No conflict and no grounds for revision of Bosch Rexroth v Piacentini award (Swiss Supreme Court)

- **Resource type: Legal update: case report**
- **Status: Published on 12-Oct-2016**
- **Jurisdiction: Switzerland**

In *decision 4A_386/2015*, the Swiss Supreme Court considered whether an indirect link between the sole arbitrator and an affiliate of the claimant, through an associated law firm, was a ground for revision of the award.

Prof Dr Nathalie Voser (Partner) and Anya George (Senior Associate), Schellenberg Wittmer Ltd

Speedread

In a French-language decision dated 7 September 2016, which is slated for official publication in the court reporter, the Swiss Supreme Court analysed whether the subsequent discovery of grounds for recusal could serve as a basis for the revision of an international arbitration award. Leaving that question undecided, the court came to the conclusion that, in the specific circumstances of the case, there was no indication of a conflict of interest. The sole arbitrator, a lawyer with CMS von Erlach Poncet in Zurich, could not be considered as working for the same firm as that which delivered advice to an affiliate of the claimant, CMS Hasche Sigle in Germany.

In this decision, the Supreme Court chose to carry out an unusual balancing act. It gave a strong indication that it believed that the discovery of circumstances raising doubts as to the independence and impartiality of an arbitrator, should constitute grounds for revision of an international award. However, rather than making a definitive ruling on the issue, it chose instead to refer the matter to Parliament to be dealt with in the upcoming revision of the Swiss International Private Law Act. However, it has provided Parliament with a roadmap for the amendment of the *lex arbitri* on that issue.

The decision is also interesting in that it confirms the importance given to the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, as an internationally recognised standard. (*Decision 4A_386/2015.*)

Background

There are no express provisions on revision of awards in Chapter 12 of the Swiss International Private Law Act (PILA). In accordance with the long standing practice of the Swiss Supreme Court, Article 123(2)(a) and Article 124(1)(d) of the Federal Supreme Court Act (FSCA) apply by analogy to the revision of international arbitral awards. There has been some debate as to whether Article 121(a) FSCA should also apply.

Pursuant to Article 121(a) FSCA:

> "[…] revision may be requested if the provisions governing the composition of the tribunal or recusal were not observed."

Pursuant to Article 123(2)(a) FSCA:

> "[…] revision may be requested if the applicant subsequently learned of new material facts or discovered decisive evidence which the applicant was unable to submit in the initial proceedings, to the exclusion of such facts and evidence which only arose after the decision".

Facts

Around 2005, a Dutch affiliate of the German engineering group Bosch (Bosch Rexroth), entered into a contract with an Italian company (Piacentini), for the construction and installation of a boat lift in Italy. When the final test was carried out in 2007, the lift cables snapped and the platform collapsed. A dispute arose between the parties as to the financial consequences of this incident, which both said was the other's responsibility.

Bosch Rexroth initiated arbitration proceedings against Piacentini in December 2011 under the International Chamber of Commerce (ICC) Rules. The ICC appointed Swiss lawyer, Hansjürg Schürmann, as sole arbitrator. Mr Schürmann rendered an award in favour of Bosch Rexroth on 23 April 2015.

On 4 August 2015, Piacentini filed for revision of the award with the Swiss Supreme Court. It argued that the arbitrator was a lawyer with the "firm CMS" (CMS von Erlach Poncet Ltd in Zurich). On 8 July 2015, Piacentini's counsel purportedly discovered a press release dated 5 December 2014, according to which CMS Hasche Sigle in Germany had advised Bosch Software Innovations, which belongs to

the Bosch Group, on the implementation of a smart phone app for drivers of electric cars. According to Piacentini, this link between CMS and an affiliate of the same group as the claimant would, had it been known at the time, have constituted grounds for the arbitrator to be recused or for the award to be set aside. As it was, this link was sufficient grounds for revision of the award.

Bosch Rexroth, in its response, disputed the circumstances alleged by Piacentini and argued that the lack of impartiality or independence of an arbitrator does not, *per se*, constitute grounds for revision of an award, but only grounds for setting aside an award pursuant to Article 190(2)(a) PILA.

The arbitrator also filed a response, in which he pointed out that CMS is not an integrated firm and that partners do not share fees at an international level. Rather it is a network of independent firms.

Decision

The Supreme Court rejected the request for revision.

The court started by recalling that there are no provisions on revision of international awards in the PILA but that, according to its established case law, Article 123(2)(a) of the FSCA applies by analogy. According to that provision, a party may request revision of a Supreme Court decision if it discovers new material facts or evidence after the proceedings. However, Piacentini sought to rely on Article 121(a) FSCA, which provides that a revision may be requested if the provisions governing the composition of the tribunal or recusal were not observed.

In essence, the issue was whether Article 121(a) FSCA also applies by analogy to international arbitral awards, or whether the discovery of circumstances that would have led to the recusal of an arbitrator could constitute grounds for revision of the award under another heading. These are questions that are the subject of debate amongst Swiss legal authorities. Some contend that this should not be the case, as the grounds for revision of international awards are, and should be, strictly limited. Others argue that it would be unfair to deprive a party of the possibility of challenging an award rendered by an arbitrator who may have lacked independence and impartiality.

After extensively reviewing both domestic and international practice and opinions, the Supreme Court came to a tentative conclusion; it held that the discovery of grounds for recusal of an arbitrator, after the expiry of the deadline to request the setting aside of the award, could form the basis for a request for revision of the award. However, such a request could only be made provided that the petitioner could not reasonably have discovered those grounds at the time of the arbitration.

However, rather than rendering a final decision on the issue, the Supreme Court indicated that it would be more appropriate for this point to be dealt with by Parliament, in the context of the upcoming revision to Chapter 12 of the PILA (see *Legal update, Swiss National Council launches revision of Swiss arbitration law (www.practicallaw.com/4-520-6466)*). This would allow for harmonisation between the various statutory provisions in play.

The Supreme Court was able to leave this issue undecided as it came to the conclusion that, in any event, there was no reason to believe that in this case, the arbitrator lacked independence and impartiality, or the appearance thereof.

Piacentini, in its request for revision, referred extensively to the International Bar Association Guidelines (IBA) on Conflicts of Interest in International Arbitration (IBA Guidelines). Piacentini argued that, as the "sole arbitrator's firm" had advised an affiliate of the claimant, and had most likely derived substantial revenue from that advice, the situation came within the scope of several of the red or orange list items. The arbitrator ought to have stepped down or, at the very least, disclosed this circumstance to the parties. Whilst the Supreme Court recognised the importance of the IBA Guidelines, it found that the specific circumstances of the case did not raise any red or orange flags. Indeed, the court considered that it was established that CMS was a network of independent firms between which there was no fee-sharing system. Therefore, the various lawyers working within the CMS network could not be considered to be members of one and the same firm. Piacentini had consequently argued on a false premise. The circumstances would, at most, fall under paragraph 4.2.1 of the IBA Guidelines, which specifically covers this type of situation, and would not have justified the recusal of the arbitrator.

Looking at the specific circumstances of the case, there was, in any event, no indication that the arbitrator was even aware of the advice provided by CMS Hasche Sigle. Therefore, there was no reason to doubt his subjective impartiality. Moreover, the link between the arbitrator and the claimant's affiliate was so tenuous, that it could not give rise to an objective appearance of partiality.

Comment

In this decision, the Supreme Court chose to carry out an unusual balancing act. It gave a strong indication that it believed that the discovery of circumstances raising doubts as to the independence and impartiality of an arbitrator, should constitute grounds for revision of an international award. However, rather than making a definitive ruling on the issue, it chose instead to refer the matter to Parliament to be dealt with in the upcoming revision of Chapter 12 of the PILA. However, it has provided Parliament with a roadmap for the amendment of the *lex arbitri* on that issue.

The decision also confirms the importance given to the IBA Guidelines as an internationally recognised standard. The Supreme Court, by referring to General Standard 6 of those Guidelines, highlights the need to always take into account the specific circumstances of the case, in particular when it comes to issues of conflict in large, international law firms and networks. The solution arrived at by the Supreme Court here was the correct one. However, in other cases a more restrictive approach may be justified, when conflict issues arise within networks of firms that promote their services under a common brand, potentially creating the perception that they are operating as "one firm".

Case

Decision 4A_386/2015 (www.practicallaw.com/w-003-8930) (Swiss Supreme Court).

Resource information

Resource ID: w-003-8938

Published: 12-Oct-2016

Products: Arbitration (All jurisdictions), PLC Arbitration Email, PLC US Law Department

Related content

Topics

Arbitrators and Appointments (http://uk.p02edi.practicallaw.com/topic0-203-6790)

Practice notes

Arbitration in Switzerland (http://uk.p02edi.practicallaw.comtopic9-513-8272)

Challenges to arbitrators (http://uk.p02edi.practicallaw.comtopic5-501-6994)

Legal update: archive

Good take-up of IBA guidelines on evidence and conflicts of interest (http://uk.p02edi.practicallaw.comtopicw-003-6094)

Swiss National Council launches revision of Swiss arbitration law (http://uk.p02edi.practicallaw.comtopic4-520-6466)

Legal update: case report

"Weaknesses" in IBA Guidelines on Conflicts of Interest (English Commercial Court) (http://uk.p02edi.practicallaw.comtopic4-624-3887)

External resource

IBA Guidelines on Conflicts of Interest in International Arbitration (http://uk.p02edi.practicallaw.comtopic0-590-8685)

©2016 Thomson Reuters. All rights reserved. Privacy Policy and Cookies(http://www.practicallaw.com/3-386-5597).Legal Information(http://www.practicallaw.com/8-531-0965). Subscription enquiries +44 (0)20 7202 1220 or email subscriptions@practicallaw.com. The reference after links to resources on our site (e.g. 2-123-4567) is to the PLC Reference ID. This will include any PDF or Word versions of articles.