Swiss Supreme Court considers application to set aside decision of the Swiss Chambers' Arbitration Institution

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In *decision 4A_546/2016*, the Swiss Supreme Court considered an application to set aside a decision of the Swiss Chambers' Arbitration Institution (SCAI) by which SCAI had appointed a sole arbitrator and whether to stay the proceedings due to an alleged breach of a multi-tiered dispute resolution clause.

Speedread

In a German-language decision dated 27 January 2017, but only recently published, which was rendered in a domestic arbitration setting, the Swiss Supreme Court confirmed and clarified several general principles regarding the types of decisions that are open to challenge before the court. In particular, the Supreme Court confirmed that only arbitral awards are subject to challenge under the relevant provisions of the Swiss Code of Civil Procedure, and not decisions by arbitral institutions. The Supreme Court further confirmed that it applies a substance-over-form approach when determining whether a decision by an arbitral tribunal constitutes an award and reiterated that procedural orders are generally not subject to setting aside proceedings, unless exceptionally, they include an implied decision regarding the arbitral tribunal's jurisdiction. (*Decision 4A_546/2016*.)

Background

Article 392(a) of the Swiss Code of Civil Procedure provides that an objection is admissible against partial and final awards.

Article 392(b), in conjunction with Article 393(a) and (b) of the Swiss Code of Civil Procedure, provides that interim awards may be challenged on the ground that an arbitrator was appointed or an arbitral tribunal was composed in an irregular manner, or that the arbitral tribunal wrongly found to have or not to have jurisdiction.

Facts

The dispute arose in connection with an agency agreement regarding hospitality packages for the football world cup in Brazil in 2014. The arbitration clause in the agency agreement provided for an "arbitral tribunal" to be constituted in accordance with the Swiss Rules of International Arbitration (Swiss Rules) in case the parties were unable within

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30 days to resolve any dispute arising from or in connection with the agreement by way of "good faith discussion and negotiation".

Upon the lodging of a notice of arbitration with Swiss Chambers' Arbitration Institution (SCAI) by its counterpart, the petitioner opposed the SCAI's jurisdiction to administer the dispute and requested that the arbitration be stayed by the institution while the parties conducted the good faith negotiations provided for in the agreement. Since the parties failed to reach an agreement both on the stay of the arbitration and on the constitution of the arbitral tribunal, SCAI ultimately proceeded to appoint a sole arbitrator. Immediately upon his appointment, the sole arbitrator wrote a letter to the parties suggesting several dates for a case management conference and attaching a draft procedural order no. 1.

The petitioner filed a motion to set aside before the Swiss Supreme Court, based on the provisions governing the setting aside of arbitral awards under the Swiss Code of Civil Procedure. It primarily challenged the institution's decision not to stay the arbitral proceedings, even though the parties had not conducted good faith negotiations, as well as its decision to appoint a sole arbitrator, claiming that the arbitration agreement provided for a three-member "arbitral tribunal", not a "sole arbitrator". The petitioner also challenged the "decision" of the sole arbitrator to propose dates for a case management conference and provide draft procedural rules for the arbitration.

The petitioner argued that both the institution's decision regarding a stay of the arbitration and the appointment of a sole arbitrator, as well as the sole arbitrator's "decision" regarding the proceedings were open to challenge before the Supreme Court, referring to a case rendered by the Supreme Court in 2013 (see *Legal update, Violation of parties' agreement on constitution of arbitral tribunal can be ground for challenge*), which it claimed supported its position.

Decision

The Supreme Court rejected the application by reiterating that only arbitral awards were amenable to set aside proceedings before the Supreme Court. This includes:

- Final awards by arbitral tribunals, which partially or entirely resolve a dispute, either by granting or dismissing a claim or by finding the claim inadmissible altogether.
- Partial awards by arbitral tribunals, which resolve a dispute with regard to a (quantitative) part of the claim.
- Interim awards by arbitral tribunals, which resolve certain preliminary procedural or substantive issues.

The court also confirmed its previous case law that, when deciding what qualifies as an award, it is the content of a decision that matters, not the form in which the decision is rendered.

The court went on to confirm in general terms that procedural orders, which do not bind the arbitral tribunal (in that it may amend or modify such decisions), do not generally qualify as challengeable awards. This includes decisions on advances on costs and decisions on requests for a stay of the proceedings, unless – exceptionally – a decision regarding a stay includes an implied decision regarding the tribunal's jurisdiction (see *Legal update, Swiss Supreme Court on consent in sports arbitration and a non-signatory's standing to bring a claim before the CAS*).

It also confirmed that decisions by institutions entrusted with the administration of arbitrations, such as the ICC or SCAI, are not challengeable, since such institutions act as private bodies and not as arbitral tribunals, nor with a judicial function. Such decisions, according to the Supreme Court, include decisions regarding the number and appointment of arbitrators and decisions regarding challenges against arbitrators. Relying on earlier case law, the Supreme Court confirmed that the allegedly wrongful constitution or composition of an arbitral tribunal can only

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be challenged with the first (challengeable) award by the tribunal. With regard to its earlier decision relied upon by the petitioner (see *Legal update, Violation of parties' agreement on constitution of arbitral tribunal can be ground for challenge*), the court clarified that whilst it had indeed in that judgment raised the issue of whether a decision by the Division President of the Court of Arbitration for Sports regarding the appointment of a sole arbitrator may be challenged before the Supreme Court, it had ultimately left the question unanswered in that particular instance. It had certainly not amended its previous case law, according to which institutional decisions regarding arbitral appointments are not challengeable as a matter of principle.

Finally, the Supreme Court held that the sole arbitrator's letter did not constitute a challengeable (interim) award. It also did not contain an implied decision on jurisdiction. Therefore, it was not open to setting aside.

Comment

This decision relates to domestic arbitration in Switzerland. However it is also relevant to international arbitrations seated in Switzerland and subject to the regime of the 12th Chapter of the Private International Law Act, since the findings of the Supreme Court are in all likelihood applicable *mutatis mutandis* to international arbitration.

The decision addresses and confirms a number of important points:

First, it clarifies that decisions of arbitral **institutions** are not challengeable, even if they concern the composition of the arbitral tribunal and therefore questions of jurisdiction. This means that parties to arbitrations seated in Switzerland must await a decision by the arbitral tribunal which qualifies as a final, partial or interim award in order to lodge a challenge with the Supreme Court.

Second, when deciding whether a decision by an arbitral **tribunal** is challengeable, the Supreme Court follows a substance-over-form approach. This means that the Supreme Court will look at the content of the decision in question and not the form in which it was taken. An illustrative example of this approach is case ATF/BGE 136 III 200 (see *Legal update, Swiss Federal Tribunal Rules on tribunal-ordered interim measures for the first time*), where the Supreme Court found that an arbitral tribunal's decision on interim measures did not qualify as a challengeable award even if it was rendered in the form of an award rather a procedural order. Conversely, whilst procedural orders may generally not be challenged, they may qualify as a challengeable award if they contain an implied decision on jurisdiction, which may exceptionally be the case with regard to decisions on requests to stay arbitral proceedings.

Finally, this decision also contains further guidance regarding multi-tiered dispute resolution clauses. In a recent decision (see *Legal update, Failure to comply with mandatory prearbitral tier can result in stay of arbitration*), the Supreme Court ruled that arbitral proceedings brought in breach of a mandatory pre-arbitration tier should be stayed until the parties have complied with the agreed multi-tiered process. As may be concluded from the present decision, even though parties may request a stay of the proceedings already before the arbitral institution, before the constitution of the arbitral tribunal proper, the institution is likely only to grant a stay at such an early stage of the proceedings with the consent of all parties, and will otherwise refer the decision to the arbitral tribunal. Such a decision on a request for a stay by the arbitral institution is not subject to challenge, which means that the party seeking a stay of the proceedings must raise the issue again before the arbitral tribunal. The arbitral tribunal's decision on the matter will only be challengeable to the extent the tribunal implicitly also decide on its jurisdiction. Absent an implicit jurisdictional decision, the requesting party will have to await the first challengeable award on the matter in order to apply for a setting aside before the Supreme Court and directions by the Supreme Court to the tribunal to stay the arbitral proceedings while the parties conduct whatever mandatory pre-arbitral tier they have agreed to.

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Case

Decision 4A_546/2016 (Swiss Supreme Court).

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Published on 22-Mar-2017

Resource Type
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