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A. Legislation and rules

A.1 Legislation

The Swiss government is proposing a “light” revision of Swiss international arbitration law as contained in Chapter 12 of the Swiss Private International Law Act. The Swiss Arbitration Association (ASA), after liaising with Swiss arbitration practitioners, participated in the official consultation process and submitted its comments in May 2017. The draft revision does not aim at fundamentally changing the key features of Swiss international arbitration law but shall mainly improve legal certainty and clarity and adapt certain provisions to recent developments. The ASA supports the general intention to regulate only “as much as necessary” and “as little as possible” in order not to deviate from the well-acknowledged principles in Swiss arbitration.

A.2 Institutions, rules and infrastructure

The Swiss Chambers’ Arbitration Institution has, in collaboration with Japanese lawyers, prepared a Japanese translation of the Swiss Rules of International Arbitration. These Rules are now available in 15 languages: Arabic, Chinese, Czech, English, French, German, Greek, Italian, Japanese, Persian, Polish, Portuguese, Russian, Spanish, and Turkish.

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B. Cases

The Swiss Supreme Court was particularly active in 2017. The following is a quick overview of the most interesting cases in international arbitration.

B.1 The Platini decision

In a decision dated 29 June 2017,⁵ the Swiss Supreme Court confirmed the four-year ban from any football-related activity pronounced by the Court of Arbitration for Sport (CAS) against former UEFA President, Michel Platini, in May 2016.

Platini was initially banned for eight years by the FIFA Ethics Committee in relation to undue advantages he had received from the former FIFA President, Joseph Blatter, mainly a CHF 2 million payment without contractual justification and an undue extension of the benefits Platini was entitled to receive as a member of the FIFA Executive Committee. The ban was reduced by the FIFA Appeal Committee (to six years) and then by the CAS (to four years).

The Swiss Supreme Court upheld the CAS award in a lengthy decision, in which it confirmed that the dispute had to be considered as international notwithstanding the fact that both FIFA and Platini were domiciled in Switzerland when the CAS proceedings started. The Swiss Supreme Court confirmed in this respect that the relevant point in time in considering whether a dispute is international or domestic is the conclusion of the arbitration agreement, ie, in the present case, the inclusion of an arbitration clause in the FIFA Statutes in 2004. Since Platini was domiciled in France at the time, the dispute qualified as international.

This should, in theory, have prevented Platini from challenging the CAS award for arbitrariness as he had done, given that this ground can only be applied to set aside domestic awards, not international awards, which can only be set aside for irregular constitution of the arbitral

⁵ Decision 4A_600/2016.



tribunal, lack of jurisdiction, *ultra* or *infra petita*, violation of due process or violation of public policy. However, the Swiss Supreme Court considered that Platini could not be prevented in good faith from raising the ground of arbitrariness in this case since the CAS Panel had (incorrectly) qualified the dispute as domestic and FIFA had not objected to this in the CAS proceedings.

The Swiss Supreme Court nevertheless dismissed Platini's challenge on the merits, holding that the CAS award could not be considered arbitrary. The Court confirmed in this respect that an award is arbitrary if it is based on findings manifestly contrary to the facts resulting from the case or if it constitutes a manifest violation of the law or fairness. According to the Swiss Supreme Court, this was not the case.

The Swiss Supreme Court finally confirmed that the sanction could not be considered disproportionate, notwithstanding the rather large and unclear scope of the ban (extending to any football-related activity).

B.2 The Yukos decision

In a decision dated 20 July 2017,⁶ the Swiss Supreme Court dismissed the challenge brought by the Russian Federation against an interim award on jurisdiction issued in an UNCITRAL arbitration in Geneva administered by the Permanent Court of Arbitration.

The arbitration was initiated in 2013 by the Luxembourg company Yukos Capital Sàrl, which claimed payment of USD 13 billion from Russia for illegal expropriation of investments. Russia objected to the jurisdiction of the arbitral tribunal based on five alternative grounds. In an interim award, the arbitral tribunal dismissed three of these grounds, while postponing the decision on the remaining two grounds to the merits phase.

⁶ Decision 4A_98/2017.

Russia moved to set aside the interim award before the Swiss Supreme Court, claiming that it was open to immediate challenge under Swiss law. The Court however considered that this was not the case, confirming that only decisions by which the arbitral tribunal definitively rules upon its own jurisdiction, by either admitting or denying it, can (and must) be challenged directly within 30 days of their notification. By contrast, decisions by which the arbitral tribunal rules only partially on its own jurisdiction, for instance by addressing only some, but not all of the grounds invoked by the parties, are not open to immediate challenge.

B.3 The Croatia decision

Swiss arbitration law allows parties to waive the statutory right to challenge an award in setting-aside proceedings pursuant to Article 190(2) PILA, if none of them have their domicile, habitual residence or place of business in Switzerland (Article 192(1) PILA). In a decision dated 17 October 2017,⁷ the Swiss Federal Supreme Court clarified that such a waiver also extends to the parties' right to request the revision of the award based on the discovery of new relevant facts, if such facts could otherwise have been invoked as a ground for having the award set aside.

This question arose in the context of a heavily fought UNCITRAL arbitration between Croatia and MOL Hungarian Oil and Gas Company Plc (“MOL”) over the privatization of the Croatian energy company INA Industrija Nafta (“INA”). In this arbitration, allegations of bribery were raised by Croatia, but ultimately dismissed for lack of evidence by an arbitral tribunal seated in Geneva. In reaction, Croatia filed both an action for annulment and a request for revision of the award, on the basis that it had, within the deadline for a setting-aside application, learned that one of the arbitrators had failed to disclose an alleged conflict of interest. However, as the underlying agreements contained a waiver with respect to any appeal, the Swiss Federal Supreme Court held that not only the setting-aside application but also

⁷ 4A_53/2017.



the revision request were inadmissible, considering that a party who has expressly given up its right to challenge the proper constitution of the arbitral tribunal pursuant to Article 190 (2)(a) PILA should not be able to file a request for revision based on this very same reason. As this decision illustrates, a waiver of setting-aside proceedings is risky, as it may well mean that there is no possibility at all of complaining about procedural irregularities before courts at the seat of the arbitration.

B.4 Request for revision must be timely

This case⁸ of 3 October 2017 concerned the termination of an employment agreement of the Chinese Manager Z with the Swiss company X SA. A sole arbitrator had rendered an arbitral award. X SA first filed a request to set the award aside with the Swiss Supreme Court, which the Court rejected in its simplified procedure for obviously unjustified requests. X SA then filed for revision with the Court of Justice of the Canton of Geneva, which declined jurisdiction and transferred the request to the Swiss Supreme Court under Article 48 Section 3 BGG⁹. X SA claimed that it had “recently” become aware of an email of Z to the sole arbitrator in which Z informed the sole arbitrator of pending litigation between the same parties in the UK. The Swiss Supreme Court rejected the request for revision. According to Article 124 Section 1(d) BGG, a request for revision of decisions of the Supreme Court must be filed within 90 days of becoming aware of the reason for revision. Accordingly, X SA should have specified the exact time it became aware of the reason for revision. Furthermore, the arbitral award had expressly referred to the pending litigation in the UK; accordingly, X SA should have raised that the arbitral tribunal in its opinion lacked jurisdiction with a timely request to set aside the award under Article 190 Sect. 2(b) IPRG, and not with its request for revision.

⁸ BGE 4A_506/2017.

⁹ Federal Law on the Swiss Supreme Court.

B.5 No unlimited right to obtain an expert opinion in an international arbitration

The Swiss Supreme Court in a decision¹⁰ of 28 August 2017 concluded that a party in principle has the right to request the tribunal obtain an opinion of an independent expert. However, the party must expressly request it on time and in line with the procedural rules of the arbitration. The requesting party must be willing to advance the costs of the expert opinion, it must relate to the relevant facts of the case, ie the expert opinion must be suitable to have an effect on the outcome of the proceedings, and it must appear necessary. In the present case, the requesting party had failed to establish to what extent the results of the expert opinion would be relevant and it failed to submit sufficient information that would have allowed the mandating of an expert. The requesting party had asked for an expert opinion on the amount of lost profits under a contract for the execution of tourism projects.

B.6 Right to be heard

A decision of 30 May 2017¹¹ concerned a dispute between a Liechtenstein company registered since 1998 in the occupied Palestinian territory, and B company, a company incorporated in 1964 under the company law of the occupied Palestinian territory. The dispute concerned a tourism project involving the construction and operation of a hotel and casino on the West Bank. An arbitral tribunal seated in Zurich rejected the claim, essentially because mandatory Palestinian law would prohibit gambling, rendering it subject to sanctions. Accordingly, the arbitral tribunal concluded that it could not order the requested issuance of licenses, but could perhaps award compensation for damages. However, due to the agreed exclusion of liability in the contract, and due to the lack of an adequate causal connection to the loss of profits, the tribunal denied the right for compensation.

¹⁰ BGE 4A_277/2017.

¹¹ BGE 4A_532/2016.



The Supreme Court partially set the award aside. It concluded that the arbitrators had failed to examine whether or not at least the hotel, as opposed to the casino, could have been granted a license. The hotel had, contrary to the casino, not been closed by the authorities. According to the Supreme Court, the arbitral tribunal had a minimal duty to examine the request of the claimant that a hotel license could be issued, and had therefore breached the claimant's right to be heard.

B.7 A decision of an arbitration institution is subject to appeal to the Swiss Supreme Court if the decision ends the arbitration proceedings

In this case¹² of 20 April 2017, the World Anti-Doping Agency (WADA) filed an appeal with the TAS against an "Acceptance of sanctions" agreed between the national doping agency of the United States and athlete X. After neither WADA nor X had paid their advances on costs for the arbitration, the TAS invited WADA to pay the full advances on costs for both parties. However, WADA erroneously paid only its share in the amount of CHF 18,000, instead of the total of CHF 36,000. Nine days after the deadline, WADA paid the remaining CHF 18,000. Due to the late payment, the TAS closed the proceedings with a termination order. WADA challenged the decision in the Swiss Supreme Court, in particular alleging undue formalism.

The Swiss Supreme Court concluded that the termination order can be challenged with the Supreme Court, given that it terminated the proceedings, even though it was rendered by the arbitral institute. However, the Swiss Supreme Court rejected the argument of undue formalism. It stated that WADA had been expressly informed that proceedings would be terminated if it did not pay the full advances on costs. Furthermore, WADA would have been able to request an extension of the deadline if it was confused by the order of the TAS. Since there was no undue formalism, the Swiss Supreme Court left the

¹² BGE 4A_692/2016.

question open of whether undue formalism could amount to a breach of the *ordre public*.

B.8 Right to be heard, *ordre public*

The International Paralympic Committee (IPC) domiciled in Bonn, Germany, organizes the Paralympics. On 18 July 2016, an independent report of Prof. Richard McLaren requested by WADA was published. It concluded that between the end of 2011 and August 2015, the Russian state had executed a doping program. Subsequently, the IPC suspended the member rights of the Russian Paralympic Committee (RPC), given that it would be unable to meet its obligations as a member of the IPC. The RPC filed an appeal against the decision of the IPC with the TAS. The TAS rejected the appeal and confirmed the decision of the IPC. The RPC moved to set the award aside with the Swiss Supreme Court.¹³ It claimed that “rights of natural justice,” ie, personal rights and the right of equal treatment with non-handicapped Russian athletes, were not addressed by the arbitral tribunal. The Swiss Supreme Court rejected the request; the arbitral award would show that the arbitrators had indeed considered the arguments of the RPC, but rejected them as not relevant. Furthermore, the RPC had failed to establish that its right to be heard was violated when the arbitrators concluded that the RPC could not claim the rights of individual athletes.

B.9 No free legal assistance before arbitral tribunals

In this case¹⁴ of 9 February 2017, the Swiss Supreme Court confirmed that the nature of arbitration would exclude a right to free legal assistance.¹⁵ This principle, which is codified in Article 380 of the Swiss Code of Civil Procedure for national arbitration proceedings,

¹³ BGE 4A_470/2016.

¹⁴ BGE 4A_690/2016.

¹⁵ *L'exclusion de l'assistance judiciaire en matière d'arbitrage est conforme à la nature de l'institution: L'état n'a pas à faciliter l'accès à des tribunaux qui ne dépendent pas de lui*, BGE 99 Ia 325, E. 3b.



also applies to international arbitration proceedings, even though there is no express statutory provision.

However, this according to the Supreme Court does not exclude that in setting aside proceedings against arbitral awards, a right for free legal assistance applies, provided that the proceedings do not lack a chance of success.

B.10 The right to be heard includes the right to address the distribution of costs

In this case¹⁶ of 7 March 2017, the Swiss Supreme Court concluded that parties have a right to address the splitting of costs in advance of an arbitral award if such splitting is not entirely clear (such as when the costs will be split as usual according to the degree of success or loss in the arbitration).

C. Funding in international arbitration

Third-party funding has attracted a certain amount of attention among users of international arbitration in Switzerland. The legal and constitutional environment is favorable to arbitration or litigation finance providers. In 2004, the Swiss Federal Supreme Court rejected a cantonal law that would have prevented parties from resorting to third-party funders. It held that litigation funding by third-party funders is admissible in Switzerland if the funder acts independently from the client's attorney.¹⁷ This decision was confirmed by the Swiss Federal Supreme Court in 2014.¹⁸ The Court stated that depending on the concrete circumstances it is even part of the lawyer's professional conduct to inform his/her client about a potential litigation funding option. Although today a number of arbitration or litigation finance providers offer their services in Switzerland (eg, Omni Bridgeway, Invest4Justice, JuraPlus, Advofin, PROFINA Prozessfinanzierung), litigation funding has not yet become common practice.

¹⁶ BGE 4A_570/2016.

¹⁷ cf. ATF 131 I 223.

¹⁸ cf. decision 2C_814/2014.

Neither the Swiss Code of Civil Procedure, the Swiss Act on Private International Law nor any other Swiss legislation contain specific provisions dealing with third-party funding in litigation or arbitration. According to the Swiss Federal Supreme Court, third-party litigation funding is not to be considered as an insurance offering, which means that the provision of funding services does not, in general, fall under the regulatory framework of Swiss financial market laws (such as the Banking and Insurance Acts, Anti Money-Laundering Act and Collective Investment Scheme Act). Nevertheless, third-party funding agreements must be structured in such a way that it is ensured there is no exploitation of a person in need. It also must not cause any conflict of interest in that the third-party funder should not unduly interfere in the client-attorney relationship. This means in practice that the funded party's attorney must be able to act freely from any instructions of the third-party funder. The principle of independence of acting on behalf of the client is regarded as a fundamental element of an attorney's professional conduct. In addition, in contentious matters, the Professional Rules of the Swiss Bar Association do not allow attorneys to agree to a "no win, no fee" or any other sort of "contingency fee only" arrangement. What is tolerated under the Bar Rules is agreeing on a reduced legal fee (fixed fee or fee on an hourly basis) that covers the attorney's costs and grants him/her a certain profit, combined with the promise of an additional fee should the claim be successful. This is not a payment scheme that third-party funders usually appear to prefer, and the limited availability of success fee arrangements is a likely reason why Switzerland has not yet become a particularly popular place for third-party funding.

Third-party funding agreements can give rise to issues of transparency, confidentiality and privilege, conflicts of interest and control over the arbitration proceedings, and may impact cost decisions rendered by the arbitral tribunal. Third-party funders bear the financial risk of the arbitration in exchange for the right to earn a certain agreed percentage (usually ranging between 15% and 40%) of any award in favor of the client or a success fee should the arbitration be ultimately successful, but they risk not receiving any payment if the



case is lost. For this reason, the third-party funder will want to have a say when it comes to settlement negotiations. Likewise, third-party funders expect to be involved in management and strategic decisions, such as the selection of arbitrators, witnesses and expert witnesses. On the other hand, a Swiss attorney owes his/her professional and fiduciary duties not to the third-party funder but only to the (funded) client who is asserting the claim. As a result, he or she must act freely from any instructions of the third-party funder. Therefore, the third-party funder will have to agree with the client on any rights or actions it intends to exercise during the course of arbitration so that the client can instruct his/her attorney accordingly. As third-party funding can pose a threat to the attorney-client relationship, it is advisable to have a funding arrangement in place confirming that in a case of a conflict of interest between the funder and (funded) client, the attorney may continue to act solely for his/her client. The existence of such a funding arrangement will generally have to be disclosed at some point in the arbitration, at the latest when cost submissions are filed. While cost decisions rendered under Swiss law in cases involving third-party funding have remained relatively rare so far, it is generally assumed that the party working with a funder can claim compensation for its effective attorney's fees and expenses related to its representation, but not for the financing costs.