

ASA Below 40 - Summer Retreat

Switzerland: Recent (case) developments and the negative effect of competence-competence



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Recent Case Law Highlights

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Independence, Impartiality, and Resignation

- > 4A_234/2010 (October 29, 2010)
 - > Same standard of independence & impartiality for all members of the AT
 - > Supreme Court may directly remove a challenged arbitrator (not merely set aside the affected award)
- > 4A_458/2009 (June 10, 2010)
 - > Chairperson in arbitration 1, party-appointed arbitrator in arbitration 2
 - > Same parties, same factual basis, but different legal issues
 - > → Challenge dismissed

Independence, Impartiality, and Resignation (cont'd)

- > 4A_514/2010 (March 1, 2011)
 - > Can a close acquaintance and counsel for both parties be arbitrator?
 - > Can setting-aside proceedings be brought against decisions refusing resignation?
- > 4A_386/2010 (January 3, 2011)
 - > Truncated tribunal
 - > Affirms distinction between an arbitrator resigning (generally need to replace) and merely obstructing/not participating (generally do not need not replace)

Multi-Tiered Arbitration Clauses

- > 4A_46/2011 (May 16, 2011)
 - > Effect of a breach left open, but SCT notes trend in favor of stay of proceedings
 - > No enforcement of pre-arbitral technical expert determination where the issues at stake are unrelated to the expert's envisaged assignment
 - > To make a pre-arbitral conciliation tier mandatory and effective:
 - Describe consequences of breach
 - Describe pre-arbitral process in detail
 - Insert time limit
 - Invoke pre-arbitral tier contemporaneously and expressly

The Arbitral Tribunal's Costs

- > 4A_391 & 399/2010 (November 10, 2010)
 - > Arbitrators lack jurisdiction to issue rulings on their own fees & costs
 - > An arbitral order / award purporting to decide on the arbitrator's costs and fees constitutes merely a non-binding invoice & states the arbitrators' claim
 - Arbitrators' claims vis-a-vis the parties arise from the *receptum arbitri*, not from the arbitration agreement, and must be pursued in state court
 - Arbitrators cannot be the judges of their own cause of action
 - Arbitrators must pursue their claims in state court
 - > "Interim Award" was no such thing and was not appealable under Art. 190 PILA

Damages for Litigation in Violation of an Arbitration Agreement

- > 4A_444/2009 (February 11, 2010)
 - > SCT appears favorably inclined to AT's jurisdiction over a claim for damages (and declaratory relief) based on the breach of an arbitration clause by a party to the agreement that commences state court litigation
 - > Issue not decided as petitioner had (belatedly) petitioned against the second of two jurisdictional interim awards, and had (misguidedly) alleged that the AT lacked jurisdiction to adjudicate the competence of the state court in which petitioner had commenced the parallel litigation, NOT that AT lacked jurisdiction over a claim for damages
 - > No violation of public policy for alleged interference with access to state court
 - > Issue may arise again following NYC-enforcement judgment in 4A_508/2010 (February 14, 2011)

Violation of Public Policy

- > 4A_490/2009 (April 13, 2010)
 - > First arbitral award set aside for a violation of public policy
 - > *Res judicata* part of Swiss procedural public policy (confirmed)
 - > Swiss state court decision finding that the 1997 FIFA Regulations for the Status and Transfer of Players were void under Swiss and EU antitrust laws bound FIFA and (under Swiss law) *erga omnes* all members of FIFA
 - > Potential tension with Article 186(1)bis PILA.

Interim Measures

- > 4A_582/2009 (April 13, 2010)
 - > True interim measures (Article 183 PILA) are no interim/partial award within the meaning of, and are hence not appealable under, Article 190 PILA
 - > Substance over form when deciding whether something is an interim measure
 - But reference to Article 183 PILA relevant
 - > Types (as in Swiss Civil Procedure):
 - Conservatory measures
 - Regulating measures
 - Performance measures

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Practice Notes

- > Valid waivers under Art. 192 PILA
 - > *“The parties expressly agree to waive their rights to a) challenge any determination(s) or award(s) by the Arbitrator through set aside proceedings or any other proceedings...”* (4A_514/2010) (March 1, 2011)
 - > *Neither party shall be entitled to commence or maintain any action in a court of law upon any matter arising from or concerning this Agreement or a breach thereof except for the enforcement of any award rendered pursuant to arbitration under this Agreement. The decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law.”* (4A_486/2010) (March 21, 2011)

Practice Notes (cont'd)

- > Submissions Outside of the Procedural Timetable
 - > In principle, parties have to limit themselves to the submissions provided for in the procedural rules, and AT may disregard a submission not provided for in the timetable (4A_612/2009 (February 10, 2010))
 - > But parties should react anyway to unsolicited submissions (4A_62/2009) (June 23, 2009)

Practice Notes (cont'd)

- > Counsel due diligence
 - > Parties must pursue and submit all available evidence, including expert evidence that may not yet be “established” (4A_144/2010) (September 28, 2010)
 - > Parties must pursue all remedies to secure any evidence that may be relevant to their legal arguments (a simple request for documents may not be sufficient) (4A_237/2010) (October 6, 2010)
 - > Evidence is “new” for purposes of Revision only if it existed before the award (but was undiscovered/unavailable then); this appears to include witness testimony that could have been rendered during the arbitral proceedings (4A_212/2010) (February 10, 2011)

Practice Notes (cont'd)

- > Arbitral Tribunal due diligence:
 - > Arbitral Tribunal bound to act in good faith
 - AT cannot request parties to undertake an action without allowing reasonable time to comply (4A_600/2010) (March 17, 2011)
 - > Arbitral Tribunal must consider the parties' arguments (two awards set aside for a violation of the right to be heard):
 - SCT will not simply credit AT's assertion that it had addressed an important argument by the Parties (4A_46/2011) (May 16, 2011)
 - SCT will quite carefully review whether AT "implicitly" addressed a party's arguments (4A_433/2009) (May 26, 2010)

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Competence-Competence Under Swiss Law

- > Article 7 PILA
 - > **If the parties have entered into an arbitration agreement** and one of the parties bring an action before Swiss court, the court **must decline jurisdiction unless**
 - (a) R has proceeded on the merits w/o objection
 - (b) Arbitration agreement is null & void, ineffective, incapable of being performed
 - (c) AT cannot be constituted for reasons attributable to R
- > Current standard of review of the validity of the arbitration agreement depends on the seat of arbitration
 - > Outside of Switzerland: Full review (“*volle Kognition*”)
 - > In Switzerland: Summary review (“*summarische Prüfung*”)

Negative Competence-Competence Under Swiss Law?

- > Initiative in Swiss Parliament to add a new para. 2 to Article 7 PILA
 - > *“In international matters the Swiss State Court, independent of the seat of the arbitral tribunal, shall refrain from rendering a decision until the arbitral tribunal has ruled on its own jurisdiction, unless based on a summary review the State Court determines that there is no arbitration agreement between the parties.”*
- > Purported Rationale
 - > Enhance the attractiveness of Switzerland as a seat of arbitration
- > Status
 - > Despite contrary recommendations from the chambers’ legal commissions, both chambers of parliament have preliminarily approved the initiative → ongoing legislative procedure

Negative Competence-Competence Under Swiss Law?

- > Effect
 - > In state court proceedings in which the *exceptio arbitri* is raised, "summary review" including where the seat is outside of Switzerland
 - > State court to desist until the AT has taken a (negative) decision on jurisdiction
- > Reaction
 - > Parliamentary discussion fairly brief and superficial
 - > Mixed reception among practitioners
 - ASA Bulletin vol. 28 no. 3 (Pierre-Yves Tschanz)
 - ASA Bulletin vol. 29 no. 1 (Bernhard Berger)

Thank you for your attention.

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