

# Swiss Supreme Court upholds partial award ordering respondent to reimburse a substitute payment for its share of advance on costs

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

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In *Decision 4A\_27/2021*, the Swiss Supreme Court dismissed an application to set aside a partial award which ordered the respondent to reimburse its share of the advance on costs which had been paid by the claimant.

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In a German-language decision, the Swiss Supreme Court rejected an application to set aside a partial award on costs and order (Partial Award) rendered in arbitration proceedings under the Swiss Rules.

During the arbitration proceedings, the tribunal requested each party to pay several advances on costs. Since the respondent refused to pay its first two shares (a total amount of CHF550,000), the claimant paid them in full. The claimant requested that the respondent reimburse the substitute payments plus interest pursuant to article 32(1) of the Swiss Rules. The respondent challenged the jurisdiction of the tribunal.

The tribunal issued the Partial Award addressing jurisdiction and reimbursement of the substitute payments. It accepted jurisdiction over several claims raised by the claimant, deferring its decision on jurisdiction regarding the other claims and the counterclaim to a later point. The tribunal also ordered the respondent to reimburse the advances on costs paid by the claimant in lieu of the respondent.

The legal successor of the respondent (applicant) challenged the Partial Award and raised several grounds for setting aside, which were all dismissed by the Supreme Court. The Supreme Court found that the tribunal had rightly accepted jurisdiction to order the reimbursement of the advance on costs in a Partial Award.

As regards jurisdiction, the applicant invoked a violation of its right to be heard (*article 190(2)(d), Swiss Private International Law Act (PILA)*), contending that the tribunal misinterpreted the scope of its objection to jurisdiction. The Supreme Court distinguished between the applicant's objection to the tribunal's jurisdiction to hear the claims in general and a specific objection to the tribunal's jurisdiction to order the reimbursement of the substitute payments. As the Supreme Court considered these objections to be separate and given that the applicant only objected to the tribunal's jurisdiction as a whole, the applicant failed to show a specific objection to the jurisdiction of the tribunal to order the reimbursement. Thus, the applicant's right to be heard was not violated.

The Supreme Court's decision concluded that a tribunal has, in principle, full discretion to order the reimbursement of the advance on costs during the proceedings. It also confirmed that the grounds for setting aside an award are limited to the grounds set out in article 190(2) of the PILA, and that a challenge must address and discuss the specific considerations of the challenged award.

Case: *Decision 4A\_27/2021 (Swiss Supreme Court) (7 May 2021)*.

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