swiss Federal Supreme Court: When Does a Subsequently Discovered Ground for Challenge of an Arbitrator Become a Possible Ground for Review of an Award?

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The Swiss Federal Supreme Court (the “Court”) recently outlined when a subsequently discovered ground for challenge of an arbitrator can be a possible ground for review of an award. The present post summarizes and discusses the Court’s decision.

Background

In [decision 4A_100/2022 of August 24, 2022](#), the Court dealt with a review request against a SCAI arbitral award dated December 2014. The review request was based on Article 190a para. 1 lit. c in conjunction with Article 180 para. 1 lit. c of the Swiss [Private International Law Act \(“PILA”\)](#).

Article 190a para. 1 lit. c PILA states that:

A party may request a review of an award if:

a ground for a challenge under Article 180 paragraph 1 letter c only came to light after conclusion of the arbitration proceedings despite exercising due diligence and no other legal remedy is available.

While Article 180 para. 1 lit. c PILA states that:

A member of the arbitral tribunal may be challenged:

if circumstances exist that give rise to legitimate doubt as to his or her independence or impartiality.

The request for a review based on Article 190a para. 1 lit. c PILA must be filed within 90 days of the ground for review coming to light. A review may not be requested more than ten years after the award becomes legally binding (Article 190a para. 2 PILA).

Overview of the Underlying Facts

A Swiss company concluded a debt assumption agreement with an English company, according to which the former undertook to assume the debt of a third-party company towards the latter. The contract provided for a Zurich-seated arbitration. On 22 February 2013, the Swiss company stopped the payments it owed thereafter.

Subsequently, the English company initiated arbitration under the [Swiss Rules of International Arbitration](#). By award of 23 December 2014, the arbitral tribunal ordered the Swiss company to pay USD 69'112'500.- plus interests.

On 15 July 2015, bankruptcy proceedings were opened against the Swiss company. Later one of its creditors informed the bankruptcy office on 4 February 2022 of a possible ground for a review of the arbitral award of 23 December 2014 and had it assigned to it pursuant to Article 260 of the [Swiss Federal Law on Debt Collection and Bankruptcy](#).

The creditor then introduced to the Swiss Federal Supreme Court a review request dated 28 February 2022, claiming a subsequent discovery of a ground for challenge (Article 190a para. 1 lit. c PILA), as the arbitrator was subject to a conflict of interest with respect to the English company. The creditor relied on information from generally available databases on English court decisions.

Arguments of the Applicant

The creditor argued that in the CV of the challenged arbitrator (respondent's appointee), available at the beginning of the arbitration proceedings, there was no indication of a possible connection between him and the English company, claimant in the arbitration. It was also claimed that the arbitrator had failed to disclose conflict of interest *vis-à-vis* the English company when he was appointed. The creditor argued that it had now "clear indications" that there had been at that time a close relationship between this arbitrator and the claimant to the arbitration (the English company).

In the CV which was amended *after* the beginning of the arbitration proceedings, the arbitrator listed, among other things, a case before the High Court of England and Wales in which he had previously represented the claimant to the arbitration (the English company), with these proceedings having lasted from August 2013 to February 2015. The updated entry in his CV gave reason to believe that he had been directly involved in these proceedings, at least in an advisory capacity. It further emerged from the relevant judgment of the High Court that the parties of that court proceedings had also conducted London Court of International Arbitration (LCIA) arbitration proceedings in November 2013, and that it could be assumed that the arbitrator had represented the English company also in that arbitration proceedings.

Furthermore, it was argued that there were close connections between the challenged arbitrator or his Chamber and the legal representatives of the English company in the arbitration proceedings conducted in Switzerland.

The Court's Decision

The Court first held that the amended version of the PILA related to international arbitration, which entered into force on 1st January 2021, was applicable to the proceedings, even if the challenged arbitral award was issued before that date.

The Court then pointed out that according to the new Article 190a para. 1 lit. c PILA, a party may request a review of an arbitral award if a ground for challenge under the new Article 180 para. 1 lit. c PILA was discovered only after the arbitration proceedings had been concluded, despite due attention and no other remedy is available.

The Court further stated that the party wishing to challenge an arbitrator must assert the ground for challenge as soon as it becomes aware of it. This rule, which flows from the principle of good faith, 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.

According to the Court, a review of the award due to alleged bias of an arbitrator on these grounds can only be considered with regard to a ground for challenge which could not have been discovered during the arbitration proceedings by exercising due diligence under the circumstances. In this regard, the parties to the arbitration are required to conduct investigations – in particular on the internet – in order to identify elements that may reveal a possible risk of dependence or partiality of an arbitrator. The circumstances of the specific individual case remain decisive for determining the extent of the duty to investigate and for assessing whether the party concerned has complied with this duty.

Accordingly, the review of arbitral awards pursuant to Article 190a para. 1 lit. c PILA does not only require that a ground for challenge pursuant to Article 180 para. 1 lit. c PILA was only discovered after the conclusion of the arbitration proceedings. In addition, the requesting party has to show that the ground for challenge was not discovered in due time despite due attention and that it could not already have been asserted in the arbitration proceedings.

The Court further noted that based on the statements in the request for review it was not clear why the alleged connections between the arbitrator/his Chamber and the legal representatives of one of the parties to the arbitration could not have been asserted during the arbitration proceedings if due attention had been paid.

The Court observed that the challenging party itself submitted that the information now presented results from generally available databases on English court decisions. Corresponding inquiries about previous representation relationships would therefore already have been obvious in the course of the arbitration proceedings. It is therefore not acceptable to present these reasons only after years in the context of review proceedings.

Moreover, the Court underlined that the applicant of the review request (the creditor) itself states that the arbitrator had asked the counsel of the arbitration respondent (Swiss company) by e-mail dated November 2013 whether he was allowed to represent the English company in another matter (unrelated to the arbitration proceedings). The counsel of the Swiss company had then informed the arbitrator that the Swiss company was “not happy” that the arbitrator takes instructions from the English company while at the same time he remained co-arbitrator in the arbitration proceedings in question. Thereupon, on the same day, the Swiss company's counsels wrote an e-

mail regarding the possibility of challenging the arbitrator under the applicable Swiss Rules.

According to the Court, it was therefore clear to the Swiss company that a conflict of interest existed or could arise. Hence the Swiss company was obliged to clarify the conduct of the arbitrator designated by it as well as his relationship to the parties to the arbitration proceedings in more detail and, if necessary, to submit a request for challenge in the arbitration proceedings.

Since there was thus a lack of a prerequisite for a review under Article 190a para. 1 lit. c PILA, the Court dismissed the request.

Analysis of the Decision

With Article 190a para. 1 lit. c PILA, the question was decided on a statutory level whether the subsequent discovery of a ground for challenge of an arbitrator can be a ground for a review of an international arbitral award before the Court.

However, it follows from the decision of the Court that a substantiated, detailed and conclusive explanation must be given as to why the reason for challenge of an arbitrator could not have been discovered during the arbitration proceedings despite due attention. This was not the case in the present review proceedings.

In other words, a subsequently discovered ground for challenge of an arbitrator is considered a possible ground for review in accordance with Article 190a para. 1 lit. c in conjunction with Article 180 para. 1 lit. c PILA, only if it can be shown that the ground for challenge could not have been discovered already during the arbitration proceedings despite due attention.

Conclusion

The decision is important because the Swiss Federal Supreme Court clarified that also under the new Article 190a para. 1 lit. c PILA a party who wishes to challenge an arbitrator must assert the ground for challenge as soon as it becomes aware of it. This rule flows from the principle of good faith. The party representatives must therefore exercise due diligence and conduct timely investigations, including internet research, in order to discover a possible ground for challenge.

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