

Two investment arbitration awards upheld: corruption and illegality allegations must be based on facts in award or on general knowledge (Swiss Supreme Court)

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In Decisions *4A_244/2019* and *4A_246/2019*, the Swiss Supreme Court rejected applications to set aside two investment treaty awards issued by the Permanent Court of Arbitration. The applications were based on allegations of corruption and illegality but they were not based on facts contained in the awards or on general knowledge.

In two recently published German-language decisions dated 12 December 2019, the Swiss Supreme Court refused to set aside two investment arbitration awards issued by the Permanent Court of Arbitration (PCA) in proceedings between Ukrainian claimants and the Russian Federation (which had not participated in the arbitration proceedings). The Russian Federation challenged the two awards before the Supreme Court, arguing that the awards were contrary to Swiss substantive public policy as they ordered the compensation of investments that were tainted by illegality and corruption. Moreover, the Russian Federation argued that the arbitral tribunal had ruled on the preliminary issue of the sovereign status of Crimea, which is an issue that is not arbitrable pursuant to Article 177(1) of the Swiss Private International Law Act (PILA).

The Supreme Court first referred to Swiss procedural rules under which it can neither correct nor supplement the facts established by an arbitral tribunal in its award, even if they are obviously wrong; the only exception to this principle is if an admissible objection within the meaning of Article 190(2) of PILA is raised, such as the violation of the right to be heard. Therefore, if the appellant wishes to correct or supplement the facts of the case, it must demonstrate by specific reference to the file, that it had already made such factual allegations in the arbitral proceedings. The Supreme Court found that, since no allegations of illegality had been made in the course of the proceedings, and because there was no mention of illegality in the awards, the ground for complaint was inadmissible. The Supreme Court therefore declined to examine the merits of the application to set aside on the ground of violation of public policy.

On the second ground for setting-aside relating to whether the subject-matter of the dispute was arbitrable, the Supreme Court referred to Article 177(1) PILA, under which all disputes of financial interest are arbitrable. In any case, it subsequently held that the subject-matter of the dispute here was a claim for damages and interest, which is arbitrable under Swiss law. Consequently, it also dismissed this petition.

Cases: *Decision 4A_244/2019 (12 December 2019)* and *Decision 4A_246/2019 (12 December 2019)*.

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