

Kluwer Arbitration Blog

2023 Year in Review: Switzerland (Part I: Scope of Arbitration Clause, Capacity of Discernment, Res Iudicata)

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This post highlights the most significant arbitration-related decisions of the Swiss Federal Supreme Court (“SFSC”) in 2023 that are of interest to the international arbitration community at large. Part I focuses on the scope of arbitration clause and its validity in the context of a party’s (in)capacity of discernment, as well as on the new developments regarding *res iudicata*. **Part II** explores new case law on the enforcement of arbitral awards. It also includes a continuation of the SFSC’s case law on the parties’ duty of curiosity in respect of an arbitrator’s independence and impartiality.

Scope of Arbitration Clause *Ratione Personae*

a) In the Context of Succession

In three decisions, the SFSC dealt with the scope of the arbitration clauses vis-à-vis non-signatories and confirmed, in accordance with its settled case law, that an arbitration clause can apply under certain conditions to persons who have not signed the contract and are not mentioned therein.

Decision [4A_575/2022](#) (7 August 2023) concerned a dispute arising from a licence agreement for the operation of a telecommunications network in a part of the southern Republic of Sudan (now the Republic of South Sudan), concluded on 15 October 2003 between C. as licensor and B. as licensee. The Ministry of Technology of the Republic of Sudan signed an amendment to the agreement with B. on 6 October 2007, which contained an arbitration clause according to which all disputes arising out of or in connection with the licence agreement were to be settled by a sole arbitrator in Geneva. The parties waived their right to appeal and agreed that the arbitral award would be final and binding. A. and B. initiated arbitration proceedings against the Republic of South Sudan on 26 July 2018, demanding payments of USD 3 billion. In the arbitration, the Republic of South Sudan took the position that it had not signed the relevant license agreements and the arbitration agreement, and therefore the arbitration agreement did not apply to it and the sole arbitrator had no jurisdiction. With a partial award of 10 November 2022, the sole arbitrator declared that it had jurisdiction, following which the Republic of South Sudan appealed to the SFSC, demanding that the partial award be set aside.

The SFSC held that the examination of the subjective scope of the arbitration clause coincided with the examination of whether the appellant’s waiver of its right to appeal could prevent the appeal.

The SFSC denied this and affirmed the appealability pursuant to [article 190\(2\)\(a\)](#) and [\(b\)](#) of the Swiss Private International Law Act (“PILA”), as it would otherwise not be possible for a party to defend itself against the applicability of the arbitration clause that it disputes. The SFSC continued by stating that a state that acquires independence in the context of a (partial) succession under international law may be bound by an arbitration agreement concluded by the predecessor state if the conditions are met. In such case, the transfer of the arbitration agreement to the new state is governed by substantive law (and not by formal requirement of article 178(1) of the PILA). The SFSC left open the question of how the succession of states in agreements should be treated under the general principles of international law. This is because, based on an Economic Agreement dated 27 September 2012 concluded between the Republic of Sudan and the Republic of South Sudan and a ministerial order of the Republic of South Sudan, it was established that the latter had entered into the licence agreements at issue, including the arbitration clause, as a successor. The SFSC found that the sole arbitrator rightly affirmed his jurisdiction.

b) In the context of Interference

Decisions [4A_144/2023](#) and [4A_146/2023](#) (4 September 2023) concerned a dispute between a father, his four sons and a group of companies owned by the father and managed by him and his sons. Within the group, the companies concluded several loan agreements and a debt assumption agreement. The agreements were not drafted, negotiated, or signed by the father or his sons. However, the father and his sons were involved in the implementation of the loans as they participated in the decisions on the investments to be made with the funds in question, personally benefited from part of these funds and actively participated in the discussions on the repayment of the loans in the context of the French tax procedure. The loan agreements and the debt assumption agreement contained an identical arbitration clause, which provided for the jurisdiction of an arbitral tribunal seated in Geneva.

The SFSC first stated that it was bound by the finding of the actual intention of the parties to be bound by the arbitration clauses at issue, as the parties’ actual intention was a question of fact. The SFSC further held that the respective behaviour of the parties (as established by the arbitral tribunal) could also be objectively interpreted as an expression of the will of the father and his sons to be bound by the arbitration clauses contained in the disputed loan agreements (question of law).

Validity of Arbitration Clause in the Context of (In)capacity of Discernment

Decision [4A_148/2023](#) (4 September 2023) concerned the same set of facts and dealt with the significance of a possible incapacity of discernment of the father (who was ninety years old and suffering from forgetfulness when the aforementioned agreements were concluded) for the question of the validity of the arbitration clauses contained in the loan agreements.

In its analysis, the SFSC emphasised the autonomy of the arbitration clause and held that a defect in the conclusion of the agreements does not automatically render the arbitration clauses contained therein invalid. Due to the relative nature of the capacity of discernment (which must be assessed on a case-by-case basis), this also applies to the question of whether a person could understand the meaning and scope of an arbitration clause at the time of signing. The SFSC held that the conclusion of the arbitration clause must be examined separately (from the agreements) in matters

of capacity of discernment and that, when assessing its jurisdiction, the arbitral tribunal proceeded correctly by examining the father's capacity of discernment only with regard to the arbitration clause.

Res Iudicata

In three decisions, the SFSC made further clarifications to its case law on *res iudicata* and thereby confirmed its restrictive approach.

Decision [4A_486/2022](#) (26 April 2023) concerned a tennis player (A.) who was suspended for 10 years and fined USD 100,000 by the Tennis Integrity Unit ("UIT") for faking a match. Before the SFSC, A. argued that UIT's decision violated the *ne bis in idem* principle because he had been convicted twice for the same offence, by the national tennis federation and the UIT.

The SFSC denied a violation of the *ne bis in idem* principle and clarified that decisions by internal adjudicatory bodies (such as those of the national tennis association) do not constitute judicial decisions or arbitral judgments and therefore do not lead to a *res iudicata*.

Decision [4A_446/2022](#) (15 May 2023) concerned a dispute between a Palestinian company (A.) and the Palestinian authority on one side, and a Liechtenstein company (B.) arising from a tourism project for the construction and operation of a hotel and casino in the city of W. in the West Bank. In the first arbitration, B. requested that the Palestinian Authority be ordered to procure licenses for the operation of the casino and hotel. After two arbitration awards were set aside by the SFSC, the third award obliged the Palestinian Authority to extend the permits and licences required for the hotel until 13 September 2028. In a second arbitration, A. sought payment from B. of rental fees for use of land. The claim was partially upheld. Before the SFSC, A. requested a (partial) annulment of the award arguing that it ignored the *res iudicata* effect of the award rendered in the first arbitration.

The SFSC denied the *res iudicata* effect of the award rendered in the first arbitration. Firstly, B.'s claim for the grant of a casino licence for the period from 13 September 2013 to 13 September 2028 in the first arbitration was not directed against A., but against the Palestinian Authority and thus another party. Secondly, B.'s claim (denied in the first arbitration) was different from A.'s claim for payment submitted in the second arbitration.

The issue decided in the second arbitration was not about whether B. was entitled to a casino licence. While assessing a possible adjustment of the agreement, the tribunal in the second arbitration dealt with the question of whether the contracting parties assumed at the time the agreement was concluded that the agreed rent would be paid even if the casino licence was not granted. The decision on the claim for the grant of the casino licence (dismissed in the first arbitration) was thus not a preliminary question of prejudicial importance in the second arbitration.

Decision [4A_256/2023](#) (6 November 2023) concerned the citizenship of a football player (A.) who played for Ecuador in the qualifying round of the 2022 FIFA World Cup. There have been doubts about the authenticity of A.'s birth certificate since 2015. In 2018, A.'s identity documents were blocked by the Ecuadorian civil registry office. At A.'s request, the Ecuadorian court ruled on 4 February 2021 that the block should be removed, and a new birth certificate issued for A. confirming his Ecuadorian nationality. In May 2022, the Chilean Football Association (C.)

initiated disciplinary proceedings against A., claiming that A. was a Colombian national. The FIFA Disciplinary Committee dismissed the complaint, and the FIFA Appeal Committee confirmed this decision. The parties appealed to CAS, which ruled that the Ecuadorian Football Association (E.) had used forged identification documents belonging to A. E. appealed against the CAS decision with the SFSC, arguing that the CAS decision violated the principle of *res iudicata*.

The SFSC denied the existence of a *res iudicata*, holding that the Ecuadorian court only ruled on the question of whether A.'s identity documents should remain blocked on the basis of the birth certificate. It did not rule on the accuracy of the information regarding A.'s identity. CAS was therefore allowed to examine the veracity of the information on A.'s birth certificate and establish that it was incorrect.

Concluding Remarks on Part I

While the SFSC regularly addresses the scope and validity of arbitration clauses (see, e.g., decision [4A_124/2020](#) discussed in the [2020 review](#) and decision [4A_636/2018](#) discussed in the [2019 review](#)) as well as the principle of *res iudicata* (see, e.g. decision [4A_536/2018](#) discussed in the [2020 review](#) and decision [4A_247/2017](#) discussed in the [2018 review](#)), the decisions presented in this Part I bring further welcome specifications on these pivotal topics. Please see **Part II** for further developments in 2023.

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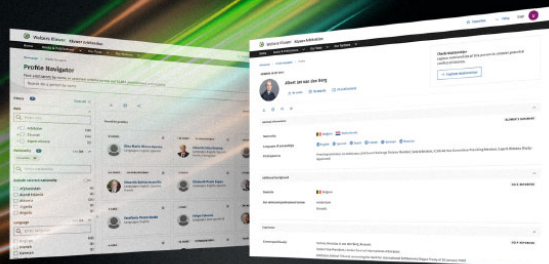
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