Swiss Court confirms threshold for challenging awards on ground of arbitrator bias (A v B)

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Arbitration analysis: The Swiss Federal Supreme Court (the Court) has confirmed that there are high hurdles to review an arbitral award on the basis of the apparent bias of an arbitrator. The ground of challenge must have been unknown, and not discoverable with reasonable diligence, while the arbitration is ongoing.
The challenging party must demonstrate that, and why, any such grounds could not have been discovered at an earlier stage. The court will not allow parties merely to assert that this was so. In the case at hand, Simon Rainey KC (a well-known English barrister) was alleged to have acted for one of the parties to the arbitration without disclosing this as he should have done. But the challenger did not demonstrate that it could not have discovered this sooner. And indeed—Mr Rainey had disclosed during the arbitration that he wished to act for one of the parties. Written by Hendrik Puschmann, Farrer & Co (London) and Lukas Rusch, Pestalozzi (Zurich).

A v B 4A_100/2022 in the Swiss Federal Supreme Court

What are the practical implications of this case?

The judgment reaffirms what Swiss arbitration law (just like English arbitration law) states expressly in any event—a party challenging an award on grounds of an arbitrator's apparent bias must show that whatever gives rise to the appearance of partiality was not just unknown during the arbitration, but not discoverable through a proportionate due diligence process.

Still—this ruling is a useful reminder that parties (or rather, their legal representatives) ought to research the arbitrators thoroughly, and early on. They should not rely on arbitrators' duties to disclose actual or potential conflicts of interest, but establish for themselves whether any such conflicts might exist and, if so, that should be raised in the arbitration.

The judgment also shows that the approach of the English bar to conflicts of interest is not easily understood in civil-law jurisdictions. The challenger complained, ie, of a close connection between Mr Rainey's 'law firm', Quadrant Chambers, and the firm representing the opposing party in the arbitration. A barristers' chambers is not a law firm. It is perfectly normal, say, for members of the same chambers to appear on opposing sides of a case or for one to represent a party before another who sits as arbitrator. And it appears that Mr Rainey did, during the arbitral proceedings, suggest to the party that had nominated him (ie respondent) that he take on an unrelated case as counsel to the other party. He may well have thought this nothing out of the ordinary, but it rankled with the nominating party.

Whether the bar's approach to conflicts (it could perhaps be described as laissez-faire) might be in need of reform may be open to debate. But that goes beyond the limits of this case note. Be that as it may, this judgment underscores that barrister arbitrators dealing with overseas parties, especially from civil-law jurisdictions, may wish to bear in mind quite how different attitudes are elsewhere.

What was the background?

The law

Arbitrations seated in Switzerland are governed by the Federal Private International Law Act of 1987, as most recently amended in 2021 (PILA). The revised PILA codifies, among other things, the long-standing case law concerning the review of awards, a separate ground for cases where the award has already become final and binding and 'regular' setting-aside proceedings are no longer possible. Such a review (*Revision*) is subject to strict conditions and time limits (90 days from the discovery of the grounds for review or ten years after the award became final and binding). A helpful 'unofficial' but government-endorsed English translation can be found here. Not unlike the Arbitration Act 1996 (AA 1996), PILA is a 'homemade' Swiss statute—its arbitration section is closely aligned with the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, but it is not a wholesale adoption of the Model Law.

Article 180 of PILA sets out grounds for challenging arbitrators. The most important of these, in practice, may be article 180(1)(c): 'circumstances exist that give rise to legitimate doubt as to [an arbitrator's] independence or impartiality'. This is basically the same test of apparent bias as in English arbitration law (see AA 1996, s 24(1)(a)).

Article 190a governs the review of awards. There is no appeal on the merits; reviews are only possible on a limited number of procedural grounds that are even narrower than the grounds to set-aside an award based on article 190. Under article 190a(c), apparent bias of an arbitrator is a ground for challenging an award only if it 'came to light after conclusion of the arbitration proceedings despite exercising due diligence and no other legal remedy is available'. Again, this is effectively the same test as for a challenge of the award based on article 190(2)(a) or under English law (see AA 1996, s 73(1)).

The facts

Mr Rainey was appointed as arbitrator in a high-value commercial case on the nomination of the respondent. The seat was Zurich and the 2012 Swiss Rules applied. The respondent lost the arbitration and went into liquidation. Some years later, a creditor considered there to be grounds for challenging the award and obtained the right to do so from the insolvency administrator.

The challenger alleged that it was evident from Mr Rainey's CV that he had represented the claimant in the arbitration in High Court proceedings and that it was also evident from online sources that there was a close connection between him 'or his law firm' Quadrant and Clyde & Co, who represented the claimant in the arbitration.

What did the Arbitrator decide?

The court roundly dismissed the request for review. It noted in particular that Mr Rainey had notified the respondent in the arbitration, while proceedings were ongoing, that he wished to represent the claimant in an unrelated matter. The respondent had been less than happy about this and had considered challenging the arbitrator there and then, but apparently never formally challenged Mr Rainey while the arbitration was still ongoing. Therefore, the challenger could not now, in the request for review, complain that respondent was not aware of a potential conflict of interest during the currency of the arbitration.

Further, the court noted that the challenger had merely pleaded that it 'appeared' to be the case that the matters now complained of were not known to the respondent during the arbitration and could not have been discovered with reasonable diligence, as required by article 190a(c) of PILA. It was not enough to raise these matters and merely assume that the arbitrator failed to comply with his obligation to disclose actual or potential conflicts (which he had both at law and under article 9 of the applicable Swiss Rules). The court noted that the parties have an obligation to conduct due diligence on arbitrators—this should involve online searches at the time of their appointment.

Finally, considering the outcome of the case, the court left the issue open whether the challenger (ie the creditor of the insolvent respondent) even had a protected interest to file the request for review and thus standing to sue.

Case details

- Court: Swiss Federal Supreme Court

- Judges: Christina Kiss, Martha Niquille, Marie-Chantal May Canellas
- Date of judgment: 24 August 2022

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