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2023 Year in Review: Switzerland (Part II: Enforcement and Parties' Duty of Curiosity)

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Part II of the 2023 Year in Review: Switzerland post (see Part I here) introduces new case law on the enforcement of arbitral awards. It also includes a continuation of the Swiss Federal Supreme Court's ("SFSC") case law on the parties' duty of curiosity in respect of an arbitrator's independence and impartiality.

Enforcement

a) In the Context of the New York Convention

Decision 5A_739/2022 (12 October 2023) concerned an award rendered by a tribunal seated in Moscow against the company B. GmbH, amongst others. It was undisputed that B. GmbH had not signed the contract containing the arbitration clause (based on which the award was issued). Subsequently, the prevailing party A., filed an application for attachment against B. GmbH's assets in Switzerland on the basis of the receivable awarded to A. in the award.

The dispute before the enforcement court (and later the SFSC) centred on the question of whether a ground for refusal under article V(1) of the New York Convention ("NYC") (whether under lit. a or lit. c was left unanswered) precluded the recognition and enforcement of the award affirming jurisdiction *ratione personae* over B. GmbH.

The SFSC emphasised that the court dealing with the recognition and enforcement of an arbitral award is generally prohibited (subject to public policy) from reviewing the content of the award (prohibition of *revision au fond*). On the other hand, the court dealing with the objection to the attachment is free to examine the question of jurisdiction and thus the existence of the grounds for refusal pursuant to article V(1) of the NYC. If the court comes to a different conclusion than the arbitral tribunal with regard to the jurisdiction *ratione personae*, this does not constitute a prohibited *revision au fond*.

The SFSC upheld the decision of the lower court, which had dismissed the attachment against B. GmbH on the grounds that the arbitration clause did not extend to B. GmbH. Just because there was a trustful relationship between certain persons involved, A. could not simply assume that B. GmbH submitted to the arbitration clause (by interfering and creating a legal appearance) without signing it. The SFSC dismissed A.'s appeal.

b) In the Context of the ICSID Convention

Decision 5A_406/2022 (17 March 2023) addressed the requirements for attachment (seizure) of state assets in the context of enforcement of an ICSID award.

On 4 April 2022, A. AG filed an application for attachment with the Regional Court of Bern-Mittelland for the amount of CHF 33,253,049.13 plus ancillary costs against the state of Spain. It demanded the attachment of assets, i.e., trademarks, patents, real estate, bank accounts, securities deposits, assets in safe deposit boxes and precious metals. The application was based on an ICSID arbitral award. The Regional Court did not grant the application and the High Court of the Canton of Bern dismissed A. AG's respective appeal.

The SFSC clarified that, in accordance with article 54(1) of the ICSID Convention, each Contracting State must recognise as binding any arbitral award issued under the Convention and enforce the financial obligations imposed therein on its territory as if it were a final judgment of one of its domestic courts. Apart from checking the authenticity of the award, no control is permitted. The Swiss authorities may not review the ICSID arbitral award with regard to general recognition requirements and they are also denied a public policy review. Pursuant to article 54(2) of the ICSID Convention, the interested party only has to submit a copy of the award certified by the ICSID Secretary-General in order to obtain recognition and enforcement of the award. Contrary to the opinion of the lower courts, the enforcement of ICSID awards in Switzerland is to be carried out by way of debt enforcement proceedings to the exclusion of any cantonal declaration of enforceability.

The SFSC reaffirmed its settled case law that assets of a foreign state located in Switzerland can only be seized if specific requirements are met, and emphasised that these requirements also apply when enforcement is sought based on an ICSID award: Firstly, the foreign state must not have acted in a sovereign capacity (*iure imperii*) in the legal relationship on which the attachment claim is based, but must have acted as the holder of private rights (*iure gestionis*). Secondly, a compulsory enforcement measure against a foreign state requires that the legal relationship in question has a sufficient internal connection (*nexus*) to Swiss territory. A sufficient *nexus* exists if the obligation from which the disputed claims are derived was established in Switzerland or if it is to be fulfilled here or if the foreign state has at least taken actions in Switzerland with which it established a place of performance in Switzerland. In contrast, it is not sufficient for assets of the foreign state to be located in Switzerland or for the claim to have been awarded by an arbitral tribunal seated in Switzerland.

Parties' Duty of Curiosity Regarding Arbitrator's Independence and Impartiality

In two decisions, the SFSC confirmed its rulings of 2022 on the arbitrator's duty of independence and impartiality, and again emphasised parties' duty of curiosity.

Decision 4A_100/2023 (22 June 2023) concerned a dispute between a Croatian football club (affiliated to the Croatian Football Federation ("CFF") and an Austrian trainer brought before the Arbitration Tribunal for Sport ("CAS") in which the club appealed against a decision of the FIFA Players' Status Committee ("FIFA PSC"). Before the Court of Arbitration for Sport ("CAS"), on

19 March 2021, the club appointed Croatian lawyer, C, as an arbitrator. On 8 April 2021, C signed a declaration of acceptance and independence, in which he disclosed that there were no circumstances likely to compromise his independence. During a hearing on 7 September 2021, the parties confirmed that they had no objections to the composition of the panel. On 21 September 2021, CAS informed the parties that C had updated his declaration disclosing that he also served as one of the twelve arbitrators at the CFF's Court of Arbitration. C thereby pointed out that this was publicly available information that could be found in his CV on the CAS website under his profile. The following day, FIFA requested that C be removed from the panel. The CAS Challenge Commission granted the request and disqualified C on 15 November 2021. Thereafter, the club appointed a new arbitrator, while expressly reserving their right to challenge the CAS Challenge Commission's decision. Subsequently, the (new) CAS panel handed down its award rejecting the club's appeal. On 14 February 2023, the club appealed to the SFSC seeking the annulment of the CAS award pursuant to article 190(2)(a) of the Swiss Private International Law Act ("PILA").

The SFSC annulled the CAS award holding that a party who intends to challenge an arbitrator must raise the ground for challenge as soon as it becomes aware of it. This rule applies to grounds for challenge of which the party is actually aware and to those of which it could have been aware if it had paid due attention. While the scope of the duty of curiosity depends on the circumstances of each specific case, the parties are certainly required to use the main computer search engines and consult sources likely to provide information revealing a possible risk of bias on the part of an arbitrator, such as the websites of the main arbitration institutions, of the parties, their counsel and of the law firms in which they and the arbitrators practise at. According to the SFSC, FIFA breached its duty of curiosity by not viewing C's CV available on the CAS website. FIFA should have learned the relevant information earlier and not only on 21 September 2021 (when it received it from CAS). FIFA's request for C's removal was belated. It should have been declared inadmissible on the grounds of foreclosure and CAS should not have ruled with a new arbitrator on the panel. In its decision setting aside the CAS award, the SFSC also held that it was not for the SFSC to decide whether the challenge of C should have been upheld if it had been lodged in time.

Decision 4A_13/2023 (11 September 2023) concerned a case in which each of the two parties (A. and B.) appointed one arbitrator (who together appointed the president). After the tribunal rendered an award on 20 November 2022, A. filed an appeal with the SFSC, requesting that the award be set aside, the arbitrator appointed by B. be declared biased, and the case be referred back to a newly constituted tribunal. A. submitted that it had discovered reasons to challenge the arbitrator M. appointed by B. after the conclusion of the arbitration proceedings. Its Swiss legal representatives engaged for the appeal proceedings had discovered close ties between M. and B.'s legal representative's law firm in that M.'s law firm (with offices in Rome and Naples) had the same office address, telephone number and fax number in Naples as B's legal representative. B.'s lead legal representative even appeared on 'lawyers.com' and 'martindale.com' as an attorney at the law firm of the arbitrator M.

The SFSC dismissed the appeal holding that A. was unable to demonstrate how the alleged close links between the arbitrator M. and B.'s legal representative could not have been asserted during the arbitration proceedings if due diligence had been exercised. The SFSC found that A.'s argument that its previous German and Chinese legal representatives lacked the necessary language skills to clarify grounds for rejection of M. lacked merit. In international arbitration proceedings conducted in English, the parties could be expected to consult the common and generally accessible international industry websites and online directories for lawyers that may provide indications of an arbitrator's potential bias. These include 'lawyers.com' and 'martindale.com'.

Concluding Remarks

In 2023, the SFSC further clarified its case law on the remedy of revision and the 90-day time limit within which a party can request revision of an award. The SFSC held that the 90-day time limit starts running as soon as the party seeking revision has knowledge of new decisive facts. The party must not wait for the these facts to be established by a judicial authority (4A_184/2022, 8 May 2023).

The SFSC also ruled that, although an appeal against an arbitral decision of a rabbinic arbitral tribunal is admissible, a review of the existence of grounds for appeal within the meaning of article 190(2) of the PILA is not possible if the decision does not contain any written findings of fact or reasoning of the tribunal (4A_41/2023, 12 May 2023).

The SFSC further dealt with the question of which law is applicable to determine whether an arbitration clause is null and void, inoperative or incapable of being performed within the meaning of article II(3) of the NYC. The SFSC upheld the lower court's approach, which had based its assessment on the law applicable to the arbitration clause (4A_19/2023, 12 July 2023).

In its 2023 decisions, the SFSC reinforced its reputation of an arbitration-friendly court. Some of the 2023 decisions might be of international significance. This is particularly true of decision 5A 406/2022, which addressed the requirements for the enforcement of ICSID arbitration awards.

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