Violations of Swiss Constitution or European Convention on Human Rights do not amount to a violation of substantive public policy (Swiss Supreme Court)

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

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In *Decision 4A_453/2021*, the Swiss Supreme Court dismissed an application to set aside an award based on alleged violations of substantive public policy. The court found, among other things, that even if the award were to breach the Swiss Constitution or the European Convention on Human Rights, these violations alone would not amount to a violation of substantive public policy.

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In a recently published French-language decision, the Swiss Supreme Court dismissed an application to set aside an ICC award for alleged violation of substantive public policy.

The claimant concluded two agreements with a bank concerning petroleum products. The agreements provided for the control, testing and documentation of the products by a third party acting on behalf of the bank and also provided that the claimant could not bring any claim against the third party without the bank's approval.

The claimant initiated ICC arbitration in Geneva against the third party for damages for breach of contract. A sole arbitrator, applying English law, dismissed all claims.

The claimant challenged the award, contending that it violated substantive public policy (*article 190(2)(e), Swiss Act on Private International Law*) because it violated articles 26 (*guarantee to ownership*) and 27 (*economic freedom*) of the Swiss Constitution. The claimant also argued that:

- It was contrary to the principle of *pacta sunt servanda* (that agreements must be kept).
- The arbitrator had committed a denial of justice.
- It was incompatible with the principles of good faith and prohibition of abuse of right.

The Supreme Court reaffirmed that an award violates substantive public policy only if its outcome violates fundamental legal or moral concepts that underpin any legal order. The court also stressed that, even if the award violated provisions of the Swiss Constitution or the European Convention on Human Rights (ECHR), those violations alone would not amount to a violation of public policy, although the constitution or the ECHR could serve as guidelines on public policy. In any event, the court considered an alleged violation of the Swiss Constitution or the ECHR even less relevant in this case since the award was subject to English law.

The Supreme Court dismissed all grounds for setting aside, including that based on the principle of *pacta sunt servanda*. It held that the violation of this principle could only be relevant where the arbitrator refuses to apply a provision while recognising that it binds the parties or, conversely, if the arbitrator imposes compliance with

a provision it believes does not bind the parties. The court added that mere breaches of contract do not violate substantive public policy.

This decision reiterates the very restrictive approach of the court towards setting aside of awards for a violation of substantive public policy and emphasises that annulment of awards on this basis is extremely rare.

Case: *Decision 4A_453/2021 (Swiss Supreme Court) (2 December 2021)*.

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