

No need to repeat proceedings where arbitrator replaced (Swiss Supreme Court)

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

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In *Decision 4A_332/2020*, the Swiss Supreme Court dismissed an application to set aside an award rendered by an arbitral tribunal constituted under the Swiss Rules of International Arbitration. The court held that arbitral proceedings, in particular evidentiary hearings and other procedural steps, did not necessarily need to be repeated after one arbitrator (on a panel of three) had resigned and was replaced by another arbitrator.

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The Swiss Supreme Court has dismissed an application to set aside an award rendered by a tribunal where one arbitrator was replaced after resigning during the arbitration.

A dispute arose out of the termination of a framework agreement and arbitration proceedings were initiated with the Swiss Chambers' Arbitration Institution. At a late stage in the proceedings, after the evidentiary hearing, the respondents challenged the claimant's nominated arbitrator for lack of independence and impartiality. The arbitrator rejected these allegations but resigned voluntarily. Although the remaining two arbitrators informed the institution that they were willing to proceed as a twopanel tribunal, a replacement arbitrator was appointed. The respondents filed a motion with the newly composed tribunal requesting that the proceedings be repeated. The tribunal dismissed the respondents' motion, relying on article 14 of the Swiss Rules, which allows proceedings to resume when an outgoing arbitrator ceases to perform their functions. In its final award, the tribunal granted the claimants' request for negative declaratory relief.

The respondents filed a set-aside application with the Swiss Supreme Court based on article 190(2) of the Swiss Act on Private International Law, alleging:

- The improper constitution of the tribunal (*article 190(2)(a)*).
- A violation of their right to be heard (*article 190(2)(d)*).
- A breach of procedural public policy (*article 190(2)(e)*).

The court dismissed the challenge on all grounds, finding that the alleged bias of the original arbitrator did not constitute a ground to challenge the newly composed tribunal's constitution. The tribunal's decision not to repeat the arbitration did not amount to a violation of the parties' right to be heard. The court highlighted that it is not necessary to repeat the proceedings, provided that a replacement arbitrator can form their opinion on the relevant points in a reasonable and fair manner. Generally, repetition of an evidentiary hearing will be unnecessary where there is a verbatim transcript, even if the arbitrator who is replaced had questioned witnesses. Finally, the court rejected the plea of a violation of procedural public policy, stating that there is no rule in international arbitration that would require the annulment and repetition of certain procedural steps where a replaced arbitrator had participated in those steps.

Case: *Decision 4A_332/2020 dated 1 April 2021* (Swiss Supreme Court).

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