

Ex parte communications between party-appointed arbitrator and counsel not necessarily indicative of lack of impartiality and independence (Swiss Supreme Court)

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In *Decision 4A_292/2019*, the Swiss Supreme Court rejected a challenge to annul an award made on the basis that the arbitral tribunal was irregularly composed on the ground of lack of impartiality and independence of one of the co-arbitrators. The Supreme Court held that ex parte communications between a party-appointed arbitrator and counsel are not always prohibited.

In a recently published German-language decision, the Swiss Supreme Court dismissed an application to annul an award, finding that ex parte communications between counsel and a party-appointed arbitrator did not call into question the independence or impartiality of the party-appointed arbitrator concerned.

The underlying dispute arose in connection with a sales contract between a Turkish company (A) and a Swiss company (B), which provided for ad hoc arbitration seated in Schwyz. A seized the *juge d'appui* of Schwyz (state court of the seat) to appoint two co-arbitrators.

The *juge d'appui* confirmed the appointment of co-arbitrator (C) as A's nominated arbitrator and appointed another co-arbitrator. The co-arbitrators then jointly agreed on a president. The tribunal issued an award in A's favour. B challenged the award, arguing that A's counsel had had an undisclosed private conversation with C. Added to the fact that A's counsel and C had worked in the same law firm between 2007 and 2009, B argued that these elements gave rise to concerns that C was not impartial and independent.

The Supreme Court dismissed B's arguments and held that it was not inappropriate for counsel and a party-nominated arbitrator to have ex parte communications. In particular, the Supreme Court underscored that it was usual and generally acceptable for party representatives to privately contact potential arbitrators to enquire about their availability and suitability, or to discuss the selection of the president of the tribunal. In the case at hand, the Supreme Court considered that the ex parte communication did not create an objective apprehension of bias, nor did it compromise C's independence and impartiality. The communication had taken place four days prior to the constitution of the tribunal and B failed to show that the merits of the dispute had been addressed during the conversation. Given the short communication time (12 minutes), the Supreme Court considered it was likely that the conversation concerned the choice of a suitable president and other matters related to such choice.

While this decision reminds arbitrators and counsel that they must maintain sufficient distance in their relationships, it also stresses that ex parte communications are acceptable in the arbitration process if conducted before the full constitution and relate to the appointment of an arbitrator. Party representatives and arbitrators should refrain from addressing any merits aspects of the case in such exchanges.

Case: *Decision 4A_292/2019 (16 October 2019)*.

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