

Swiss Supreme Court dismisses jurisdictional challenges against ICC award in Turkish rail project as inadmissible

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

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In *Decisions 4A_221/2024* and *4A_223/2024*, the Swiss Supreme Court declared inadmissible two challenges against an ICC award brought by members of a construction consortium, which had argued that the tribunal had exceeded its jurisdiction by revisiting issues already settled in a previous arbitration.

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The Swiss Supreme Court has dismissed challenges to an ICC award in a dispute between three contractors from France, Japan, and Turkey, which had entered into a consortium agreement for a project to modernise Istanbul's rail network.

The consortium concluded a contract with the Turkish Ministry of Transport (CR1 Contract). Following project delays, the French contractor terminated the CR1 Contract on behalf of the consortium without first informing the other contractors.

In a Swiss-seated ICC arbitration, the Ministry was awarded EUR27 million (CR1 Award), to be paid jointly and severally by the three consortium members.

The Japanese and Turkish contractors then initiated an ICC arbitration against the French contractor (Consortium Arbitration), claiming indemnities for their liability towards the Ministry under the CR1 Award. In the award (Consortium Award), the French contractor was ordered to pay compensation, but its liability was reduced because the other two contractors had contributed to the damage.

The French and Japanese contractors applied separately to the Swiss Supreme Court to have the Consortium Award set aside. They argued that the tribunal exceeded its jurisdiction, citing a provision in the consortium agreement stating that "[a]ny settlement or award under the [CR1 Contract] will be binding in respect of the arbitration proceedings under the [consortium agreement]".

The French contractor argued that, when assessing liability, the tribunal had improperly substituted its own findings for those made in the CR1 Award. The Japanese contractor contended that the tribunal lacked jurisdiction to reduce the French contractor's liability, as the joint liability of the contractors was established in the CR1 Award and was, therefore, *res judicata*.

The Supreme Court declared both jurisdictional challenges inadmissible. First, they were belated, as neither party had contested jurisdiction during the Consortium Arbitration. Second, the applicants were confusing a tribunal's jurisdiction with its power to review claims falling within its jurisdiction. The applicants were not claiming that the tribunal had exercised jurisdiction over a dispute not covered by the consortium agreement's arbitration clause. Rather, they were criticising the tribunal for departing from the findings made in the CR1 Award.

While highly fact specific, the Supreme Court's decision provides guidance on distinguishing the jurisdiction of a tribunal from its power of review. The court emphasised that a jurisdictional challenge under article 190(2)(b) of the Swiss Private International Law Act cannot be used as a backdoor to obtain a substantive review of an award.

Cases: *Decisions 4A_221/2024 and 4A_223/2024* (Swiss Supreme Court) (both dated 17 February 2025) (French language).

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