

Kluwer Arbitration Blog

No Post-Award Duty of Independence and Impartiality: Proving Arbitrator Bias in Revision Proceedings Before the Swiss Federal Supreme Court

Stefanie Pfisterer, Richard G. Allemann (Homburger) · Friday, September 20th, 2024

On 11 June 2024, the Swiss Federal Supreme Court (the “Court”) rendered another pair of decisions in the high-stakes arbitration saga Crescent Petroleum Co. International Ltd. (“Crescent”) v. National Iranian Oil Company (“NIOC”) (decisions no. [4A_288/2023](#) and [4A_572/2023](#)). The Court rejected two separate applications for revision by NIOC, requesting revision of an interim award following the ICC Court of Arbitration’s (the “ICC”) disqualification of two arbitrators for purported conflicts of interest, incomplete disclosures and bias, including over Charles Poncet’s highly publicized “burkini” comments.

The Court ruled that for an application seeking the revision of an arbitral award on grounds for challenge of an arbitrator to be granted, such grounds for challenge must have already existed at the time the award was rendered. Furthermore, when several years have elapsed between the issuance of the award and subsequent comments made by an arbitrator that imply bias against a party or a community, these comments should not be automatically taken to indicate a bias that existed at the time of the award.

While the decisions’ main holding does not come as a surprise, the detailed guidance given by the Court as to the requirements for a successful request for revision is noteworthy.

This post summarizes the decisions, the factual background and their wider implications.

Factual Background

Crescent’s dispute with NIOC, a state-owned oil company controlled by Iran, began in the late 2000s over a long-term gas supply contract. After NIOC’s alleged failure to supply gas, Crescent initiated ad hoc arbitration proceedings in 2009. In 2018, Crescent launched a second arbitration, claiming US\$ 18.6 billion in damages. A Geneva-seated tribunal chaired by Laurent Aynès and including co-arbitrator Charles Poncet issued an interim award in 2020, holding that Crescent had validly terminated the supply contract (the “Interim Award”). Still in 2020, the Court [declared](#) an application to set aside the Interim Award inadmissible.

Beginning in late 2022, NIOC filed a series of challenges against the arbitrators with the ICC, to

which the arbitration clause delegated the authority to decide on challenges of arbitrators.

- In March 2023, NIOC brought a challenge against the tribunal chair, Laurent Aynès, based on his law firm's involvement in a separate ICC arbitration, which indirectly involved Iranian state entities, as well as on incomplete disclosures in that regard. In the other arbitration, Aynès' law firm had raised serious corruption allegations against high-level Iranian officials and was collaborating with Crescent's lead counsel. Also, Mr. Aynès had himself worked alongside Crescent's lead counsel in the past. The ICC [upheld](#) the challenge.
- In November 2023, NIOC also challenged Charles Poncet based on his statements in a Swiss TV program in which he had made provocative [comments](#) about men of Islamic faith who support the practice of women wearing burkinis in public swimming facilities in Switzerland. NIOC argued that the comments displayed Charles Poncet's long-standing bias against Muslims and the Islamic faith and, consequently, raised concerns about his position towards Iran and NIOC. The ICC again [sustained](#) the challenge.

Following these disqualifications, NIOC lodged separate applications for the revision of the Interim Award with the Court.

Grounds for Revision of Arbitral Awards under Swiss Law

Pursuant to Article 190a(1)(c) [PILA](#), a provision that was newly introduced in 2021, a party may petition the Court for the revision of an arbitral award if, despite having exercised due diligence, it discovers a ground for challenge under Article 180(1)(c) PILA after the conclusion of the arbitration and the 30-day period (Article 190(4) PILA) for applying to set aside the award has already expired. According to Article 180(1)(c) PILA, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality.

The application for revision must be submitted within 90 days of the discovery of the ground for revision, but in any event no later than after ten years from the date on which the award could no longer be set aside (Article 190a(2) PILA).

The Decisions of the Swiss Federal Supreme Court

The Court dismissed both applications for revision of the Interim Award. It recalled that revision is "a weapon to be wielded with caution" and that, therefore, the provisions on revision must be interpreted restrictively.

No Post-Award Duty of Independence and Impartiality

The first issue the Court clarified was the relevant point in time at which the ground for challenge triggering the revision of the award must have existed, which is not specified in Article 190a(1)(c) PILA.

The Court ruled that the ground for challenge must have existed when the award was made. In the Court's view, this follows from the requirement that the party applying for a revision must have exercised due diligence. As a matter of logic, even with the utmost diligence, a party could not

discover during the arbitration proceedings a ground for challenge that materializes post-award.

Drawing on the [IBA Guidelines on Conflicts of Interest](#), the Court concluded that the arbitrator's obligation to maintain independence and impartiality generally does not survive the issuance of the award and the tribunal becoming *functus officio*.

The Court considered that in bifurcated proceedings, it is entirely conceivable that circumstances evolve in the interval between an interim and the final award. On this point, the Court provided the hypothetical example of a romantic affair between an arbitrator and a party's counsel developing a few years after the interim award but before the final award has been issued. In the Court's view, such a development would necessitate the arbitrator's withdrawal, yet it would not affect the interim award made at a time when no such affair existed between the individuals involved.

In the case of Laurent Aynès, the Court determined that the majority of the circumstances relied upon by NIOC had occurred after the Interim Award and that those that predated it did not warrant its revision. Similarly, in the case of Charles Poncet, his comments on the TV show were made more than three years subsequent to the award.

Post-Award Comments Cannot Be Presumed to Reflect a Bias Already Existing at the Time of the Award

A second issue the Court decided was whether an arbitrator's post-award comments indicative of bias could be presumed to reflect a bias already existing at the time of the award. The Court rejected this. It emphasized that the burden of proof to demonstrate justifiable doubts regarding an arbitrator's impartiality or independence lies with the party seeking revision. In other words, an arbitrator is presumed to be impartial unless proven otherwise.

The Court recalled that proving actual bias is not necessary to succeed with an application for revision under Article 190(1)(c) PILA. Rather, under Article 180(1)(c) PILA the appearance of bias is sufficient to raise justifiable doubts. In that sense, there is a factual presumption of bias and lack of impartiality if the revision-seeking party can prove circumstances giving the appearance of bias. Nevertheless, in the Court's view, inferring a bias during the arbitration from post-award comments would inappropriately shift the burden of proof. The Court emphasized that impartiality is not static and that an arbitrator's views and biases may evolve over time.

Consequently, the Court determined that NIOC had not proven that Charles Poncet harbored a long-standing bias at the time of the award. NIOC also failed to provide evidence to refute the arbitrator's public support for Muslim causes in the early 2000s.

Finally, the Court distinguished this case from a 2022 [decision](#) by the *Cour d'appel de Paris*, later [confirmed](#) by the *Cour de cassation*, where an award was annulled due to a post-award tribute by the chair to the late Emmanuel Gaillard. The tribute suggested a long-standing friendship, casting doubt on the chair's impartiality. The Court observed that the tribute in the French case indicated a long-term relationship that existed during the arbitration proceedings.

Key Takeaways

The two decisions confirm the Court's restrictive stance on the revision of arbitral awards under

the Swiss *lex arbitri*, establishing a high threshold for proving bias retrospectively based on an arbitrator's statements after the award has been made.

The Court's determination regarding the necessity for the grounds for challenge to have existed at the time of the award to justify a revision appears clear-cut. The more thorny issue is whether facts post-dating the award can show an arbitrator's bias at the time of the award. While the Court was skeptical, it did not formulate a clear rule. In the case concerning Charles Poncet, the Court repeatedly emphasized the significant time lapse – several years – between the Interim Award and Charles Poncet's comments. It is conceivable that the Court might reach a different conclusion in a scenario where an arbitrator expresses biased views a few weeks or months after an award. After all, the shorter the period between the issuance of the award and the expression of the comments, the less probable it is that the arbitrator's opinions have significantly evolved. The temporal proximity of the post-award comments to the award date may be, therefore, a critical factor in determining whether an arbitrator's comments suggesting bias can be considered indicative of a pre-existing bias at the time of the award.

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](#).

Istanbul Arbitration Week

September 30th to October 4th 2024
Istanbul, Türkiye

Register Now →



This entry was posted on Friday, September 20th, 2024 at 8:16 am and is filed under [Independence and Impartiality, 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.

