

Switzerland—no requirement of retrial after resignation of an arbitrator (Swiss Federal Tribunal 4A_332/2020)

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Arbitration analysis: The decision concerned an application to set aside an arbitral award rendered in Switzerland on the basis that a newly constituted arbitral tribunal refused to repeat certain procedural acts after one of the arbitrators resigned. The Swiss Federal Tribunal (SFT) held that the arbitral tribunal has wide discretion to decide whether parts of the arbitral proceeding had to be repeated. According to the SFT, the newly appointed arbitrator could form an independent and objective view on the merits of the dispute based on the available records. The SFT decided that the arbitral tribunal was not improperly constituted and that the arbitral tribunal did not violate the parties' right to be heard or formal public policy, and it dismissed the application to set aside the award. **Written by Dr Florian Mohs, partner, Lukas Rusch, partner, and Irene Röthlisberger, associate, at Pestalozzi Attorneys at Law Ltd in Zurich and Geneva.**

Swiss Federal Tribunal 4A_332/2020 ([in German](#))

What are the practical implications of this case, and why is this decision of interest to international arbitration practitioners globally?

The decision is noteworthy for a number of reasons. First, the SFT confirmed its previous case law that only the arbitral tribunal issuing the award can be subject to a challenge based on an improper constitution of the tribunal. The alleged improper behaviour of a replaced arbitrator is irrelevant when determining the independence of the newly constituted arbitral tribunal. The award of the new arbitral tribunal may only be challenged on the basis of a violation of the right to be heard or of public policy, unless the new arbitral tribunal itself gave rise to doubts as to its impartiality or independence.

Second, the SFT held there was generally no need to repeat procedural acts where the new arbitrator had sufficient opportunity to form an independent and objective view on the merits of the dispute. According to the SFT, this was particularly true where hearing transcripts were available to the new arbitrator. With this statement, the SFT also implied that there is a risk that a hearing would have to be repeated if an arbitrator is replaced after the hearing and no hearing transcript existed. Parties are thus well advised to transcribe their evidentiary hearing, as it is customary in arbitration.

Third, the SFT held that the general rule in Swiss litigation that acts in which a judge who resigned has participated must be annulled and repeated, is not part of the Swiss public policy. Only a violation of a rule that is essential to ensure the fairness of the proceedings can give rise to a challenge based on public policy.

What was the background?

The decision concerned a Swiss Rules of International Arbitration proceeding with seat in Zurich. The respondents challenged the arbitrator appointed by the claimants for alleged undisclosed contacts with the claimants' counsels. The challenged arbitrator dismissed the challenge as meritless, but resigned from office one day after the challenge. The challenge was brought at a late stage of the arbitral proceeding. The parties had already conducted their evidentiary hearing and exchanged post-hearing briefs.

The remaining arbitrators offered to the Court of the Swiss Chambers' Arbitration Institution (SCAI) to prepare the final award jointly, as the arbitral tribunal had already held deliberations and wrote a draft award. Respondents requested that the entire arbitral proceeding should be repeated. The SCAI Court decided to appoint a new arbitrator, replacing the challenged arbitrator.

Respondents again requested that the arbitral proceeding be repeated. After an internal deliberation, the newly constituted arbitral tribunal decided based on Article 14, Swiss Rules that no procedural acts would be repeated. The arbitral tribunal subsequently issued its final award in favor of the claimants as a majority decision.

The respondents challenged the final award to the SFT based on an improper constitution of the arbitral tribunal (Article 190, para 2, lit A, Swiss Private International Law Acts (SPILA)), a violation of Respondent's right to be heard (Article 190, para 2, lit d, SPILA), and a violation of public policy (Article 190, para 2, lit e, SPILA).

What did the court decide?

The SFT confirmed its previous case law (BGE 118 II 359, cons 3a) that only the arbitral tribunal issuing the final award can be 'improperly constituted' in the sense of Article 190, para 2, lit a, IPRG (Swiss Federal Statute on Private International Law). It was undisputed that the three members of the new arbitral tribunal issuing the final award were impartial and independent. The mere fact that the arbitral tribunal refused to repeat certain procedural acts did not make the arbitral tribunal appear impartial. According to the SFT, the arbitral tribunal did not violate Swiss *lex arbitri* or the applicable arbitration Rules. While the *lex arbitri* does not provide any guidance under what circumstances certain procedural acts should be repeated after replacement of one arbitrator, Article 14, Swiss Rules expressly provides that the proceedings shall resume at the stage reached at the when the arbitrator was replaced unless the arbitral tribunal decided otherwise.

Furthermore, the SFT dismissed the respondents' plea for a violation of the right to be heard. The SFT held that it is not necessary to repeat procedural acts if the arbitrator who was appointed at a later stage can form an independent and objective view on the merits of the case, in particular if hearing protocols and other written records were available to the new arbitrator. According to the SFT, the mere fact that the replaced arbitrator participated in the evidentiary hearing does not constitute a violation of the right to be heard. The newly appointed arbitrator's decision not to repeat any procedural acts was made in full knowledge of the records and the allegation against the replaced arbitrator.

Finally, the SFT denied the respondents' argument that procedural public policy would have compelled the arbitral tribunal to repeat the entire or parts of the arbitral proceeding. The respondents referred to rules concerning Swiss state court proceedings, which provide that official procedural steps that were made under participation of a judge lacking impartiality and independence must be annulled and repeated. The SFT held that these rules do not apply to arbitration proceedings and that the rules were not part of procedural public policy in Switzerland. Only a violation of a procedural rule that is essential to ensure the fairness of the proceedings can give rise to a violation of public policy (cf BGE 129 III 445, cons 4.2.1).

Case details

- Court: Swiss Federal Tribunal
- Judges: Judge Hohl, President; Judges Kiss, Niquille, Rüedi, May Canellas, and Law Clerk Leemann
- Date of judgment: 1 April 2021

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