

## Arbitration - Switzerland

### Arbitrators' Independence

June 28 1999

Two Swiss Supreme Court decisions resolve the following crucial issues as to arbitrators independence:

- A. Is an arbitrator's lack of independence a ground to set aside an award?
- B. From whom must an arbitrator be independent?
- C. When is an arbitrator not independent?

The first case is *Hitachi Ltd v SMS Schloemann*, 15 ASA BULLETIN 99-107 (1997) (Supreme Court, June 30 1994), as follows:

#### Facts

Counsel to a party regularly recommended a particular arbitrator, also a practicing attorney, to clients for appellate cases and vice versa. This pattern of recommendation is usual in Germany between lawyers practicing a specialized field (eg intellectual property) when one counsel is admitted to appellate court only and the other to trial court under the German rules about exclusive court admission.

#### Held

The arbitrator was independent.

**A. *An arbitrator's independence may be reviewed in an action to set aside the award*** under PIL Act, Art. 190(2)(a) regarding improperly constituted tribunals. Such review is open after a challenge of the arbitrator has been rejected by the ICC (no appeal being available against the ICC's decision). However, the scope of review of the award is limited to independence as required by PIL Act Article 180(1) lit. a. The court will not review any further qualifications that may have been agreed by the parties and which can be asserted only when the challenge is directed against the arbitrator.

**B. *An arbitrator must be independent not only from the parties, but also from the parties' counsel.***

**C. *A party-appointed arbitrator may not derive a substantial portion of his income from a party's counsel.*** PIL Act Article 180(1) lit. a in effect provides for the same standard as Swiss Constitution Article 58 and European Convention on Human Rights Article 6(1), but the arbitration context must be taken into account. A higher degree of independence is required for the presiding arbitrator than for a party-appointed arbitrator. An arbitrator would lose independence if a party is in a position to influence his judgment. But a practicing attorney acting as arbitrator can be expected to discriminate between judicial independence and friendly professional relations.

The second case is *I.S.A. v V*, 16 ASA BULLETIN 634 *et seq.* (1998) (Supreme Court, February 9 1998) as follows:

#### Facts

The party-appointed arbitrator had a partner who represented a third party acting against an affiliate of a party in the arbitration.

#### Held

The arbitrator was independent.

A. The party-appointed arbitrator's independence was reviewed in an action to set aside the award, after such arbitrator was unsuccessfully challenged before the court at the

### Author

Pierre-Yves  
Tschanz



place of arbitration (as the *ad hoc* arbitration clause did not give power to any private body to decide challenges against arbitrators).

B. While arbitrators must be independent from the parties and their counsel, arbitrators need not be independent from counsel to a third party, even if such third party is the opponent of a party in the arbitrations in another case. While the arbitrator was a partner of the third party's counsel, and thus not independent from that counsel, that counsel was not representing a party in the arbitration. It therefore did not matter as there was no interest in deciding in favour of a party in the arbitration just because that party was opposed to a client of the arbitrator's firm.

C. A party-appointed arbitrator does not lose his independence just because one of his partners is acting against one of the parties' affiliate.

**Comment:** The rule of thumb remains that independence turns on whether the arbitrator has an interest in deciding one way or another. Accordingly, arbitrators must be independent from those standing to benefit/lose from the award, but not from persons for whom the outcome does not matter.

*For further information on the above topics please contact Pierre-Yves Tschanz in the first instance by phone on 00 41 22 704 37 00, or by e-mail to [tschanz@ttv.ch](mailto:tschanz@ttv.ch)*

The materials contained on this web site are for general information purposes only and are subject to the [disclaimer](#).

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at [www.iloinfo.com](http://www.iloinfo.com).



Official Online Media Partner to the International Bar Association  
An International Online Media Partner to the Association of Corporate Counsel  
European Online Media Partner to the European Company Lawyers Association

© Copyright 1997-2009 Globe Business Publishing Ltd