Pestalozzi Arbitration Digest 2020: Overview of Swiss arbitration case law

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The Swiss Supreme Court had another busy year in 2020. Typically, the Swiss Supreme Court issues between 30 and 50 arbitration-related decisions per year (Dasser/Wójtowicz 'Swiss International Arbitral Awards Before the Federal Supreme Court. Statistical Data 1989-2019', ASA Bulletin (2021), no. 1, pp. 7-41, p. 11 et seq.). This level was exceeded in 2020, which saw 54 decisions on challenges and revisions of arbitral awards. Of the 54 decisions, 51 concerned applications to set aside an arbitral award rendered in Switzerland, and of those four were withdrawn in the course of the proceedings. Two requests were made for revision of an arbitral award rendered in Switzerland. One request was made for both setting-aside and revision of the arbitral award.

The Swiss Supreme Court remained true to its restrictive practice with less than 10% of the challenges being successful (Dasser/Wójtowicz, p. 15 et seq.). Only five applications to set aside or to revise an arbitral award were successful in 2020 (decision 4A_306/2019 of 23 March 2019 [BGE 146 III 142]; decision 5A_213/2020 of 31 August 2020; decision 4A_124/2020 of 13 November 2020; decision 4A_528/2019 of 7 December 2020 and decision 4A_318/2020 of 22 December 2020). All other applications were either dismissed on the merits or the Swiss Supreme Court declared the application inadmissible on procedural grounds. This relatively low success rate shows that the bar to set aside an arbitral award rendered in Switzerland is – and remains – very high.

The Pestalozzi Arbitration Digest categorises the Swiss Supreme Court's arbitration decisions in 2020 and highlights the most significant cases.

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Key takeaways from 2020:

- **Only 10% of challenges of arbitral awards rendered in Switzerland were successful**
- **Challenges based on an incorrect decision on jurisdiction have the highest chances of success**
- **Arbitrators may be deemed partial based on violent and racist remarks**
- **'Boilerplate statements' that all relevant arguments and facts have been considered do not prevent a violation of the right to be heard**
- **Human rights violations may only be relied upon as a violation of Swiss public policy**

Improper constitution of the arbitral tribunal

Three awards were challenged on the basis of an improper constitution of the arbitral tribunal (decision 4A_287/2019 of 6 January 2020 2020; decision 4A_248/2019 and 398/2019 of 25 August 2020; decision 4A_318/2020 of 22 December 2020). Two cases are particularly noteworthy.

In decision 4A_287/2019 of 6 January 2020, the applicant challenged the award on the basis that one of the arbitrators of a CAS panel was not independent and impartial. The Swiss Supreme Court dismissed the application because the arbitrator had already resigned and the applicant had no current and practical interest in the challenge, and because the CAS panel in its new composition confirmed the contested decision of the previous panel.

Decision 4A_318/2020 of 22 December 2020 is a rare example of a successful application for revision, a remedy only available in exceptional circumstances. After issuance of the arbitral award and expiry of the deadline for setting-aside, the applicant, the Chinese elite swimmer Sun Yang, became aware that the presiding arbitrator of the CAS panel, an Italian national, had made racist tweets against Chinese nationals before and during the arbitration proceedings. In his tweets, the presiding arbitrator criticised the alleged Chinese practice of dog slaughter, using violent and racist language (e.g.,"…this yellow face Chinese monster smiling while torturing a small dog, deserves the worst of the hell").

The Swiss Supreme Court held that doubts as to the impartiality of the arbitrator were objectively justified given the circumstances. The Swiss Supreme Court also held that it was not so much the underlying subject of his tweets that was problematic, but the language he had used.

The Swiss Supreme Court rejected the argument that the applicant should have discovered the grounds for challenge earlier. While parties have a duty to investigate potential grounds for

challenge of any potential arbitrator ('duty to investigate' or 'duty of curiosity') and cannot simply rely on an arbitrator's declaration of independence and impartiality, that duty is not without limits. The parties must consult the main computer search engines and other relevant sources (e.g., websites of the institution and of law firms involved in the case), but they are not expected to scrutinise all sources relating to a given arbitrator, even if accessible to everyone, such as the arbitrator's twitter account. The Swiss Supreme Court annulled the arbitral award and decided that the case needed to be re-assessed by a new CAS panel.

Incorrect decision on jurisdiction

Challenges based on an incorrect decision on jurisdiction statistically have the highest chances of success before the Swiss Supreme Court (Dasser/Wójtowicz, p. 19). This trend was confirmed in 2020 with three jurisdictional challenges being successful (decision 4A_306/2019 of 23 March 2020 [BGE 146 III 142]; decision 4A_124/2020 of 13 November 2020; decision 4A_528/2019 of 7 December 2020) out of thirteen (decision 4A_342/2019 of 6 January 2020; decision 4A_287/2019 of 6 January 2020; decision 4A_80/2018 of 7 February 2020; decision 4A_306/2019 of 23 March 2020 [BGE 146 III 142]; decision 4A_12/2019 of 17 April 2020; decision 4A_418/2019 of 18 May 2020; decision 4A_58/2020 of 3 June 2020; decision 4A_209/2020 of 19 August 2020; decision 4A_618/2019 of 17 September 2020; decision 4A_461/2019 of 2 November 2020; decision 4A_124/2020 of 13 November 2020; decision 4A_563/2020 of 25 November 2020; decision 4A_528/2019 of 7 December 2020).

The leading case BGE 146 III 142 (decision 4A_306/2019 of 23 March 2020) concerns an award rendered under the 1995 Bilateral Investment Treaty between Spain and Venezuela (Spain-Venezuela BIT). The US company C transferred its shares in the Venezuelan company D to the newly established Spanish company A by way of a contribution in kind (in German "Sacheinlage"). The claimant in the arbitration proceedings was the Spanish company A. The arbitral tribunal rejected jurisdiction because in its view, the shareholding in company D was not a protected 'investment' under the Spain-Venezuela BIT. It is understood that company C transferred its shares in company D to company A with the sole purpose of gaining protection under the Spain-Venezuela BIT.

The Swiss Supreme Court annulled the arbitral tribunal's decision on jurisdiction. The Swiss Supreme Court found that the broad definition of the term 'investment' in the Spain-Venezuela BIT also covered the transfer of shares from company D to company A. Unlike some other BITs, the Spain-Venezuela BIT does not contain a 'denial of benefits' clause or 'origin of capital' clause designed to prevent treaty shopping as in the present case. The Swiss Supreme Court also clarified that even in the absence of such clauses, states would not have to condone clearly abusive practices. According to the Swiss Supreme Court, the prohibition of abusive conduct is an international legal principle and forms part of Swiss public policy. In this particular case, however, the Swiss Supreme Court did not consider the claimant's practice to be abusive.

Decision 4A_342/2019 of 6 January 2020 concerned the scope of an arbitration agreement. A and B negotiated three different contracts, of which only one was ultimately signed. B initiated arbitration under the arbitration clause of the signed contract, but raised claims that did not result from this agreement. In a partial award, the arbitral tribunal confirmed its jurisdiction over all claims raised by B. The Swiss Supreme Court dismissed A's challenge against this

partial award. The Swiss Supreme Court upheld its practice that the scope of the arbitration agreement must be interpreted broadly according to the principle of good faith. In its view, the parties had declared their intent during the negotiations to submit their entire commercial relationship to the arbitration agreement contained in the signed contract. Thus, the arbitration agreement covered the present dispute and the arbitral tribunal had jurisdiction.

Another noteworthy case is decision 4A_618/2019 of 17 September 2020, in which the Swiss Supreme Court dismissed an application to set aside a negative award on jurisdiction. The Swiss Supreme Court held that an arbitral tribunal may conduct its own investigations to confirm its jurisdiction should the respondent refuse to participate in the arbitration. The arbitral tribunal does not merely have to rely on the information provided by the claimant. The arbitral tribunal is free (but not obliged) to request further information from the claimant or to make its own inquiries concerning jurisdiction.

Decision beyond the claims submitted to the arbitral tribunal or failure to decide a claim (ultra et infra petita)

Three arbitral awards were challenged in 2020 on the basis that the arbitral tribunal went beyond the claims or failed to address all claims submitted to it (decision 4A_67/2020 of 12 June 2020; decision 4A_198/2020 of 1 December 2020; decision 4A_244/2020 of 16 December 2020). The Swiss Supreme Court dismissed all three challenges. One decision is particularly interesting.

In decision 4A_244/2020 of 16 December 2020, the Swiss Supreme Court examined the scope of a catch-all prayer for relief. The claimant requested damages of almost 8 billion in a local currency – equivalent to USD 3,755,269 – and, as a catch-all prayer for relief, "...alternatively such other sum as the Tribunal deems fit (having regard to the Parties' claims)". In its final award, the arbitral tribunal converted all damages into USD, awarding USD 3,755,269 and USD 20,505,649 to the claimant. The respondent challenged the award before the Swiss Supreme Court, arguing that the arbitral tribunal awarded more than what was sought (ultra petita) because the claimant had not requested the conversion of the amount in local currency into USD.

The Swiss Supreme Court dismissed the setting-aside application. According to the Swiss Supreme Court, the conversion into USD was covered by the catch-all prayer for relief. Furthermore, the Supreme Court held that the respondent should, during the arbitration proceedings, have already objected to the wide discretion granted to the arbitral tribunal by way of the catch-all prayer for relief, and not only at the setting-aside stage.

Violation of equal treatment or the right to be heard

Following the trend of previous years (Dasser/Wójtowicz, p. 18 et seq.), the most frequently invoked ground in setting-aside proceedings was the violation of equal treatment of the parties or the right to be heard, accounting for 20 challenges in total (decision 4A_395/2019 of 2 March 2020; decision 4A_536/2018 of 16 March 2020; decision 4A_12/2019 of 17 April 2020; decision 4A_422/2019 of 21 April 2020; decisions 4A_548/2019 and 4A_550/2019 of 29 April 2020; decision 4A_543/2019 of 30 April 2020; decision 4A_35/2019 of 15 May 2020; decision 4A_67_2020 of 12 June 2020; decision 4A_93/2020 of 18 June 2020; decision 4A_70/2020 of 18 June 2020; decision 4A_300/2020 of 24 July 2020; decision 4A_462/2019 of 29 July 2020; decision 4A_486/2019 of 17 August 2020 [BGE 146 III 358]; decision 4A_248/2019 and 4A_398/2019 of 25 August 2020; decision 4A_62/2020 of 30 September 2020; decision 4A_156/2020 of 1 October 2020; decision 4A_198/2020 of 1 December 2020; decision 4A_384/2020 of 10 December 2020; decision 4A_244/2020 of 16 December 2020; decision 4A_478/2020 of 29 December 2020). None of these challenges was successful.

For example, in decision 4A_156/2020 of 1 October 2020, the Swiss Supreme Court dismissed an application to vacate an award on costs, which was challenged on the basis of an alleged violation of the right to be heard. The (unsuccessful) applicant argued that the arbitral tribunal failed to extend deadlines that were impossible to meet and that it had denied an opportunity to comment on an unsolicited brief of the counterparty. The Swiss Supreme Court held that the right to be heard does not include a right for multiple extensions of a deadline. In this particular case, the reasons that would have allegedly justified the extension arose after the deadline had already expired and the applicant failed to show that it suffered any prejudice as a result of the denied extension of time, which rendered the case meritless.

The Swiss Supreme Court also confirmed its earlier case law (see BGE 142 III 360) that there is no absolute right to a second exchange of submissions in international arbitration. The arbitral tribunal was under no obligation to order a second exchange of written submissions after an unsolicited submission on its own motion. The applicant could (and should) have either applied to make a further submission or submitted an unsolicited submission itself.

In decision 4A_536/2018 of 16 March 2020, the Swiss Supreme Court had to assess whether a CAS tribunal infringed the right to be heard. The Swiss Supreme Court held that a boilerplate statement in the award that all allegations, arguments and evidence presented had been taken into account and that the parties had confirmed at the end of the hearing that they had had a fair opportunity to present their case, does not prevent a party from pleading a violation of the right to be heard. Such award is subject to the same scrutiny as any other arbitral award.

In decision 4A_300/2020 of 24 July 2020, the Swiss Supreme Court declared inadmissible a challenge of an interim award for an alleged violation of the right to be heard. The case is a helpful reminder of the differences between final, partial, and preliminary or interim awards. Final or partial awards put an end to the arbitral proceedings for some or all claims and/or one or more parties. In contrast, interim awards only decide preliminary issues of substance or procedure. While final or partial awards can be challenged on the basis of all statutory grounds, interim awards can only be challenged for an improper constitution of the arbitral tribunal or a lack of jurisdiction. To the extent an interim award influences the outcome of a partial or final award, the interim award can be challenged together with that partial of final award.

The case at hand concerned a dispute between the parties regarding a contract on gas delivery. The buyers initiated arbitration proceedings over damages and terminated the contract with the seller. The arbitral tribunal decided in a first award that the contract termination was valid. The seller appealed the award at the Swiss Supreme Court. The Swiss Supreme Court found that the award on termination was not independent of the buyer's claims for damages. The award therefore qualified only as an interim award and the challenge was held inadmissible.

Violation of Swiss public policy

A violation of public policy was invoked in twelve setting-aside proceedings in 2020 (decision 4A_536/2018 of 16 March 2020; decision 4A_12/2019 of 17 April 2020; decision 4A_548/2019 and 4A_550/2019 of 29 April 2020; decision 4A_70/2020 of 18 June 2020; decision 4A_462/2019 of 29 July 2020; decision 4A_486/2019 of 17 August 2020 [BGE 146 III 358]; decision 4A_248/2019 and 4A_398/2019 of 25 August 2020; decision 4A_618/2019 of 17 September 2020; decision 4A_324/2020 of 18 September 2020; decision 4A_156/2020 of 1 October 2020; decision 4A_416/2020 of 4 November 2020; decision 4A_563/2020 of 25 November 2020). The Swiss Supreme Court dismissed all challenges. Challenges on the ground of violation of public policy remain popular among parties despite generally having the lowest probability of success; only around 0.9% of all challenges are successful (Dasser/Wójtowicz, p. 19 et seq.).

In decision 4A_416/2020 of 4 November 2020, the Swiss Supreme Court had to decide whether the coronavirus pandemic constituted a valid reason to disregard a procedural deadline. The case concerns a dispute between soccer club A and soccer club B. A filed an appeal with the CAS against a decision of the FIFA Players' Status Committee. The CAS invited A to appoint an arbitrator by 14 May 2020, holding that the appeal would be considered as withdrawn if A did not do so within the deadline. A appointed the arbitrator one day late on 15 May 2020. As a result of the late appointment, the CAS terminated the proceedings by way of a termination order.

Before the Swiss Supreme Court, A argued that the CAS applied its rules in an arbitrary way, that the refusal of the CAS to grant a short grace period to appoint the arbitrator was excessively formalistic, and that the delay was caused by valid reasons, namely the coronavirus pandemic, which was at its peak in May 2020. As a preliminary issue, the Swiss Supreme Court confirmed that a termination order could be the subject of setting aside proceedings because it had the same effect as an award on admissibility. The Swiss Supreme Court subsequently dismissed the challenge on its merits. The Swiss Supreme Court held that the prohibition of excessive formalism was, unlike a wrong or even arbitrary application of arbitration rules, in principle part of public policy and prohibited by article 29(1) of the Swiss Constitution. However, the Swiss Supreme Court found that in the present case, public policy was not violated. The Swiss Supreme Court rejected the argument that the coronavirus pandemic prevented A from arranging timely appointment of an arbitrator, pointing out inter alia that A appeared able to appoint the arbitrator as soon as one day later.

Two other noteworthy decisions concern the effect of human rights under the European Charter of Human Rights (ECHR) in arbitration (decision 4A_486/2019 of 17 August 2020 [BGE 146 III 358]; decision 4A_248/2019 and 4A_398/2019 of 25 August 2020). The appellants in both decisions claimed that the CAS had violated their right to a fair trial under

article 6 ECHR. The Swiss Supreme Court dismissed both challenges. In line with a preceding decision in 2019 on this issue (decision 4A_248/2019 of 29 July 2019), the Swiss Supreme Court held that appellants may only invoke the grounds enumerated in article 190 Swiss Federal Act on Private International Law (PILA). A violation of human rights cannot serve as a ground to challenge an award unless such violation amounts to a violation of public policy pursuant to article 190(2)(e) PILA (for a more detailed discussion, see Kluwer Arbitration Blog of 23 March 2021).

In decision 4A_156/2020 of 1 October 2020, the appellant argued that the fees awarded to the counterparty were excessive and violate public policy. The Swiss Supreme Court held that an award on costs could only be against public policy in exceptional circumstances, namely if the award exceeded the costs that a party could reasonably expect to incur, and dismissed the challenge.

In decision 4A_536/2018 of 16 March 2020, the Swiss Supreme Court addressed the principle of res judicata in relation to a dispute between a football club and a football agent over fees for the transfer of a football player. In a first arbitration before the CAS, the agent requested remuneration based on an employment contract and a declaratory judgement regarding an additional fee in case of a future transfer of the football player. The CAS panel dismissed the claim for remuneration and declared the request for declaratory relief inadmissible. In the second arbitration, the agent requested fees for the successful transfer of the football player to a third club. This time, the CAS panel granted the football agent's request. The football club challenged the second award, arguing that the CAS panel violated public policy because of a breach of the principle of res judicata. The Swiss Supreme Court held that res judicata only applies to the operative part of an award. Factual and legal findings can be relevant to determine the exact scope of the operative part, but they do not otherwise bind a subsequent tribunal. The Swiss Supreme Court concluded that the decision of the CAS panel about the admissibility of the request for declaratory relief did not prevent the football agent from bringing a new claim for payment under the same contract.

Swiss domestic arbitration: Result of the arbitration is arbitrary, manifestly excessive fees and expenses

In domestic arbitration, awards may also be contested on the grounds that the result of the award is arbitrary because it is based on findings that are obviously contrary to the facts on record or because it constitutes an obvious violation of law or equity (article 393(e) of the Swiss Civil Procedure Code (CPC)), or that the costs and compensation fixed by the arbitral tribunal are obviously excessive (article 393(f) CPC). These grounds are not available for challenges against awards rendered in international arbitration proceedings seated in Switzerland.

The Swiss Supreme Court decided on seven challenges against arbitral awards on the ground that the result of the award was arbitrary (decision 4A_395/2019 of 2 March 2020; decision 4A_586/2019 of 21 April 2020; decision 4A_35/2020 of 15 May 2020; decision 4A_58/2020 of 3 June 2020; decision 4A_67/2020 of 12 June 2020; decision 4A_56/2020 of 8 July 2020; decision 4A_215/2020 of 5 August 2020). The Swiss Supreme Court dismissed all challenges except one, which was, however, granted on the ground of jurisdiction (decision 4A_528/2019 of 7 December 2020). For example, in decisions 4A_395/2019 of 2 March 2020 and

4A_586/2019 of 21 April 2020, the Swiss Supreme Court held that an award cannot qualify as arbitrary only because the arbitral tribunal follows one or another opinion in legal writing if a particular legal question is in dispute. To qualify as 'arbitrary' in the sense of article 393(e) CPC, the result of the award must be in clear contradiction to an undisputed legal norm or principle.

The fees and expenses of an arbitral tribunal were challenged once in 2020 (decision 5A_213/2020 of 31 August 2020). In decision 5A_213/2020, the Swiss Court upheld the challenge and referred the case back to the arbitral tribunal for re-assessment of its fees and expenses. The arbitration costs exceeded the maximum costs of the scale in the applicable arbitration rules based on the amount in dispute. During the course of the arbitration, the arbitral tribunal conducted a site inspection, rendered a partial award on jurisdiction and decided on a request for interim measures. The parties eventually settled their dispute and the arbitral tribunal did not have to render a final award. The Swiss Supreme Court found that the case did not require extraordinary efforts from the arbitral tribunal and did not justify fees in excess of the maximum amount provided for in the arbitration rules.

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No legal advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this legal update.

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