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SELECTED OVERVIEW OF RECENT SWISS CASE LAW IN INTERNATIONAL ARBITRATION

This article discusses four selected issues that were subject of recent decisions of the Swiss Federal Tribunal in the context of international arbitration seated in Switzerland. The first case examines the scope of the parties' duty of curiosity when it comes to challenging an arbitrator's independence and impartiality, specifically in the context of online resources. The case further touches upon the possibility for a review of an award if such grounds for challenge of an arbitrator were discovered after the 30-day time limit for setting aside the final award. The second case concerns a successful challenge to a partial award, in which the Swiss Federal Tribunal confirmed that an arbitration agreement cannot be extended to a non-signatory subcontractor based on its interference in the execution of the main contract. In the third case, the Swiss Federal Tribunal clarifies that a blanket dismissal of overly broad and vague document production requests as fishing expedition does not violate a party's right to be heard. Finally, in the fourth case, the Swiss Federal Tribunal dealt with the interpretation of a waiver clause in the arbitration agreement that excludes all appeals against arbitral awards.

Key words: *arbitration, duty of curiosity, extension of arbitration agreements, fishing expeditions, waiver of all appeals*

THE SCOPE OF PARTIES' DUTY OF CURIOSITY IN THE CONTEXT OF ONLINE SOURCES AND PARTICULARLY SOCIAL MEDIA

BGer 4A_318/2020 of 22 December 2020¹

On 28 February 2020, the Court of Arbitration for Sport (hereinafter: "CAS") Panel chaired by Mr. Franco Frattini decided in its Award that the Chinese swimmer

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¹ Later published under BGE 147 III 65.

and multiple Olympic Medallist, Mr. Sun Yang, was guilty of violating Art. 2.5 of the Fédération Internationale de Natation² Doping Control Rules and thus banned Mr. Yang from swimming for the next eight years from the date of the Award, i.e., 28 February 2020. On 15 June 2020, Mr. Yang submitted a request for review of the arbitral award before the Swiss Federal Tribunal.³ The request was based on the fact that Mr. Yang on 15 May 2020 became aware through an online article published on a website that the chair of the CAS Panel had repeatedly posted unacceptable comments about Chinese nationals on his Twitter account in the years 2018 and 2019, i.e., also during the proceedings.⁴ These comments were, in Mr. Yang's view, giving rise to legitimate doubts as to the impartiality of the said arbitrator. The Swiss Federal Tribunal ultimately accepted the request for review, annulled the CAS Award, and accepted the challenge against the chair of the CAS Panel.⁵

In its reasoning, the Swiss Federal Tribunal assessed, whether the ground for a challenge of the arbitrator could be accepted after the expiry of the 30 days' time limit for setting aside the award.⁶ Thus, the Swiss Federal Tribunal examined whether Mr. Yang could have discovered these comments during the arbitration proceedings by exercising required due diligence relating to the specific circumstances.⁷ In this context, the Swiss Federal Tribunal referred to its existing case law that parties generally do have a duty of curiosity regarding possible grounds for a challenge of an arbitrator and may not solely rely on the statement of independence and impartiality of the arbitrator.⁸ Rather, a party, in line with its duty of curiosity,

² International Swimming Federation, available at: <https://gaisf.sport/members/international-swimming-federation/>, 24.09.2023.

³ A party may request for review of an award based on the Art. 190a Federal Act on Private International Law (PILA). According to Art. 190a para. 1 lit. c PILA, a review of an award is *inter alia* possible if a ground for a challenge under Art. 180 para. 1 lit. c PILA, i.e., if circumstances that give rise to legitimate doubt as to the independence and impartiality of an arbitrator, only came to light after conclusion of the arbitration proceedings despite exercising due diligence and no other legal remedy is available. The request for review based on Art. 190a para. 1 lit. c PILA must be filed within 90 days of the grounds for review coming to light and may not be requested more than ten years after the award becomes legally binding (Art. 190a para. 2 PILA).

⁴ BGer 4A_318/2020 of 22 December 2020, Facts A to D. as well as consid. 5.

⁵ BGer 4A_318/2020 of 22 December 2020, consid. 7.9.

⁶ A party's action to set aside an award must be filed within 30 days from the award being communicated and may solely be based on the grounds set out in art. 190 para. 2 lit. a-e PILA. Thereafter, only a review of an award may be possible as per art. 190a PILA.

⁷ BGer 4A_318/2020 of 22 December 2020, consid. 6.

⁸ BGer 4A_318/2020 of 22 December 2020, consid. 6.5 referring to the existing case law, e.g. BGE 136 III 605 of 29 October 2010, consid.3.4.2; BGer 4A_110/2020 of 2 March 2020, consid. 2.2.2; BGer 4A_763/2011 of 30 April 2012, consid. 3.3.2; BGer 4A_234/2008 of 14 August 2008, consid. 2.2.2.

has to assure that the arbitrator is indeed independent and impartial, and may not ignore certain publicly available information, e.g., information published on the website of the CAS.⁹

While the Tribunal acknowledged that it is difficult to draw exact lines of duty of curiosity, it also held that such duty cannot be limitless. It is generally expected that parties consult the most important computer search engines, as well as the websites of the principal arbitral institutions, the parties, their counsel and the law firms in which they practice. Yet, it is not expected that a party systematically and thoroughly goes through all sources relating to an arbitrator. Depending on the circumstances a party may need certain indications that draw the attention to a possible conflict of interest to be required to investigate further. Hence, the mere fact that an information is publicly available on the internet may not, *ipso facto*, mean that the party violated its duty of curiosity if, despite its research, has not discovered such information.¹⁰

In the present case, it had not been proven that the use of the search terms “Franco Frattini” would lead to a display of the disputed tweets in the Google results. Thus, Mr. Yang could not be blamed for also not having searched for the word “China”, as this would amount to him being aware from the outset of a possible lack of impartiality of the chair solely on the basis of his Chinese nationality. The Swiss Federal Tribunal then addressed the question whether Mr. Yang should have consulted the “main social media networks” of the arbitrator. In this regard, it held that while it should not *prima facie* be excluded that a party may under certain circumstances be required to go through the social media of an arbitrator – given the number of different social media networks and their frequent use – the requirements should not be set too high, as otherwise the duty of curiosity would be unlimited.¹¹

The Swiss Federal Tribunal held that Mr. Yang did not violate his duty of curiosity by not discovering tweets of the arbitrator that were posted on a very active twitter account ten months before the arbitrator’s appointment on 1 May 2019 also keeping in mind Mr. Yang had only seven days to challenge the arbitrator as per R34 Procedural Rules of the CAS. Likewise, it established that a party cannot be expected to investigate an arbitrator online and on his social media accounts during the course of the proceedings.¹²

⁹ BGer 4A_318/2020 of 22 December 2020, consid. 6.5 referring to BGer 4A_234/2008 of 14 August 2008, consid. .2.2.2.; BGer 4A_506/2007 of 20 March 2008, consid. 3.2.

¹⁰ BGer 4A_318/2020 of 22 December 2020, consid. 6.5.

¹¹ BGer 4A_318/2020 of 22 December 2020, consid. 6.5.

¹² BGer 4A_318/2020 of 22 December 2020, consid. 6.5.

Regarding the question whether the tweets of the arbitrator were likely to give rise to doubts about his impartiality, the Swiss Federal Tribunal reasoned that although an arbitrator may state its views freely in public, this does not mean that one may state everything one thinks in extreme offensive terms without entering into the risk of creating doubts to one's impartiality. In the present case, the Swiss Federal Tribunal held that while the cause advocated by the arbitrator was not *per se* problematic (i.e., criticizing animal abuse), the extremely offensive terms¹³ the arbitrator had used, which had absolutely nothing to do with the animal abuse itself, were. In consideration thereof, the Tribunal concluded that the tweets objectively gave rise to legitimate doubts as to the arbitrator's impartiality. Consequently it accepted the challenge against the chair of the CAS Panel and annulled the award.¹⁴

Commentary

This case of the Swiss Federal Tribunal is important as it gives clearer guidelines relating to the scope of the duty of curiosity of the parties and discusses the interplay of one's freedom of speech and the appearance of an arbitrator's impartiality and independence.

Regarding the first issue, the approach adopted by the Swiss Federal Tribunal appears generally reasonable as it does not require parties to systematically and thoroughly go through each and every online source including each and every post, comment or alike of the arbitrator on social media to flag a potential bias of the arbitrator. This particularly, if there were no previous indications that the arbitrator has such potential bias, and the comments could not have been easily found without assuming a potential bias. Otherwise, the threshold of the duty of curiosity is set too high and a review of an award based on Art. 190a lit. c PILA would be rendered nearly impossible.

Nonetheless, practitioners are well advised to conduct reasonable investigations, including the most common social media networks (such as e.g., Facebook,

¹³ Among other "*This yellow face chinese monster smiling while torturing a small dog, deserves the worst of the hell*", BGer 4A_318/2020 of 22 December 2020, consid. 7.9.

¹⁴ BGer 4A_318/2020 of 22 December 2020, consid. 7.9. Note by the author: While the first CAS award was effectively set aside by 28 February 2020, the subsequent CAS Award dated 22 June 2021 rendered by a newly formed CAS Panel, banned Mr. Yang again from swimming for four years and three months from 28 February 2020. A subsequent complaint by Mr. Yang was dismissed by the Swiss Federal Tribunal in BGer 4A_406/2021 of 14 February 2022, cf. Swiss Federal Tribunal, Press Release of 4 March 2022, available at: www.bger.ch/files/live/sites/bger/files/pdf/en/4a_0406_2021_2022_03_04_T_e_12_07_26.pdf, 24.09.2023.

Twitter, Instagram, LinkedIn, or similar) to find out whether there is an appearance of an arbitrator's lack of impartiality and independence and not to forfeit their right to challenge an arbitrator. This all the more, as the threshold on the duty of curiosity heavily depends on the specific facts of the case. Particularly, the level of diligence might be elevated under certain circumstances. For instance, if the case is to be adjudicated by a sole arbitrator,¹⁵ or if there is a longer deadline to challenge an arbitrator compared to the seven-day limit in the current case,¹⁶ or in situation the party was already aware of certain affiliations to a party.¹⁷

As to the content of the tweets, the Swiss Federal Tribunal carefully and rightly distinguished between being critical to a certain cause, which should not be problematic for challenging the impartiality of an arbitrator *per se*, and the use of offensive language or of an ethnic slur, which had nothing to do with the cause. The Swiss Federal rightly concluded that the challenge of the arbitrator, even if he had no actual bias against the party, was objectively justified to give doubts as to his impartiality.

THIRD-PARTY EXTENSION OF AN ARBITRATION AGREEMENT TO A SUBCONTRACTOR DENIED

*BGer 4A_124/2020 of 13 November 2020*¹⁸

On 15 July 2010, A.B. Co., Ltd (hereinafter: "Supplier" and "Claimant") concluded with C. Pte Ltd. (hereinafter: "Principal") and E.E. Company Ltd. (hereinafter: "Guarantor") a supply agreement over the planning, procurement, manufacturing and delivery of a diesel power plant in V. (hereinafter: "V. Agreement"). Thereafter, the Supplier entered into three further supply agreements with further parties (jointly with the Principal and Guarantor referred as "Respondents"). All four supply agreements contained the same arbitration clause and the same choice of law in favour of Swiss law. The diesel engines for the power plant were to be supplied by A.A., a subcontractor of the Supplier (hereinafter: "Subcontractor" or "A.A."), for which the Supplier and the Subcontractor entered into a separate supply contract (hereinafter: "Supply Contract").¹⁹

¹⁵ BGer 4A_234/2008 of 14 August 2008, consid. 2.2.2.

¹⁶ BGer 4A_318/2020 of 22 December 2020, consid. 6.5 *e contrario*.

¹⁷ BGer 4A_100/2022 of 24 August 2022, consid. 3.3.1 and 3.3.2.

¹⁸ Published as BGE 147 III 107 of 13 November 2020.

¹⁹ BGer 4A_124/2020 of 13 November 2020, Facts A.

After delivery and installation of the diesel engines, the Guarantor raised complaints about technical issues and alleged defects in relation to the installed diesel engines, which ultimately could not be settled between the parties. The Respondents then denied payment under the four supply agreements, which is why the Supplier initiated arbitration proceedings. Thereupon, the Respondents submitted that the Subcontractor should be included as an additional party in the arbitration proceedings, since they wanted to submit counterclaims for alleged damages against both, the Supplier and the Subcontractor. Following the Subcontractor's plea of lack of jurisdiction, the arbitral tribunal declared itself competent to assess the claims brought by the Respondents under the V. Agreement in its partial final award on jurisdiction. The Subcontractor thereafter requested the Swiss Federal Tribunal to set aside the said partial award based on the ground that the arbitral tribunal wrongfully accepting jurisdiction (Art. 190 para. 2 lit. c PILA).²⁰

At the core of the dispute was the arbitral tribunal's consideration that an extension of the arbitration agreement was justified, as the Subcontractor had allegedly interfered in such a manner in the conclusion and execution of the V. Agreement that in good faith it could be interpreted as implied consent to the arbitration agreement contained in the V. Agreement.²¹

The Swiss Federal Tribunal first explained that it is long established practice that an arbitration agreement may bind parties, which did not sign and are not mentioned in the contract containing the arbitration agreement, e.g., through assignment, assumption of debt or the contract itself. Moreover, third parties, which interfere in the execution of a contract, may also agree to the arbitration agreement by implied consent.²²

In the present case, the Swiss Federal Tribunal pointed out that the fact that A. A. was a subcontractor of the Supplier, needs to be considered. This all the more as it was explicitly listed in Annex I of the V. Agreement (hereinafter: "Vendor List") as a supplier of a part of the works, i.e., the diesel engines. In light of this role, it is not surprising that certain terms, e.g. guarantee values, performance test procedures or payment terms, contained in the V. Agreement corresponded or originated from the Supply Contract. The view of the Swiss Federal Tribunal was that these facts do not amount to an interference in the conclusion of a contract. Likewise,

²⁰ BGer 4A_124/2020 of 13 November 2020, Facts B, C.

²¹ BGer 4A_124/2020 of 13 November 2020, consid. 3.2, 3.3.1 et seq.

²² BGer 4A_124/2020 of 13 November 2020, consid. 3.3.1 with references to BGE 145 III 199 of 17. April 2019, consid. 2.4; BGE 134 III 565 of 19 August 2008, consid. 3.2; BGE 129 III 727 of 16 October 2003, consid. 5.3.1 f.

the mere fact that the Subcontractor was present at the first meeting, where a certain type of engine was discussed, is insufficient to construe interference.²³

As the V. Agreement was signed only between the Supplier, the Principal and the Guarantor, the Respondents should have been aware that A. A. was only a subcontractor of the Supplier.²⁴

In its role as a subcontractor and supplier of a significant part of the diesel power plant, A. A. was involved in the execution of the V. Agreement. Likewise, there is nothing out of the ordinary, if representatives of A. A. are present during the test of the diesel motors after the performance of the V. Agreement, or if they replace certain components of the diesel engines at the diesel power plant in V. This as well cannot be interpreted as interference in the execution of the V. Agreement that would amount to an implied consent to the arbitration agreement therein. Rather the measures by the Subcontractor to rectify the issues with the diesel engine were undertaken in its role as subcontractor responsible for the diesel engines under Supply Contract.²⁵

In light of the contractual distribution of roles within this project, the joint communication by the Supplier and the Subcontractor, where representatives of both companies promised to “*take care of this matter with [their] best attention*”, could not be understood in good faith as a clear expression of the Subcontractor’s intention to agree to the arbitration agreement in the V. Agreement and waive state jurisdiction vis-à-vis the Respondents.²⁶

Thus, the Swiss Federal Tribunal concluded that the arbitral tribunal wrongfully declared jurisdiction over the Subcontractor based upon implied consent and referred the case back to the arbitral tribunal to rule on the other remaining open questions relating to the jurisdiction.²⁷

Commentary

Under Swiss law, an extension to a non-signatory generally should not be accepted lightly and the evidence relied upon is subject to a restrictive interpretation. Such extension of the arbitration agreement based on third-party interference may be possible, if the third party has interfered in such a way in the conclusion or execution

²³ BGer 4A_124/2020 of 13 November 2020, consid. 3.2 and 3.3.2.

²⁴ BGer 4A_124/2020 of 13 November 2020, consid. 3.2 and 3.3.2.

²⁵ BGer 4A_124/2020 of 13 November 2020, consid. 3.2 and 3.3.2.

²⁶ BGer 4A_124/2020 of 13 November 2020, consid. 3.2 and 3.3.2.

²⁷ BGer 4A_124/2020 of 13 November 2020, consid. 3.3.3.

of the main contract that the party seeking the extension had reasonable grounds to believe that the third party intended to become a party to the arbitration agreement.²⁸

In its case law, the Swiss Federal Tribunal, had assumed such interference to be sufficient to bind a non-signatory third party, where an third party was not contractually involved in the execution of the main contract, but influenced the management of the companies regarding the real-estate project, and repeatedly interfered in performance of the contract.²⁹ In another case, the non-signatory third party was assumed to be bound to the arbitration agreement, as it had fulfilled a distribution agreement instead of the signatory (which belonged to the same group) for years with the agreement of all parties involved.³⁰

The present case thus, underscores that simply being a subcontractor of the main contractor, which is bound to the arbitration agreement and involvement in the execution of the main project, cannot be sufficient to bind that subcontractor to the arbitration agreement as long as this involvement was predicated by a contract with the subcontractor.³¹ In conclusion, in arbitrations seated in Switzerland, a subcontractor has only a limited risk of being drawn into a pending arbitration proceeding between the parties of the main contract, even if it was actively involved in the performance of the contract.³²

OVERLY BROAD DOCUMENT PRODUCTION REQUESTS MAY GENERALLY
BE DISMISSED AS FISHING EXPEDITION BY A TRIBUNAL

*BGer 4A_438/2020 of 15 March 2021*³³

B. is professional football player (hereinafter: “Footballer B”), who concluded an employment contract with the professional football club A. (hereinafter: “FC A”)

²⁸ Bernhard Berger, Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, Bern, 2021, paras. 565a ff.; Stephanie Pfisterer, *Ausdehnung von Schiedsvereinbarungen im Konzernverhältnis*, Zurich, 2011; para. 422 f.; Dieter Gränicher, „Commentary to Art. 178 PILA“, *Basler Kommentar zum Internationalen Privatrecht* (Eds. Pascal Grolimund, Leander Loacker, Anton Schnyder), Basel, 2020, para. 79 with further references.

²⁹ BGE 129 III 727 of 16 October 2003, consid. 5.1.1.; 5.3.2.

³⁰ BGE 145 III 199 of 17 April 2019, Facts, consid. 2.4; see also Berger B., Kellerhals F., op. cit., para. 566 for further references.

³¹ BGer 4A_124/2020 of 13 November 2020, consid.3.3.3.

³² Cf. Stephanie Pfisterer, Balz Gross, «Urteilsbesprechung 4A_124/2020», *AJP* 2021, 515-523, 520.

³³ Published as BGE 147 III 107 of 15 March 2021.

on 1 June 2016 and expiring on 31 May 2018 (jointly referred to as “the Parties”). On 3 August 2016, Footballer B. unilaterally terminated the employment contract with immediate effect. Subsequently, Footballer B. had entered an employment agreement with football club C. (hereinafter: “FC C”) and then with football club D (hereinafter: “FC D”). On 1 February 2019, the Dispute Resolution Chamber of FIFA partially approved the claim filed by Footballer B. against FC A and ordered the FC A to pay EUR 976.666, plus interest at 5% from 1 February 2019. Both Parties subsequently appealed to the CAS.³⁴

During the CAS arbitration, FC A had requested the release of the following documents:

“In relation to [FC D]:

- *Employment contract(s) signed with [FC D] in January 2018 as well as any and all annexes to said contract and/or side-agreements;*
- *Any and all emails exchanged between the Player, his agent and [FC D] leading up to the conclusion of the employment contract with [FC D];*
- *Copy of any and all pre-contractual documents, offers, memorandum of understanding exchanged and/or signed with [FC D];*

In relation to [FC C]:

- *Employment contract (s) signed with [FC C] in August 2018 as well as any and all annexes to said contract and/or side-agreements;*
- *Any and all emails exchanged between the Player, his agent and [FC C] leading up to the conclusion of the employment contract in August 2016;*
- *Copy of any and all pre-contractual documents, offers, memorandum of understanding exchanged and/or signed with [FC C] as of July to August 2016;*

In relation to his Agent E.:

- *Representation Agreement (s) signed with Mr. E. and any other third agent in relation to his agency activities with regards to him signing an employment contract with A. and/or in force during said time period.*³⁵

On 6 January 2020, the CAS Panel partially granted the requests and ordered FIFA to hand over the complete dossiers, in particular the concluded contracts of Footballer B. with FC D and FC C. However, it had rejected all other document

³⁴ BGer 4A_438/2020 of 15 March 2021, Facts A, B.

³⁵ BGer 4A_438/2020 of 15 March 2021, consid. 4.2.

production requests. Upon further FC A's inquiry via email of 6 January 2020, the CAS Panel confirmed on 7 January 2020 that it had rejected all other document production requests.³⁶

On 4 February 2020, FC A reserved all of its rights in relation to the decision of the CAS Panel of 6 January 2020 relating to the rejected document production requests. On 14 February 2020, the hearing took place, during which the President of the CAS Panel explained that the CAS Panel rejected these document production requests, as they constituted "*a kind of fishing expedition*". At the conclusion of the hearing, both parties affirmed that they had no objections to the CAS Panel's handling of the proceedings and that their right to be heard had been upheld throughout. With award of 2 July 2020, the CAS Panel dismissed the FC A's appeal, partially granted the appeal of Footballer B. and ordered the latter to pay EUR 2.939.131, plus interest at 5% from 3 August 2016.³⁷

In the following, FC A requested the Swiss Federal Tribunal *inter alia* to set aside the Award of 2 July 2020 based on a violation of its right to be heard because the CAS Panel did not evaluate its document production requests.³⁸

According to the case law of the Swiss Federal Tribunal the right to be heard entails in particular parties' right to comment on all material facts, to represent their legal point of view, to prove their material factual arguments with suitable means offered in due time and form, to participate in the proceedings and to inspect the case file.³⁹

With regards to the case at hand, the Swiss Federal Tribunal reasoned that the correspondence of 7 January 2020 confirmed that the CAS Panel in no way omitted document production requests, but deliberately assessed and expressly rejected them. During the hearing, it had even provided the reasons for such rejection, namely, that the requests were "*a kind of fishing expedition*". The Swiss Federal Tribunal further held that in view of the vague and overly broad formulation "*any and all*" of the further requests for disclosure, without any further specification as to the existence of these material documents, no further explanation was required. After the hearing, FC A did also not insist on these requests and did not raise any reservations regarding a violation of the right to be heard.

³⁶ BGer 4A_438/2020 of 15 March 2021, consid. 4.2.

³⁷ BGer 4A_438/2020 of 15 March 2021, consid. 4.2.

³⁸ BGer 4A_438/2020 of 15 March 2021, consid. 4.

³⁹ BGer 4a_438/2020 of 15 March 2021, consid. 4.2 with references to BGE 142 III 360 of 26 April 2016, consid. 4.1.1.; BGE 130 III 35 of 30 September 2003, consid. 5.; BGE 127 III 576 of 10 September 2001, consid. 2c.

Thus, the CAS Panel did not violate FC A right to be heard and the appeal to the Swiss Federal Tribunal was dismissed.⁴⁰

Commentary

Generally, procedural orders issued by an arbitral tribunal regarding document production requests do not need to state the reasons for its decision in writing.⁴¹ In the present case, too, the arbitral tribunal initially did not provide any reasons for the rejection of the requests in questions, but only informed the party that all other requests were rejected. Only one month later at the hearing it provided presumably an (oral) explanation that these requests were “*a kind of fishing expedition*.” The Swiss Federal Tribunal also did not see an infringement of the party’s right to be heard by categorically rejecting vague and overly broad document production requests as “*a kind of fishing expedition*”.⁴² Nonetheless, summary explanations may be a good instrument for the arbitral tribunal to inform the parties, what it sees as relevant and material to the outcome of the case, and thus, may render the remainder of the dispute more efficient.⁴³ In the author’s experience, this also appears to be common practice nowadays in international arbitration.

At last, the case at hand also highlights that uncarefully vague and broadly drafted document production requests by parties, e.g. by using catch-all expressions like “*any and all*” or broad descriptions of a category of documents or by requesting documents relating to a general contention⁴⁴ – regularly end up in the arbitral tribunal’s bin. Even more so, if the arbitral tribunal and the parties have a civil law background, who are not used to extensive US-style discovery.⁴⁵ Hence, parties should ensure from the outset that their document production requests are as narrow and specific as possible and relate to facts that are in fact relevant to the case and material to its outcome.⁴⁶

⁴⁰ BGer 4a_438/2020 of 15 March 2021, consid. 4.2 et seq.

⁴¹ Cf. Tobias Zuberbühler, Dieter Hofmann, Christian Oetiker, Thomas Rohner, *IBA Rules of Evidence, Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*, Zurich, 2022, Art. 3 para. 185.

⁴² BGer 4A_438/2020, consid. 4.2.

⁴³ Cf. T. Zuberbühler, D. Hofmann, Ch. Oetiker, Th. Rohner, op. cit., Art. 3 para. 185; Hilmar Raeschle-Kessler, „The Production of Documents in International Arbitration – A Commentary on Article 3 of the New IBA Rules of Evidence“, *Arbitration International*, 2002, 411 ff., 423 et seq.

⁴⁴ Cf. T. Zuberbühler, D. Hofmann, Ch. Oetiker, Th. Rohner, op. cit., Art. 3, paras. 100 et seqq., 106.

⁴⁵ *Ibidem*, Art. 3, paras. 77.

⁴⁶ *Ibidem*, Art. 3, paras. 96 et seqq.

INTERPRETATION OF AN EXCLUSION OF “ALL APPEALS”
AGAINST ARBITRAL AWARDS

*BGer 4A_69/2022 of 23 September 2022*⁴⁷

In 1990, the Republic of Croatia (hereinafter: “Croatia”) privatized INA-INDUSTRIJA NAFTE D.D.. (hereinafter: “INA”), a Croatian Oil and Gas Company founded in 1964 and became the main shareholder. In 2003, MOL Hungarian Oil and Gas PLC (hereinafter: “MOL”), acquired 25% of the share capital plus one share of INA. The same year Croatia and MOL entered into the Shareholders’ Agreement (hereinafter: “SHA”). Subsequently in 2008, MOL obtained 47.15% of INA’s shares and became the largest shareholder of INA. On 30 January 2009, Croatia and MOL entered into the GAS Master Agreement (hereinafter: “GMA”) and the first amendment to the SHA (hereinafter: “FASHA”). These contracts were approved unanimously by the members of the government of Croatia and according to Croatia, led to the transfer of management control of INA to MOL.⁴⁸ They both contained an arbitration agreement with the seat of arbitration in Switzerland.

On 17 January 2014, Croatia initiated arbitration proceedings against MOL and claimed that the GMA and the FASHA were concluded thanks to a bribe of EUR 10 million offered by the CEO of MOL to the former Prime Minister, and thus, should be declared void. On 23 December 2016, the arbitral tribunal dismissed Croatia’s claim.⁴⁹

Croatia’s subsequent request to set aside the award of 17 October 2017 was not considered by the Swiss Federal Tribunal, as it held that Croatia and MOL had validly waived their right to appeal (hereinafter: “First Judgement”). Both arbitration agreements in the SHA and the GMA contained a waiver clause, which unmistakably expressed the parties’ joint intention to waive any right of recourse against any decision of the arbitral tribunal before any state court whatsoever.⁵⁰ The respective clauses stated:⁵¹

“Awards rendered in any arbitration hereunder shall be final and conclusive and judgment thereon may be entered into any court having jurisdiction for enforcement thereof. There shall be no appeal to any court from awards rendered hereunder.”

On 8 February 2022, Croatia filed a request for review of the final award rendered on 23 December 2016 seeking its annulment based the two grounds in

⁴⁷ Later published as BGE 148 III 436.

⁴⁸ BGer 4A_69/2022 of 23 September 2022, Facts A.; PCA n° 2014-15.

⁴⁹ BGer 4A_69/2022 of 23 September 2022, Facts B; PCA n° 2014-15.

⁵⁰ BGer 4A_69/2022 of 23 September 2022, Facts B.c.

⁵¹ BGer 4A_69/2022 of 23 September 2022; also BGE 143 III 589 of 17 October 2017, consid. 2.2.

Art. 190a para. 1 lit. a⁵² and b⁵³ PILA of Switzerland. In support thereof, Croatia submitted that the former Prime Minister was convicted by a final judgement of the Supreme Court of Croatia of 7 July 2021 for having accepted a bribe in connection with the GMA and FASHA and that the award was influenced by a felony or misdemeanour.⁵⁴

With regard to the Art. 190a lit. a PILA, the Swiss Federal Tribunal denied such request *inter alia*, because Croatia did not comply with the 90-days' time limit to submit such request as it already became aware of all significant facts with the judgement of the lower instance at the end of 2019.⁵⁵

Additionally, the Swiss Federal Tribunal reasoned that the Parties had validly excluded any right to appeal in accordance with Art. 192 PILA. The Swiss Federal Tribunal held that it is a matter of interpretation, whether the exclusion clause agreed upon by the parties also would encompass the legal remedy of review as per Art. 190a PILA. In this regard, the existing case law of the Swiss Federal Tribunal had already established that the word "appeal", in its broadest sense, is a generic term embracing the most diverse legal remedies.⁵⁶ With its First Judgement, the Swiss Federal Tribunal had concluded that the term "appeal", as used by the Parties, should be understood in this generic sense. Therefore, given the clear intention of the Parties to remove any dispute from the hands of the state courts, it has to be accepted that the Parties' waiver clause also entailed the right to review as per art. 190 Abs. 1 lit a. PILA.⁵⁷

In any case, the Swiss Federal Tribunal held that Art. 190a para. 1 lit. a PILA would also not apply in the present case, as Croatia relied on facts within the judgement of 7 July 2021, and hence, on elements which were produced after the award.⁵⁸

⁵² Art. 190a lit. a PILA states: "A party may request a review of an award if: it has subsequently become aware of significant facts or uncovered decisive evidence which it could not have produced in the earlier proceedings despite exercising due diligence; the foregoing does not apply to facts or evidence that came into existence after the award was issued."

⁵³ Art. 190a lit. b PILA states: "A party may request a review of an award if: criminal proceedings have established that the arbitral award was influenced to the detriment of the party concerned by a felony or misdemeanour, even if no one is convicted by a criminal court; if criminal proceedings are not possible, proof may be provided in some other manner."

⁵⁴ BGer 4A_69/2022 of 23 September 2022, Facts C.

⁵⁵ BGer 4A_69/2022 of 23 September 2022, consid. 4.2.2.

⁵⁶ BGer 4A_69/2022 of 23 September 2022, consid. 4.3.1, 4.3.2 f. with references to BGE 131 III 173, consid. 4.2.3.2.

⁵⁷ BGer 4A_69/2022 of 23 September 2022, consid. 4.3.3.

⁵⁸ BGer 4A_69/2022 of 23 September 2022, consid. 4.4.

With regard to the Art. 190a lit. b PILA, the Swiss Federal Tribunal concluded that the conviction in Croatia did not show that the award was influenced by a felony or misdemeanour.⁵⁹

Commentary

Generally parties, which have neither their domicile, habitual residence or seat in Switzerland may, by a declaration in the arbitration agreement or by subsequent agreement wholly or partly exclude all appeals against arbitral awards, safe for the right to a review under Article 190a paragraph 1 letter b.⁶⁰ While it is not necessary to reference art. 190 (or 190a PILA)⁶¹ in the waiver clause, the common intent of the parties to waive all appeals as per art. 192 PILA must be clear and unambiguous. According to the Swiss Federal Tribunal this is a matter of interpretation.⁶²

In this respect, authors already have rightly pointed out that the use of ambiguous term such as “*appeal*”, which depending on the jurisdiction may have different meanings, cannot constitute a clear and unambiguous intent of parties to waive all their legal remedies in Switzerland. Given the consequences of such waiver, the Swiss Federal Tribunal should adopt again a more restrictive approach for the interpretation of waiver clauses.⁶³

Conclusively, foreign parties should be aware that the Swiss Federal Tribunal repeatedly held that if parties, like in the case at hand, would use expressions in their arbitration agreements, such as “*no appeal to any court*” or “*any rights of appeal*”, that such terms would be considered as an unambiguous waiver of all possibilities to challenge or review an award.⁶⁴

In any case, one may ask, if it is reasonable to waive all possibilities to challenge or review an award from the outset. It is generally known that the Swiss Federal Tribunal established a high threshold for setting aside an award with only seven

⁵⁹ BGer 4A_69/2022 of 23 September 2022, consid. 5.

⁶⁰ Art. 192 para. 1 PILA.

⁶¹ BGer 4A_69/2022 of 23 September 2022, consid. 4.3.3.

⁶² BGer 4A_69/2022 of 23 September 2022, 4.3.3; BGE 143 III 589 of 17 October 2017, consid. 2.1.1.

⁶³ Mladen Stojiljkovic, Alisa Winter, „Der Vorausverzicht auf die Revision von Schiedsurteilen“, *Der Vorausverzicht auf die Revision von Schiedsurteilen*, 2023, which both criticized the Swiss Federal Tribunal's approach used in the case at hand, paras. 17, 19 et seq., 25 et seq.

⁶⁴ *Ibidem*, paras. 14 et seqq.

percent of all applications succeeding.⁶⁵ Further, in comparison to Dutch, French and English Courts, the proceedings in front of the Swiss Federal Tribunal are rather fast and usually over within six months.⁶⁶ In Switzerland it is also not possible to review an award on a point of law, as may be possible in the United Kingdom or United States.⁶⁷ Rather, the substantive review is limited to the question on whether the award complies with Switzerland's *ordre public*.⁶⁸ Hence, in consideration of the above, it appears that the advantages of having a last resort remedy against an award in Switzerland as provided for in art. 190 and 190a PILA outweigh potential efficiency gains from an exclusion of such remedies.

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POGLED NA ODABRANE SLUČAJEVE NOVIJE ŠVAJCARSKE SUDSKE PRAKSE U OBLASTI MEĐUNARODNE ARBITRAŽ

Rezime

U radu su razmotrena četiri odabrana pitanja koja su bila predmet nedavnih odluka švajcarskog Saveznog suda u kontekstu međunarodne arbitraže sa sedištem u Švajcarskoj. Prvi slučaj ispituje obim dužnosti radoznalosti (tzv. „*duty of curiosity*“) kada je u pitanju nezavisnost i nepristrasnost arbitra u kontekstu onlajn izvora. Slučaj se dalje tiče mogućnosti osporavanja arbitražne odluke kada su takve okolnosti otkrivene nakon isteka roka od 30 dana za poništaj oduke. Drugi slučaj se odnosi na delimičnu odluku koja je uspešno osporena, u kojoj je švajcarski Savezni sud potvrdio da se arbitražna klauzula ne može proširiti na podizvođača koji nije potpisao glavni ugovor na osnovu njegovog učešća u izvršenju glavnog ugovora u ulozi podizvođača. U trećem slučaju, švajcarski Savezni sud pojašnjava da neobrazloženo odbacivanje zahteva za izvođenje pismenih dokaza koji su opšti i neprecizni ne predstavlja povredu prava stranke da bude saslušana ukoliko se takav zahtev smatra vidom „lovljenja informacija“ (tzv. *fishing expedition*). Konačno, u četvrtom slučaju, švajcarski Savezni sud se bavio interpretacijom klauzule o odricanju prava na žalbu koja je sadržana u arbitražnom sporazumu.

Ključne reči: *arbitraža, dužnost radoznalosti, proširenje arbitražne klauzule, „lovljenje informacija“, odricanje od pravnih lekova*

⁶⁵ Felix Dasser, „Judging, Fast and Slow“, ASA Bulletin, Vol. 41, No. 2, 2023, 254.

⁶⁶ Ibidem., 254; see for further statistical data, Felix Dasser, Piotr Wójtowicz, „Swiss International Arbitral Awards Before the Federal Supreme Court – Statistical Data 1989-2019“, ASA Bulletin, Vol. 39, No. 1, 2021, 7-41.

⁶⁷ Art. 69 Arbitration Act 1996; Gary Born, *International Commercial Arbitration*, Kluwer Law International, 2020, § 25.05 [A], [a] and [b].

⁶⁸ Art. 190 para. 2 PILA.

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Article history

Received: 24.09.2023.

Accepted: 27.10.2023.

REVIEW PAPER