

Swiss Supreme Court confirms unenforceable prior foreign judgment cannot invalidate arbitral award

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In *decision 4A_247/2017*, the Swiss Supreme Court dismissed an application to set aside an award for violation of the principle of *res judicata* because the prior judgment was unenforceable in Switzerland.

In a French-language decision dated 18 April 2018, but only recently published, the Swiss Supreme Court dismissed a challenge to an award rendered by a three-member tribunal under the auspices of the International Chamber of Commerce.

The underlying dispute arose in connection with two loan agreements containing arbitration clauses. Actions were brought before state courts of the British Virgin Islands and Russia (despite the existence of the arbitration clauses) prior to arbitration proceedings being initiated. The arbitral tribunal found that the issue of admissibility due to the binding effect of a prior judgment (*res judicata*), pertained to the merits of the case and decided this issue preliminarily in a procedural order, reserving a final decision for the award.

The Swiss Supreme Court confirmed its prior case law that ignoring *res judicata* effect would constitute a violation of procedural public policy. However, this is not the case where the prior judgment is not enforceable in Switzerland. A foreign court judgment, rendered despite the existence of a valid arbitration agreement cannot prevent an arbitral tribunal from rendering an award. The Moscow court had ignored the arbitration clause regardless of it being raised in objection to its jurisdiction, without ruling that it was null and void, inoperative or incapable of being performed. Accordingly, the judgment could not have *res judicata* effect and, therefore, the award did not breach procedural public policy.

The court also addressed Article 186(1bis) of the Swiss Private International Law Act which provides that in case of parallel proceedings, an arbitral tribunal may stay the proceedings, if noteworthy grounds require such a stay. In this case, the arbitral tribunal had previously issued a procedural order rejecting a stay pending the outcome of an appeal of the Moscow judgment. The court confirmed its case law that such an order amounts to a jurisdictional decision. Therefore, the party who requested the stay should have immediately applied to the court appealing the order (which is actually treated as an award on jurisdiction). Here, it was too late to raise this issue when trying to set aside the final award.

Case: [Decision 4A_247/2017](#).

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