

## Arbitration - Switzerland

### No two-tier judicial review of constitution of arbitral tribunal

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#### Introduction

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#### Introduction

The guarantee to an independent and impartial tribunal is a fundamental tenet of justice (eg, Article 2, Paragraph 3 lit b of the International Covenant on Civil and Political Rights; see Article 6, Paragraph 1 of the European Convention on Human Rights). In the context of arbitration, it requires that national law allow the regularity of the constitution of the arbitral tribunal to be reviewed by a judicial authority (one-tier judicial review). Under Swiss law, such review occurs at a different stage depending on whether the initial determination on the constitution of the tribunal is made by:

- a judicial authority in an ancillary proceeding (as is the case for *ad hoc* arbitration), in which case there will be no further judicial review in this respect – not even against the final award; or
- a private body (as is usually the case for institutional arbitration (eg, the ICC International Court of Arbitration or the Court of Arbitration for Sport)), in which case the judicial review will be part of the challenge against the award.

The Supreme Court confirmed this practice in a recent decision. It declined to hear, in a challenge against the final award, arguments related to the constitution of an *ad hoc* arbitral tribunal that had already been heard by the lower cantonal court in an ancillary proceeding.<sup>(1)</sup>

In the same decision, the Supreme Court made clear that when an award is set aside, there is nothing to prevent the case from being decided by the same arbitrators, as long as the grounds for annulment are not the tribunal's irregular constitution or lack of jurisdiction.

#### Facts

An *ad hoc* arbitral tribunal issued a final award in a commercial dispute between two parties. The Supreme Court vacated this award in part, on the grounds that it failed to address – even implicitly – the absolute statute of limitations objection raised by the defendant, which could have led to a different outcome on the merits.<sup>(2)</sup> Thereafter, the arbitral tribunal reconvened on its own motion and invited the parties to file their additional submissions on the statute of limitations argument. The defendant objected:

- first, on the grounds of lack of jurisdiction of the arbitral tribunal after the issuance of the previous but cancelled final award, failing any express reference to the arbitral tribunal's jurisdiction in the Supreme Court's decision; and
- second, on the grounds of the arbitral tribunal's lack of impartiality to decide the matter.

The arbitral tribunal dismissed both objections, and the defendant filed a revocation application of the entire arbitral tribunal (Article 180, Paragraph 2(c) of the Private International Law Act)<sup>(3)</sup> with the lower cantonal court in an ancillary proceeding (Article 180, Paragraph 3 of the Private International Law Act).<sup>(4)</sup> The lower cantonal court dismissed the challenge and (erroneously) reserved the right for the parties to seek annulment of the future award before the Supreme Court on the same grounds. Thereafter, the arbitral tribunal completed the hearing process for the statute of limitations, declared the proceeding closed and issued a second final award dismissing explicitly the statute of limitations argument. The defendant sought the annulment of this second award before the Supreme Court, invoking, among other

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things, the irregular constitution of the tribunal (Article 190, Paragraph 2(a) of the Private International Law Act )<sup>(5)</sup> and, subsidiarily, its lack of jurisdiction (Article 190, Paragraph 2(b) of the Private International Law Act ).<sup>(6)</sup>

## Decision

In the challenge proceeding against the final award, the Supreme Court considered that the lower cantonal court had already issued a final and binding determination on the constitution of the tribunal and had thus satisfied the judicial review requirement. In that respect, and in line with the majority of legal scholars,<sup>(7)</sup> the court denied any inconsistency between:

- the general exclusion of the constitution-based ground in a challenge against *ad hoc* awards; and
- the admission of such ground in a challenge against institutional awards.

In the former case, the regularity of the constitution of the tribunal has been judicially reviewed in a final and binding decision that should not be reviewed by the Supreme Court. It expressly dismissed the view supported by certain scholars whereby Swiss law (ie, Article 180, Paragraph 3 of the Private International Law Act) rules out only an immediate judicial challenge against the lower court's decision, but allows the same constitution-based ground in the challenge against the final award.<sup>(8)</sup>

In the latter case, the challenge against the arbitrators is heard at first instance by a private body (the arbitral institution) and determined in a decision that is not subject to immediate judicial review under Swiss law.<sup>(9)</sup>

According to the Supreme Court, such private determination does not comply with the fundamental guarantee to an independent and impartial tribunal:

*"the decision on the challenge of the tribunal is issued by a private body to which the Swiss legal order cannot surrender the responsibility to secure compliance with such fundamental rights as the independence and impartiality of the members of the arbitral tribunal."*<sup>(10)</sup>

On the contrary, the Supreme Court considered this dual approach to be in line with the general non-intrusive spirit of Swiss international arbitration law, "the purpose of which...is to confine as much as possible the challenge possibilities in this [arbitration] proceeding",<sup>(11)</sup> as well as with the necessity that constitution and jurisdiction challenge be raised and finally decided at the earliest possible stage in the arbitration proceeding.<sup>(12)</sup>

The Supreme Court further confirmed the revived jurisdiction of the same arbitral tribunal that issued the vacated award upon the court's annulment decision. As a matter of principle, the award provides a final and binding resolution of the parties' dispute and has preclusive effects in relation to the dispute it resolves – *res judicata* (ie, a conclusive final judgment) authority – when communicated to the parties (Article 190, Paragraph 1 of the Private International Law Act), thereby terminating the arbitral tribunal's jurisdiction (subject to limited exceptions such as rectification, complement or revision, when applicable). However, a successful challenge of the award before the Supreme Court would, to the extent of such annulment:

- reverse the *res judicata* authority of the award; and
- revive the authority of the arbitral tribunal to decide on the vacated issues.

Therefore, according to the Supreme Court, there is no objection to the same arbitrators' jurisdiction upon the annulment of their final award:

*"subject of course to the ground of such annulment not lying in the irregular constitution of the tribunal...or their lack of jurisdiction...and subject to their not having been successfully removed in the meantime."*<sup>(13)</sup>

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## Endnotes

(1) Supreme Court Decision 4A\_14/2012, May 2 2012, in *X GmbH v Y Sàrl*. The full text of the decision, which will be published in the official reports of the Supreme Court's decisions, is available, in French, at [www.bger.ch/fr/index/jurisdiction/jurisdictioninherit-template/jurisdiction- recht/jurisdiction-recht-urteile2000.htm](http://www.bger.ch/fr/index/jurisdiction/jurisdictioninherit-template/jurisdiction- recht/jurisdiction-recht-urteile2000.htm).

(2) Supreme Court Decision 4A\_46/2011, May 16 2011; for further details please see "[Supreme Court confirms benchmarks on pre-arbitration conciliation duties](#)" and "[Recent developments in Swiss arbitration law](#)".

- (3) "An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his/her independence" (authors' translation).
- (4) "To the extent that the parties have not made provisions for this challenge procedure, the judge at the seat of the arbitral tribunal shall make the final decision" (authors' translation).
- (5) "The award may be annulled only if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted" (authors' translation).
- (6) "The award may be annulled only if the arbitral tribunal wrongly accepted or declined jurisdiction" (authors' translation).
- (7) See, for example, Tschanz, in *Commentaire romand, Loi sur le droit international privé – Convention de Lugano*, 2011, Article 180 LDIP No 62; Leemann, Challenging international arbitration awards in "Switzerland on the ground of lack of independence and impartiality of an arbitrator", in *Bulletin de l'Association Suisse de l'Arbitrage*, 2011, 10, at 16, Berger/Kellerhals, *International and Domestic Arbitration in Switzerland*, 2nd ed 2011, No 839a *in fine*; and numerous other references in Ground 2.2.1.
- (8) Kaufmann-Kohler/Rigozzi, *Arbitrage international*, 2nd ed 2010, No 402/ 808a and note 633, page 504; Poudret/Besson, *Comparative law of international arbitration*, 2nd ed 2007, No 791, page 729; Besson, "Réflexions sur la jurisprudence suisse la plus récente rendue en matière d'arbitrage international", in *Bulletin ASA* 2003 463, at 471.
- (9) See, for example, the Supreme Court Decision 4A\_644/2009, April 13 2010, Ground 1, and Decision 4P.226/2004, March 9 2005, Ground 3.1.
- (10) Ground 3.1 (authors' translation).
- (11) Ground 2.2.1 (authors' translation).
- (12) *Loc cit*.
- (13) Ground 3.1.1 (authors' translation).

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