Swiss Supreme Court refuses to revise interim award based on subsequent ICC disqualification of two arbitrators

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

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In *Decisions 4A_288/2023 and 4A_572/2023*, the Swiss Supreme Court dismissed requests to revise awards based on the successive disqualifications by the ICC of two of the arbitrators in the underlying arbitration for circumstances that postdated the award. The court confirmed that, to justify the revision of an award under article 190a(1)(c) of the Swiss Private International Law Act (PILA), the ground for challenge of an arbitrator must have existed at the time of the issuance of the award.

Speedread

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In two recent French-language decisions both rendered on 11 June 2024 and slated for official publication, the Swiss Supreme Court dismissed two requests for revision filed by NIOC against a US$32 billion ICC interim award based on the successive disqualifications by the ICC of two of the arbitrators in the underlying arbitration for circumstances that postdated the award.

The Supreme Court held, in both decisions, that, to justify the revision of an award under article 190a(1)(c) of the Swiss Private International Law Act (PILA), the ground for challenge of an arbitrator must have existed at the time of the issuance of the award. The occurrence of a ground for challenge of an arbitrator after the award was rendered does not, of itself, constitute a ground for revision of the award.

Furthermore, when the circumstances relied upon as a ground for revision of an award are opinions expressed by an arbitrator after the issuance of the award that may reveal a bias against a party or a community, the party requesting the revision bears the burden of proving that the ground for challenge of the arbitrator (that is, the bias) already existed at the time the award was rendered.

In the first decision, the Supreme Court found that almost all the circumstances relied upon by NIOC in relation to the first arbitrator postdated the award and that the only two circumstances which predated the award did not justify its revision.

In the second decision, the Supreme Court found that NIOC had failed to establish the existence of any long-standing bias of the second arbitrator towards Iranians, Muslims or the practice of veil-wearing, at the time of the issuance of the award. (*Decisions 4A_288/2023 and 4A_572/2023 (Swiss Supreme Court) (11 June 2024)*.)

Background

Article 190a(1) of the Swiss Private International Law Act (PILA) provides a narrow list of grounds on which a party may request the revision of an international arbitration award by the Swiss Supreme Court, including "if despite having exercised due diligence, a ground for challenge under Article 180(1)(c) was not discovered until after the conclusion of the arbitration and no other remedy is available" (*article 190a(1)(c)*).

Pursuant to article 180(1)(c) of PILA, an arbitrator may be challenged "if circumstances exist that give rise to justifiable doubts as to that arbitrator's independence or impartiality".

The other two grounds for revision of an award under article 190a(1) of PILA refer to:

- The discovery, after the issuance of the award, of facts or evidence that predated the award (*article 190a(1)(a)*).
- The influence of a criminal act on an award (*article 190a(1)(b)*).

The application for revision under article 190a(1) of PILA must be made within 90 days of discovery of the ground. The right to apply for revision expires ten years from the date on which the award has come into force (*article 190(a)(2), PILA*).

Facts

Ad hoc arbitration

In June 2018, UAE-based petroleum company, Crescent, initiated an ad hoc arbitration (Ad Hoc Arbitration), seated in Geneva, in respect of a failure by the National Iranian Oil Company (NIOC) to honour a 25-year gas supply contract made with Crescent (Contract).

In September 2018, Crescent terminated the Contract. In a 2019 interim award, the arbitral tribunal accepted jurisdiction. In a 2020 interim award, it ruled that Crescent had validly terminated the Contract (Award on Termination).

In July 2020, in decision *4A_300/2020*, the Swiss Supreme Court dismissed NIOC's application to set aside the Award on Termination on the ground that the award did not definitely adjudicate and conclude the proceedings with respect to a part of what was claimed and thus qualified as an interim or preliminary award that was not open to challenge (as opposed to a partial award). For further details, see *Legal update, Challenge against interim award inadmissible (Swiss Supreme Court)*.

In September 2022, the chair of the tribunal in the Ad Hoc Arbitration, Professor Aynès (PA), disclosed that partners of his law firm had been working alongside one of Crescent's counsel (RD) on an unrelated ICC arbitration between a UAE and a French party (ICC Arbitration) since July 2022. The dispute involved a sale of goods where the end-user was an Iranian telecommunication company.

According to NIOC, after members of its legal department had accidentally overheard, in February 2023, Iranian government officials discussing the ICC Arbitration, it became aware of the fact that the ICC Arbitration involved (as non-parties) Iranian state entities, and that serious corruption allegations against high-ranked Iranian officials were being made by PA's partners in the ICC Arbitration. NIOC challenged PA before the ICC (which, under the Contract, had authority to decide on challenges to arbitrators), arguing that these circumstances raised doubts as to his independence and impartiality. Among other things, NIOC relied on anonymously leaked documents from the ICC Arbitration published by Global Arbitration Review. NIOC further relied on another alleged conflict of interest arising from PA and RD having acted for the same party (Kout Food Group) in proceedings to set aside an award in Paris and to oppose its enforcement in London.

In March 2023, the ICC accepted the challenge and removed PA as tribunal chair.

In August 2023, another arbitrator on the ad hoc tribunal, Dr. Poncet (DP), appeared on a Swiss TV broadcast in which he discussed the use of burkinis in Swiss public swimming pools. NIOC subsequently made a challenge to DP as arbitrator on the grounds of his broadcast remarks, alleging that these gave rise to doubts as to his impartiality.

In November 2023, the ICC removed DP, finding that his remarks could be perceived as encompassing the practice of veil-wearing and be offensive to the Muslim community.

Application to the Swiss Court

Following PA's disqualification, NIOC applied to the Swiss Supreme Court for the revision of the 2020 Award on Termination under article 190a(1)(c) of PILA.

Following DP's disqualification, NIOC filed another application for revision of the Award on Termination under article 190a(1)(c) of PILA and requested the consolidation of the two applications for revision.

Decisions

The Swiss Supreme Court rejected NIOC's consolidation request on the ground that the circumstances in each case were significantly different and that the issues did not necessarily overlap. It nevertheless rendered its decision on each application for revision on the same day, dismissing them both.

On the application for revision based on the removal of PA (*4A_288/2023*)

The Supreme Court noted that the party applying for revision must demonstrate that it had duly complied with the 90-day time limit under article 190(a)(2) of PILA for applying for revision following discovery of the relevant ground. If the applicant cannot do so, the application is inadmissible.

The Supreme Court pointed out that the only evidence relied upon by NIOC to demonstrate that it had purportedly discovered the ground for revision in February 2023, was an affidavit by its own General Counsel, which had limited probative value and was insufficient to establish, in and of itself, the date of the discovery of the ground for revision.

The Supreme Court also noted the "nebulous, if not troubling" way in which the ground for challenge was purportedly discovered by NIOC, following a conversation allegedly overheard by its General Counsel and the anonymous leaks of documents from the ICC Arbitration.

The court further underlined that PA's disclosure of September 2022 that the ICC Arbitration involved an Iranian telecommunication company should have aroused NIOC's curiosity. Had NIOC carried out additional investigations at that time, in accordance with the parties' "duty to investigate" (duty of curiosity) existing in Swiss arbitration law, it could have potentially discovered the ground for challenge earlier than February 2023.

The Swiss Supreme Court concluded that there were thus serious doubts as to the admissibility of NIOC's application for revision. It found that, in any event, NIOC's application was devoid of any merit. In the course of its judgment, the court affirmed the following legal principles:

- Whereas the decision of a private arbitral institution on a challenge to an arbitrator is not subject to (direct) appeal to the Supreme Court, it is always open to (indirect) review by the court in the framework of an application for setting

aside or revision of the award pursuant to article 190 or article 190a of PILA, whether such decision admits or rejects the challenge.

- The Supreme Court's role is not to determine whether the arbitrator was disqualified by the arbitral institution for valid reasons, but whether the circumstances relied upon in the application for revision constitute a ground pursuant to article 190a(1)(c) of PILA justifying the revision of the award. In undertaking such exercise, the Supreme Court is solely bound by the findings of fact made by the arbitral institution in its decision, not by its legal findings.
- Revision of an award is an extraordinary remedy under Swiss law governed by rules that are stricter than setting aside proceedings. The requirements for admitting an application for revision must therefore be interpreted restrictively.
- In order to justify the revision of an award under article 190a(1)(c) of PILA, the ground for challenge of an arbitrator (in this case a lack of impartiality) must have existed at the time the award was rendered. The occurrence, **after** the rendering of the award, of a ground for challenge of an arbitrator does not, of itself, constitute a ground for revision of the award (whether it is a final, partial or interim (preliminary) award). There is no reason to annul an award rendered by a duly independent and impartial arbitral tribunal on the sole ground that one of the arbitrators subsequently lacked independence or impartiality after the award was rendered. This would be contrary to legal certainty and open the door to dilatory tactics.

The Supreme Court held that almost all the circumstances relied upon by NIOC in its application for revision postdated the Award on Termination and that the only two circumstances which predated that award did not justify its revision. The court thus dismissed the application for revision.

On the application for revision based on the removal of DP (*4A_572/2023*)

The Supreme Court affirmed the same legal principles summarised above in the decision concerning PA.

The court further added that, when the circumstances relied upon as a ground for revision of an award are opinions expressed by an arbitrator, after the issuance of the award, that may reveal an apparent bias against a party or a community, the party requesting the revision bears the burden of proving that the ground for challenge of the arbitrator already existed at the time the award was rendered.

In this case, since the TV broadcast took place more than three years after the Award on Termination was rendered, NIOC had the onus of demonstrating that DP's alleged bias against Muslims or the Muslim practice of veil-wearing already existed at the time the Award on Termination was rendered.

The Supreme Court then sought to establish the most appropriate criterion to determine whether a ground for challenge based on circumstances that postdate an award already existed at the time the award was rendered.

The court rejected NIOC's argument that when, after the issuance of an award, an arbitrator makes comments that give rise to justifiable doubts as to that arbitrator's bias against a party or a community, it should be assumed that such bias already existed at the time the award was rendered. It concluded that this would reverse the burden of proof and give too much weight to subjectivity. An arbitrator's opinions are not immutable and may evolve over time.

The Supreme Court held that, in this case, in the absence of any other evidence, it was not possible to conclude that DP's comments, made more than three years after the Award on Termination, revealed, in and of themselves, a long-standing bias against Iranians, Muslims or the practice of veil-wearing that existed when that award was rendered.

The court noted that the evidence on record rather showed that DP had, in the past, both professionally and personally, publicly supported Muslim causes, including the freedom of speech of Muslims expressing radical Islamic opinions. The court further

noted that NIOC had failed to submit any evidence showing that DP had reneged on his previous opinions or had any bias at the time the Award on Termination was rendered. The court concluded that NIOC had failed to establish the existence of a ground for challenge at the time of the issuance of the Award on Termination, and it therefore dismissed the application for revision.

Comment

Unlike the first two grounds for revision of an arbitral award under articles 190a(1)(a) and 190a(1)(b) of PILA, which specifically refer to elements that predate the issuance of the award, the third ground for revision relied on in this case, namely the discovery of a ground for challenge of an arbitrator (*article 190a(1)(c), PILA*), does not specify that the ground for challenge must predate the issuance of the award.

Following its general pragmatic and pro-arbitration approach, the Swiss Supreme Court has held for the first time with respect to article 190a(1)(c) of PILA that only grounds for challenge of an arbitrator that predate the award can constitute a ground for revision of the award (whether final, partial or interim). The court noted that if an award could be annulled on the basis of any ground for challenge occurring within the ten-year time limit during which revision of an award may be sought under Swiss law, this would put in serious jeopardy the legal security of awards rendered in Switzerland.

However, although the principle laid down by the Supreme Court is relatively easy to apply where the ground for challenge relied upon is based on the existence of a conflict of interest which, by definition, arises at a certain point in time, it is harder to apply where the ground for challenge is based on an arbitrator's alleged bias. This is more difficult to pinpoint in time. In such cases, revision of an award should be denied where the application is based exclusively on circumstances (speeches, publications and so on) that postdate the award and where there is no additional evidence of any bias already existing at the time the award is issued.

Cases

Decisions 4A_288/2023 and 4A_572/2023 (Swiss Supreme Court) (11 June 2024).

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