

# Swiss Supreme Court upholds foreign state's jurisdictional immunity objection against appointment of arbitrator by state court

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

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In *Decision 4A\_163/2023, 4A\_490/2023*, the Swiss Supreme Court recognised an exceptional right to appeal against the appointment of arbitrators by a Swiss state court. In a landmark decision, the court declared the appeal admissible and then allowed it, finding that the appellant, a foreign state, enjoyed sovereign immunity from the jurisdiction of the Swiss courts in this case.

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## Speedread

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In a recently published French-language decision, slated for publication in the official court reporter, the Swiss Supreme Court examined whether there is any legal recourse against the appointment of arbitrators by a state court (so-called "*juge d'appui*"). Here, the arbitration was seated outside of Switzerland. The court found that a party to an arbitration may, exceptionally, appeal a court decision to appoint an arbitrator in the highly unusual circumstance where the *juge d'appui* assumes jurisdiction based on a *forum necessitatis* (jurisdiction by necessity).

After declaring the appeal procedurally admissible, the court upheld the appeal and found that by appointing arbitrators over the objections of the appellant, a foreign state, the *juge d'appui* had violated the state's sovereign immunity from the jurisdiction of the Swiss courts.

This landmark decision is remarkable because of the Supreme Court's willingness to depart from its established case law, which, in principle, excludes any appeal against arbitrator appointments made by the *juge d'appui*. (*Decision 4A\_163/2023, 4A\_490/2023 (16 January 2025)*.)

## Background

Article 179 of the Swiss Public International Law Act (PILA) governs the appointment of arbitrators. It provides:

"Article 179 Appointment and replacement

1 The members of the arbitral tribunal shall be appointed or replaced in accordance with the agreement between the parties. Unless the parties agree otherwise, the arbitral tribunal shall comprise three members, with the parties each appointing one member; the members shall appoint a chairperson by unanimous decision.

2 In the absence of an agreement or if the members of the arbitral tribunal cannot be appointed or replaced for other reasons, the state court where the arbitral tribunal has its seat may be seized. If the parties have not agreed on a seat or only agreed that the seat of the arbitral tribunal be in Switzerland, the first state court seized has jurisdiction.

... "

For further information on the appointment of arbitrators with the assistance of the *juge d'appui*, see [Practice note, Arbitration in Switzerland: Arbitral tribunal](#).

Article 3 of the PILA provides for a *forum necessitatis* jurisdiction (jurisdiction by necessity) of the Swiss courts:

"Article 3 Jurisdiction by necessity

Where this Act does not provide for jurisdiction in Switzerland and proceedings abroad are impossible or cannot reasonably be required, the Swiss judicial or administrative authorities at the place with which the case has a sufficient connection have jurisdiction."

Article 17 of the UN Convention on Jurisdictional Immunities of States and Their Property (UN Jurisdictional Immunities Convention) limits states' jurisdictional immunity in the context of arbitration agreements:

"Article 17 Effect of an Arbitration Agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity, interpretation or application of the arbitration agreement;

(b) the arbitration procedure; or

(c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides."

## Facts

In 2019, a Swiss company (Y) sent a notice of arbitration to a foreign company (X) based on an arbitration clause, which provided for ad hoc arbitration before a tribunal seated outside Switzerland. Y nominated an arbitrator in its notice of arbitration.

In its response to the notice of arbitration, X sought to join a foreign state (State) to the arbitration and raised counterclaims against the State. X also nominated an arbitrator and asked the State to accept Y's nomination or to jointly nominate a new arbitrator with Y.

In July 2021, X petitioned the Geneva Court of First Instance to appoint two arbitrators in the pending arbitration. This request was granted in February 2023. The State appealed to the Geneva Court of Justice, which rejected the appeal in August 2023.

The State appealed both decisions of the Geneva courts to the Supreme Court, which joined the cases and ruled on both appeals in a single decision.

## Decision

The Supreme Court granted the State's appeal against the judgment of the Geneva Court of First Instance.

### Appeal against decision of *juge d'appui* appointing arbitrator declared admissible

The Supreme Court first examined whether the State's appeals against the decisions of the Geneva courts were admissible.

According to the established case law of the Supreme Court, a decision by the *juge d'appui* appointing an arbitrator is, as a rule, not appealable. However, the court held that the "highly unusual circumstances of the present case" justified making an exception to this general rule. In particular, the court considered that in previous cases in which it had declared appeals against the appointment of arbitrators inadmissible, the jurisdiction of the Swiss *juge d'appui* had not been controversial, as the seat of arbitration in those cases was always in Switzerland (see *article 179(2), PILA and article 356(2)(a), Swiss Civil Procedure Code*). By contrast, the State's appeal concerned an arbitration seated outside Switzerland and the Geneva courts had relied on a *forum necessitatis* under article 3 of the PILA to ground their jurisdiction.

In this respect, the Supreme Court expressed doubt as to whether a Swiss court has jurisdiction to act as *juge d'appui* for an arbitration seated in another state based on a *forum necessitatis*. The court ultimately left this question open. However, it held that given this uncertainty, a party cannot be compelled to participate in an arbitration, without the opportunity to challenge the jurisdiction of the Swiss *juge d'appui* that appointed the arbitrators to conduct the foreign arbitration. Therefore, the court recognised, exceptionally, the right of the State to appeal the appointment decision of the Geneva court.

### Jurisdictional immunity objection upheld

Having determined that the appeal was admissible, the court examined the merits of the State's claim to jurisdictional immunity.

The State submitted that the Geneva court's decision to appoint arbitrators against its will violated its sovereign immunity from the jurisdiction of the courts in other states.

The court recalled that the jurisdictional immunity of states is governed by customary international law but that inspiration can be drawn from the UN Jurisdictional Immunities Convention, even though that treaty has not yet entered into force, as an insufficient number of states have ratified it.

In its decision appointing the arbitrators, the Geneva Court of First Instance held that article 17 of the UN Jurisdictional Immunities Convention prevented the State from invoking its immunity from the jurisdiction of the Swiss courts. The Supreme Court overturned that decision, pointing out that, under article 17, a state must have entered into an arbitration agreement "in writing" in order to conclude that the state waived its immunity from jurisdiction. In the present case, it was undisputed that the State had not signed the arbitration agreement, which was concluded between Y and X only.

After assessing certain other arguments, the Supreme Court held that the Geneva *juge d'appui* had wrongly rejected the State's jurisdictional immunity objection. As a result, the Geneva court had unlawfully exercised jurisdiction over the State by appointing arbitrators against its will.

The Supreme Court annulled the February 2023 judgment of the Geneva Court of First Instance and ordered the removal of the State from the proceedings before the *juge d'appui*. The case was remanded to the Geneva Court of First Instance to assess whether X's request for the appointment of arbitrators could be admitted without involving the State in the proceedings. The Supreme Court explicitly instructed the Geneva *juge d'appui* not to appoint an arbitrator for the State against its will.

## Comment

This landmark decision is remarkable because of the Supreme Court's willingness to depart from its established case law which, in principle, excludes any appeal against arbitrator appointments by the *juge d'appui*. The court gave due consideration to the unique circumstances of the case, particularly the fact that the *juge d'appui* founded their jurisdiction not on the basis of a Swiss seat of the arbitration, but rather based on a *forum necessitatis*. However, it left open the question of whether a *forum necessitatis* is even available in case of an arbitration seated outside Switzerland. At the same time, the court confirmed its settled case law that, under normal circumstances, there is no legal remedy against arbitrator appointments made by the *juge d'appui*.

The Supreme Court also clarified that a waiver of jurisdictional immunity for arbitration-related proceedings, codified in article 17 of the UN Jurisdictional Immunities Convention, cannot be assumed if a state has not signed the arbitration agreement in question.

## Case

[Decision 4A\\_163/2023, 4A\\_490/2023 \(16 January 2025\)](#) (French language).

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