Kluwer Arbitration Blog

2024 in Review: Switzerland

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As part of the 2024 Year in Review series, this post highlights the most significant arbitration-related decisions of the Swiss Federal Supreme Court ("SFSC") in 2024. The 2024 decisions provide welcome (and, in some case, vividly debated) clarifications on the issues of the tribunal's jurisdiction, the arbitrator's impartiality, the remedy of revision and the enforcement of arbitral awards.

Tribunal's Jurisdiction

a) In the Context of an Intra-EU ECT Dispute

Decision 4A_244/2023 (150 III 280) (03.04.2024) concerned a dispute between the French company A, which invested in photovoltaic plants on Spanish territory through Spanish companies controlled by it, and Spain. Between 2010 and 2014, Spain amended the regulations on the financial support for such investments. Against this amendment, A initiated arbitration proceedings based on Art. 26 of the Energy Charter Treaty ("ECT") and claimed compensation. Spain challenged the jurisdiction of the arbitral tribunal seated in Geneva, arguing that the arbitration tribunal did not have jurisdiction over disputes between an investor domiciled in an EU Member State and another EU Member State concerning investments made in the latter's territory (intra-EU). The arbitral tribunal rejected the challenge, held that Spain had violated Article 10(1) of the ECT, and ordered Spain to pay A damages of EUR 29,600,000. Spain appealed against the award and requested that it be set aside due to the arbitral tribunal's lack of jurisdiction.

The SFSC examined whether Art. 26 of the ECT constitutes a valid arbitration agreement for disputes concerning intra-EU investments and whether the consent of the EU Member States to arbitration under Art. 26 ECT is valid. The SFSC referred to two decisions of the Court of Justice of the European Union ("CJEU"), *Achmea* (C-284/16) and *Komstroy* (C-741/19), and held that CJEU case law was not binding on the SFSC as a Swiss court reviewing the jurisdiction of an arbitral tribunal seated in Switzerland. The rule that in the case of a disputed interpretation of foreign law, the opinion of the foreign supreme court should be followed was also not applicable, since the CJEU does not have the role of a supreme court with regard to the interpretation of the ECT as a multilateral treaty also involving non-EU member states. The SFSC therefore examined the scope of Art. 26 ECT itself. It found that an interpretation of Art. 26 ECT did not lead to the conclusion that the consent to arbitration declared therein by Spain excluded disputes concerning intra-EU investments. It further found that Art. 26 ECT does not conflict with EU law and EU law

does not prevail over the ECT. The SFSC dismissed Spain's appeal.

b) In the Context of an ICSID-award

Decision 4A_172/2023 (11.01.2024) concerned a dispute between Singapore-based companies A and B and China. A and B, through their Chinese subsidiaries, held exploration and mining licences for phosphate mines in the Chinese province of Sichuan and owned two plants that produced yellow phosphorus using phosphate rock from those mines. In 2016 and 2017, China banned mining in the area. According to A and B, they were forced to close their mines. A and B claimed that China had breached the 1985 China-Singapore Investment Protection Agreement ("IPA") and was liable for compensation. A and B brought an arbitration against China before the International Centre for Settlement of Investment Disputes ("ICSID") under Article 13(3) IPA. China challenged the jurisdiction of the Geneva-seated tribunal arguing that the dispute did not fall within the scope of the IPA arbitration clause. By award (16.02.2023), the tribunal declared that it lacked jurisdiction. A and B appealed against the award.

The SFSC held that under Art. 178(2) PILA, the substantive validity and objective scope of the arbitration clause must be assessed in accordance with the law chosen by the parties, the law applicable to the dispute or Swiss law, and that the jurisdiction of the arbitral tribunal must be based on clear and unequivocal consent. The SFSC held that the IPA is to be interpreted in accordance with Art. 31 et seq. of the Vienna Convention on the Law of Treaties of 1969 and that the scope of the arbitration clause contained in the IPA is limited to disputes regarding the amount of compensation, while disputes regarding the existence and legality of an expropriation must be brought before the state courts. The SFSC upheld the arbitral tribunal's interpretation and dismissed the appeal.

c) In the Context of a Multi-tiered Dispute Resolution Clause

Decision 4A_313/2024 (30.10.2024) concerned a dispute arising from an advance payment guarantee ("APG") issued under an engineering, procurement and construction ("EPC") contract between a Russian company A and a Finnish company B for work on a Finnish nuclear power plant. The EPC contract contained a multi-tiered arbitration clause which required the parties to attempt to settle a dispute in a first tier, to submit it to a dispute resolution board ("DRB") in a second tier, and to resort to arbitration in a third tier. The APG declared that the arbitration clause contained in the EPC contract applied *mutatis mutandis* to the APG. In April 2022, the EPC contract was terminated and based on the APG, B initiated arbitration proceedings to recover cost advances of almost EUR 800 million. In the arbitration, A objected to the jurisdiction of the arbitral tribunal, arguing that the dispute should first be submitted to the DRB in accordance with the multi-tiered arbitration clause applicable *mutatis mutandis* to the APG. In a partial award, the arbitral tribunal confirmed its jurisdiction, whereupon A appealed to the SFSC.

The SFSC first noted that under Swiss law (the applicability of which was not disputed), the (multi-tiered) arbitration agreements were subject to the general principles of contract interpretation. The SFSC held that it was bound by the arbitral tribunal's finding that it was not the parties' actual common intention to submit disputes arising under the APG to the DRB as a step prior to arbitration. Because the arbitral tribunal determined the actual intention of the parties by a "subjective" interpretation, the determination of the parties' common intention was a finding of fact (*Tatfrage)*, binding on the SFSC. The SFSC dismissed the appeal.

Arbitrator's Impartiality

In Decision 4A_575/2023 (18.04.2024), the SFSC addressed the situation in which a sole arbitrator was repeatedly nominated by the law firm representing one of the parties, and he was assisted by a trainee who was later employed by that same law firm. The SFSC considered the challenge of bias due to repeated nomination to be late because it was not raised within 30 days (Art. 14(2) ICC Rules). With regard to the trainee, the SFSC also saw no bias, as he had only worked for the sole arbitrator in a subordinate capacity and under his supervision. The fact that a trainee works for several law firms does not in itself lead to bias on the part of the former employer.

In the ECT-decision 4A_244/2023 (150 III 280) discussed above, the SFSC reiterated its settled case law that a party who intends to challenge an arbitrator must raise the ground for challenge as soon as it becomes aware of it. This applies both to grounds for challenge of which the party was aware and to those of which it could have been aware with due care. The challenge does not require that the arbitrator's actual bias is established. It is sufficient that the circumstances give the appearance of bias and give rise to a fear that the arbitrator may be biased. In this case, the appellant argued that the presiding arbitrator's opinion had already been definitively formed at the time of the tribunal's deliberations because the tribunal's decision repeated verbatim the reasoning adopted by another arbitral tribunal presided by the same arbitrator. The SFSC held that the appellant was aware that the presiding arbitrator was sitting as chairman in the two arbitration proceedings concerned and that an identical problem arose in these two cases, since he had raised the same objection of lack of jurisdiction in both. The SFSC concluded that the appellant was precluded from complaining that the composition of the arbitral tribunal was irregular. The same principles were applied in Decision 4A_268/2024 concerning composition of an arbitral tribunal in sports arbitration.

Remedy of Revision

Decisions 4A_288/2023 and 4A_572/2023 (both 11.06.2024) also concerned the issue of impartiality. They were rendered in the context of a dispute between the UAE-based Crescent Petroleum Co. International Ltd ("Crescent") and the National Iranian Oil Company ("NIOC") concerning a gas supply contract, in which an interim award was rendered on 5 May 2020, with the tribunal ruling that Crescent had validly terminated the contract. The arbitration continued and, in September 2022, the presiding arbitrator disclosed circumstances based on which NIOC challenged him before the ICC in February 2023 and the ICC removed him on the grounds of bias in March 2023. In August 2023, a co-arbitrator discussed on television the use of burkinis in public swimming pools in Switzerland, also making critical comments about the behaviour of certain Muslim men towards women. The ICC removed the co-arbitrator from the tribunal in November 2023. Subsequently, NIOC applied to the SFSC for revision of the 5 May 2020 award under Article 190a(1)(c) PILA.

The SFSC held that an award cannot be set aside solely on the ground that an arbitrator violated his duty of independence or impartiality only after the award was rendered. The occurrence of a ground for challenge after the award has been rendered does not of itself constitute a ground for revision. The party seeking revision must show that the ground for challenge (*i.e.*, bias) could have

existed at the time of the arbitrator's involvement in the award. With respect to the co-arbitrator, the SFSC concluded that it could not be inferred from his statements of 31 August 2023 that he may have been biased against a company from Iran as early as 5 May 2020. The co-arbitrator's comments of 31 August 2023 were not sufficient in themselves to constitute grounds for a revision of the award. The SFSC rejected both applications.

Enforcement

a) In the Context of Lugano Convention

Decision 4A_621/2023 (06.08.2024) concerned the case of the Slovenian company A, which in 2009 entered into a distribution agreement with the Swiss company BAG containing an arbitration clause. This contractual relationship was already the subject of the Decision 4A_646/2018 (17.04.2019) discussed here. After the Ljubljana-seated arbitral tribunal rejected its own jurisdiction (on the grounds that BAG was not a party to the arbitration agreement), A filed a claim before the commercial court of the Canton of Aargau. In 2018, the Aargau commercial court declared that it lacked jurisdiction due to the arbitration clause in the distribution agreement. A then brought a claim against BAG before the District Court of Koper, Slovenia. In March 2022, the Koper district court upheld A's claim and ordered BAG to pay A ca. EUR 600,000. Thereafter, A applied to the District Court of Zofingen for the Koper judgment to be recognised and enforced in Switzerland in accordance with the Lugano Convention. A's application was granted. BAG, however, appealed to the SFSC arguing that the Zofingen court was bound by the decision of the Aargau commercial court, which had ruled in favour of jurisdiction of the arbitral tribunal.

The SFSC held that the question to be answered was not whether the Zofingen court was bound by the decision of the Aargau commercial court, but whether a state court in Switzerland is bound by a negative decision of an arbitral tribunal seated abroad. The SFSC held that the state court is bound by the decision of the foreign arbitral tribunal if the tribunal has declared that it has no jurisdiction, and this decision is recognised in Switzerland. The SFSC concluded that the recognition and enforcement of the Slovenian court judgment was rightly requested based on the Lugano Convention.

b) In the Context of New York Convention

In Decision 4A_646/2023 (31.01.2024), the SFSC confirmed its case law according to which procedural defects must be objected to without delay. It ruled that the objection that an ICC-tribunal had not conducted the arbitration in accordance with the parties' agreement by conducting a witness examination not provided for in the ICC-Rules does not preclude a declaration of enforceability under Article V(1)(d) of the New York Convention if the party concerned did not raise this objection in due time during the proceedings and did not make all reasonable efforts to give the tribunal the opportunity to rectify the defect.

Explanatory Award

Decision 4A_603/2023 (150 III 238) (25.03.2024) concerned the case of the rabbinical arbitral tribunal (discussed here), which subsequently issued an explanatory award at the request of the

claimant. In doing so, it did not inform the respondent of the claimant's request, nor did it hear the respondent on the claimant's request before issuing the explanatory award. The SFSC reiterated that if one party requests an explanation of an arbitral award, the other party must be heard before the award is issued. The SFSC upheld the respondent's appeal, holding that the respondent's right to be heard and his right to equal treatment had been violated.

Concluding Remarks

Generally, but particularly because of the landmark decisions discussed above, 2024 was certainly one of the most exciting years for Swiss arbitration case law.

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