

# Simultaneous application to set aside or revise ICC award dismissed (Swiss Supreme Court)

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

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In *Decision 4A\_464/2021*, the Swiss Supreme Court dismissed an application to have an award set aside based on an alleged violation of substantive public policy or revised due to alleged newly discovered facts.

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In a recently published French-language decision, the Swiss Supreme Court dismissed an application to set aside or revise an ICC award for alleged violation of substantive public policy and newly discovered facts.

Buyer (A) and seller (B) entered into a sales contract and three supplementary agreements. A initiated arbitration in Geneva against B and a sole arbitrator subsequently awarded damages to A and dismissed B's counterclaim based on the supplementary agreements.

B challenged the award in the Swiss Supreme Court claiming that it violated substantive public policy (*article 190(2)(e), Swiss Private International Law Act (PILA)*). In addition, B applied to revise the award, claiming that it had discovered decisive facts after the award was rendered (*article 190a(1)(a), PILA*), namely that one of the supplementary agreements had been forged.

The Supreme Court first recalled that where a party simultaneously applies to set aside and revise an award, the setting aside application takes precedence. However, it summarily dismissed the setting-aside application, as it was based on newly discovered facts (which are inadmissible in setting-aside proceedings) and insufficiently substantiated.

As for the application for revision, the court recalled the five requirements for such an application to be successful: the applicant is relying on one or more new facts; these facts are capable of changing the outcome of the award; these facts existed before the award was rendered; these facts were discovered only after the award was rendered; and the applicant could not have relied on these facts during the arbitration proceedings, even if it had acted with due diligence.

The Supreme Court held that B had simply alleged that it discovered the purported forgery of the supplementary agreement after the award was rendered, without providing any proof. As the supplementary agreements were discussed at length in the arbitration, B could and should have examined them carefully and raised doubts as to their authenticity at that time. Therefore, it had failed to act with due diligence. Moreover, the alleged forgery was in no way established and B had not even sought to bring criminal charges in that regard. The application for revision was consequently dismissed.

This decision serves as a reminder that a party seeking revision of an award based on the discovery of decisive facts must demonstrate not only that it discovered those facts after the award was rendered, but that it could not reasonably have discovered them beforehand.

Case: *Decision 4A\_464/2021 (Swiss Supreme Court) (31 January 2022)*.

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