

# Swiss Supreme Court dismisses revision application based on evidence discovered during US discovery proceedings

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

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In *Decision 4A\_36-2020*, the Swiss Supreme Court dismissed an application for revision of an arbitral award based on the discovery of new facts and evidence after the award was issued. The Swiss Supreme Court found that the new facts and evidence would not have caused the tribunal to reach a different decision and could have been discovered during the arbitration.

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The Swiss Supreme Court has dismissed an application to revise an arbitral award on the basis that new evidence discovered after the award was rendered would not have led to a different decision and could have been discovered during the arbitration.

The dispute concerned a distribution agreement between a German producer (A) and a US distributor (B). In 2013, A informed B that it would no longer supply it with products for distribution in the US. Shortly thereafter, B contracted with another US distributor (C) to distribute A's products in the US, but was then unable to supply the products to C as A no longer delivered to the US. Consequently, in November 2016, B paid C compensation and initiated SCC arbitration proceedings against A. In November 2018, the tribunal issued an award ordering A to compensate B for that settlement payment.

A applied to the Swiss Supreme Court to revise the award, alleging that it had discovered new facts and evidence in US discovery proceedings in 2019, namely statements and emails made by a connected party concerning the contract and settlement between B and C. A argued that this new evidence contradicted B's evidence in the arbitration regarding the execution dates of those agreements and that the tribunal's decision would have been different had it been aware of them.

The court noted the conditions necessary for revision of an award under article 123(2)(a) of the Federal Act on the Swiss Supreme Court:

- The facts or evidence must exist prior to the award but, exercising due diligence, the applicant could not have discovered them.
- The facts or evidence must be material to the outcome of the arbitration, possibly causing the tribunal to reach a different finding.

The court found that the tribunal did not regard the specific dates of the agreements as decisive when finding a business relationship between B and C to which the settlement payment related. The new evidence would not necessarily have led to a different decision.

Further, A could have discovered the new evidence during the arbitration proceedings if it had acted with due diligence by requesting that the connected party be ordered to testify, which the court found possible under the applicable SCC arbitration rules.

The decision confirms the court's restrictive approach to revision of awards based on new facts or evidence and the relatively high burden on parties to investigate facts and obtain evidence during the arbitration proceedings.

Case: [4A\\_36-2020](#) dated 27 August 2020.

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