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Review of the recent case law of the Swiss
Federal Supreme Court

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New Developments in International Commercial
Arbitration 2020

6 November 2020 – Laura AZARIA

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LALIVE Review of the recent case law of the Swiss Federal Supreme Court

I. Irregular Constitution of the Arbitral Tribunal (Art. 190(2)(a) PILA)

SFSCD no. 4A_292/2019, 16 October 2019

- Admissibility of *ex parte* communications between an arbitrator and a party or its counsel

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Facts

- 12-minute telephone conversation between a co-arbitrator and one of the parties' counsel:
 - 2 days after his appointment

BUT

- 4 days before the tribunal's constitution

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Independence and Impartiality Test

- Application of principles developed for state courts
- BUT taking into consideration arbitration's special features
- Doubts as to independence or impartiality must have an objective basis
- A party's subjective perceptions are not sufficient

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IBA Guidelines on Conflicts of Interest, Green List

“4.4 Contacts between the arbitrator and one of the parties

4.4.1 The arbitrator has had an initial contact with a party, or an affiliate of a party (or their counsel) **prior to appointment**, if this contact is limited to the arbitrator's availability and qualifications to serve, or to the names of possible candidates for a chairperson, and did not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case.”

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IBA Guidelines on Party Representation, sct 8

“It is not improper for a Party Representative to have Ex-Parte Communications in the following circumstances:

(a) A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.

(b) A Party Representative may communicate with **a prospective or appointed** Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.”

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SC's Ruling

- *Ex parte* communications to appoint the president are admissible
- After the tribunal's constitution: prohibited
- Decisive point in time:
 - The tribunal's constitution
 - Not the co-arbitrator's prior appointment

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II. Enforcement of Awards under NYC

SFSCD no. 145 III 199 (4A_646/2018), 17 April 2019

- Art. II NYC: Can an arbitration agreement be binding on non-signatories?

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Facts

- Distribution agreement :
 - Signed by an affiliate of A
 - A not a signatory
 - BUT A performed the agreement
- B sued A before the court at A's place of business
- A resisted the court's jurisdiction based on Art. II NYC

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SC's Ruling

Issue no. 1: A's intervention in the performance

- Similarity of requirements under Art. II(2) NYC and Art. 178 PILA
- Consequence: case law on extension of arbitration agreements to non-signatories developed under Art. 178 PILA applies by analogy to Art. II(2) NYC
- Test:
 - (i) Non-signatory's involvement in the performance
 - (ii) Non-signatory shows intent to be party to the agreement and the arbitration clause

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SC's Ruling

Issue no. 2: Tacit Prolongation of Arbitration Agreement

- Formal requirements of Art. II(2) NYC:
 - Not a bar to the tacit prolongation of an arbitration agreement
 - Applicable to the original parties NOT to a third party

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II. Enforcement of Awards under NYC

SFSCD no. 4A_663/2018, 27 May 2019

- Swiss public policy exception as per Art. V(2)(b) NYC

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Facts

- Enforcement proceedings of two ICC awards in Switzerland
- Applicant's position:
 - Violation of Swiss public policy (Art. V(2)(b) NYC)
 - Numerous undisclosed ties between the defendant's group and the chairman's law firm

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SC's Ruling

- Restrictive interpretation of public policy under Art. V(2)(b) NYC
- Only blatant violation of right to impartial arbitrator breaches Swiss public policy
 - E.g. situations listed in the Red List of the IBA Guidelines on Conflicts of Interest
- No automatic conflict in case of services rendered by the arbitrator's law firm to a party

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SC's Ruling

- Irrelevance of foreign court's decision based on its own public policy
- Left open whether the punitive damages granted were against Swiss public policy

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III. Other Lessons

1. International vs Domestic Arbitration : Opting Out

SFSCD no. 145 III 266 (4A_540/2018), 7 May 2019

- Same requirements to opt out of rules governing domestic and international arbitration
- Latest moment to opt out ?
 - If the arbitral tribunal consents, at any stage before the award

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2. Time Limit to Challenge Awards

SFSCD no. 4A_40/2018, 26 September 2018; 4A_264/2019, 16 October 2019

- *Dies a quo* of the 30-day time limit of Art. 100(1) FSCA:
 - Signed original award's notification
 - Not the ICC's advance electronic copy

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3.1 Jurisdiction

SFSCD no. 4A_636/2018, 24 September 2019

- No automatic extension of arbitration agreements entered into by State-controlled entities to the controlling States

SFSCD no. 4A_342/2019, 6 January 2020

- Arbitration agreement in a contract found to apply to disputes under a different – unsigned – contract with its own arbitration clause that was part of the same contractual relationship

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<h2>3.1 Jurisdiction</h2> <p>SFSCD no. 4A_12/2019, 17 April 2020</p> <ul style="list-style-type: none"> ▪ Arbitration clause encompasses the licensee's right to bring claims against the licensor for damages incurred by its sub-licensee 	
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<h2>3.2 Arbitral Tribunal's Jurisdiction under BITs</h2> <p>SFSCD no. 4A_306/2019, 25 March 2020 - Clorox España v. the Bolivarian Republic of Venezuela</p> <ul style="list-style-type: none"> ▪ First annulment of BIT award in which the arbitral tribunal had wrongly declined jurisdiction <p>SFSCD no. 144 III 559 (4A_396/2017), 16 October 2018 - Russian Federation v. Ukrafta; 4A_398/2017, 16 October 2018 - Russian Federation v. Stabil <i>et al.</i></p> <ul style="list-style-type: none"> ▪ Russia's responsibility under the Russia-Ukraine BIT for Ukrainian investments in Crimea made prior to the Russian annexation in 2014 	
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