

Arbitral tribunal's findings as to parties' actual intent to arbitrate not subject to judicial review (Swiss Supreme Court)

by *Dr Wolfgang Junge* (Senior Associate) and *Luka Grosej* (Senior Associate),
Schellenberg Wittmer Ltd

Legal update: case report | Published on 05-Aug-2020 | Switzerland

In *Decision 4A 418/2019*, the Swiss Supreme Court dismissed an application to set aside an arbitral award in which the tribunal had declined jurisdiction for lack of a valid arbitration agreement. The Supreme Court confirmed that its review in setting-aside proceedings does not extend to an arbitral tribunal's findings in relation to the parties' actual (as opposed to presumed) and common intent to arbitrate.

In a recently published German-language decision, the Swiss Supreme Court refused to vacate an UNCITRAL tribunal's award, declining jurisdiction.

The decision concerned a dispute arising out of an agreement for the construction of a housing project between two Turkish-controlled construction companies (claimants), and two state-controlled Iranian parties (respondents). The agreement contained an arbitration clause that mirrored article 11 of the 1996 bilateral investment treaty between Turkey and Iran. Consequently, whereas not "pathological" as such, the wording of the arbitration clause neither referred to the parties, nor to disputes arising out of or in connection with, the agreement.

The tribunal declined jurisdiction, holding that the parties had not agreed to submit disputes to arbitration. According to the tribunal's factual determinations, at the time the agreement was concluded, the parties disagreed on whether to refer potential disputes to an international tribunal seated outside Turkey or Iran. During the contract negotiations, the claimants insisted on international arbitration, while the respondents refused to accept international arbitration in line with the requirements of the Iranian constitution. For this reason, the respondents had objected to any amendments to the arbitration clause that referenced the agreement. The tribunal established that the claimants had recognised the respondents' rejection of international arbitration at the time the contract was concluded.

The claimants challenged the award before the Swiss Supreme Court, invoking an erroneous decision on jurisdiction. The court held that a tribunal's determinations as to the parties' **actual** and common intent in relation to the arbitration agreement are outside its scope of review because they constitute a finding of fact, as opposed to the determination of the parties' **presumed** intent, which is a finding of law that the court may freely scrutinise. The court emphasised that factual findings may only be reviewed if they are tainted by a ground for annulment or in the very exceptional case that new facts or evidence are admissible. Since the claimants had failed to plead such grounds, the court was bound by the arbitral tribunal's findings that the respondents had disagreed with submitting the parties' disputes to international arbitration, and that the claimants had been aware of this fact.

This decision is a useful reminder of the practical difficulties that can arise when challenging a jurisdictional award in which the tribunal has established the parties' actual intent.

Case: *Decision 4A 418/2019 (18 May 2020) (Swiss Supreme Court)*.

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