

Swiss Supreme Court dismisses jurisdictional challenge based on multi-tiered dispute resolution clause

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

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In *Decision 4A_313/2024*, the Swiss Supreme Court dismissed a challenge against an ICC award brought by a contractor on the basis that the owner had failed to first submit the dispute to a dispute review board and the tribunal therefore lacked jurisdiction.

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The Swiss Supreme Court has dismissed a contractor's challenge against an ICC award affirming the tribunal's jurisdiction over payment claims by the owner under an engineering, procurement and construction (EPC) contract. The contract included a multi-tiered dispute resolution clause requiring the parties to submit disputes to a dispute review board (DRB) before resorting to arbitration.

The owner made advance payments of over EUR920 million and the contractor issued an advance payment guarantee (APG), which the owner could call in case of termination of the EPC contract. The APG provided that the EPC contract's multi-tiered dispute resolution clause "shall apply mutatis mutandis".

The owner terminated the EPC contract and called the APG. The contractor refused to pay and the owner initiated arbitration. The contractor contested the tribunal's jurisdiction, arguing that the dispute should have first been brought before a DRB.

The tribunal dismissed the jurisdictional objection, finding that the pre-arbitral tier of the DRB was not a mandatory requirement because the APG only contained a "mutatis mutandis" reference to the multi-tiered dispute resolution clause in the EPC contract.

On appeal, the Supreme Court upheld the tribunal's jurisdiction. It held that compliance with a mandatory pre-arbitral step is assessed as a matter of jurisdiction *ratione temporis* under the Swiss *lex arbitri*. Affirming a 2014 judgment (discussed in *Legal update, First decision on FIDIC Dispute Adjudication Boards (Swiss Supreme Court)*), the court held that the general contract interpretation principles of article 18 of the Swiss Code of Obligations apply when construing multi-tiered arbitration agreements, in order to determine whether a pre-arbitral step is mandatory before initiating arbitration.

The court noted that the tribunal had found that it was not the parties' true and common intention that disputes arising under the APG must first be submitted to a DRB. According to the court's long-standing case law, a tribunal's findings as to the parties' true and common intention are findings of fact which the Supreme Court cannot review in the context of a challenge under article 190(2) of the PILA. Therefore, the court was bound by the tribunal's findings on this point and dismissed the jurisdictional challenge.

This recently published decision is the first in many years to address multi-tiered dispute resolution clauses and provides an important reminder that when parties have agreed to a Swiss-seated arbitration, Swiss contract law principles apply to the interpretation of the arbitration agreement, including as to whether pre-arbitral tiers are mandatory.

Case: [Decision 4A_313/2024 \(Swiss Supreme Court\) \(30 October 2024\)](#).

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