ABSTRACTS OF SWISS SUPREME COURT CASES ON ARBITRATION 2020

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Introduction to the Case Law Section 1/2020

1. – 14. In this Bulletin you will find a **survey** by Catherine A. KUNZ of decisions rendered by the Swiss Supreme Court over the last decade (2009-2019) on requests for the **revision of arbitral awards**[1]:

Revision is an extraordinary remedy that aims at correcting a decision that is already final and binding. Revision is only ordered in exceptional circumstances, in particular when new facts or evidence that existed at the time of the arbitration are discovered after the award was rendered or the outcome of the award was affected by a criminal offence. The survey shows that revision is granted extremely rarely: there are to date only three reported cases where an award was revised in the last decade. On two occasions, the Supreme Court has also had to examine requests for the revision of its own decisions on requests for the setting aside of arbitral awards.[2]

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1 See Catherine A. KUNZ, *Revision of Arbitral Awards in Switzerland: An Extraordinary Tool or Simply a Popular Chimera?*, ASA Bull. 1/2020, p. 6.

2 Swiss Federal Supreme Court, Decision 4A_662/2018 of 14 May 2019, ASA Bull. 1/2020, p. 99.
Swiss Federal Supreme Court, Decision 4A_506/2017 of 3 October 2017, ASA Bull. 1/2020, p. 108.
Swiss Federal Supreme Court, Decision 4A_412/2016 of 21 November 2016, ASA Bull. 1/2020, p. 113.
Swiss Federal Supreme Court, Decision 4A_645/2014 of 20 February 2015, ASA Bull. 1/2020, p. 119.
Swiss Federal Supreme Court, Decision 4A_247/2014 of 23 September 2014, ASA Bull. 1/2020, p. 124.
Swiss Federal Supreme Court, Decision 4A_231/2014 of 23 September 2014, ASA Bull. 1/2020, p. 133.
Swiss Federal Supreme Court, Decision 4A_688/2012/4A_126/2013 of 9 October 2013, ASA Bull. 1/2020, p. 139.
Swiss Federal Supreme Court, Decision 4A_666/2012 of 3 June 2013, ASA Bull. 1/2020, p. 153.
Swiss Federal Supreme Court, Decision 4A_750/2011 of 21 August 2012, ASA Bull. 1/2020, p. 162.
Swiss Federal Supreme Court, Decision 4A_570/2011 of 23 July 2012, ASA Bull. 1/2020, p. 166.

15. – 16. In 2018 Chinese swimmer Sun Yang was first accused of an anti-doping rule violation, then whitewashed by the International Water Sports Federation's (FINA) anti-doping commission. The anti-doping agency WADA appealed the decision to the CAS acting against the swimmer and adding later FINA. The swimmer objected that one of WADA's counsel had, until two weeks before the appeal, been a member of the legal commission at FINA. Due to this conflict of interest the lawyer was allegedly not authorized to act, and the notice of appeal was void. CAS rejected this argument. The swimmer took the decision to the Supreme Court. In its decision 4A_287/2019[3] the Supreme Court found the annulment request to be inadmissible.

The swimmer had also challenged the CAS award on the ground of irregular composition of the arbitral tribunal. One of the arbitrators had been appointed ten times in the last 5 years by WADA.[4] However, the incriminated arbitrator had stepped down in the meantime. The panel with the replacement arbitrator had confirmed the decision that the notice of appeal and appeal brief were timely. The Court found that the Swiss arbitration law (chapter 12, PIL Act) did not address the **consequence of an arbitrator's resignation on the proceedings**. The CAS Code, however, did so (in R36). The proceedings were to carry on without repetition of past acts.[5] The Court rejected the argument for lack of any current interest of the plaintiff.[6]

Swiss Federal Supreme Court, Decision 4A_212/2010 of 10 February 2011, ASA Bull. 1/2020, p. 174.

Swiss Federal Supreme Court, Decision 4A_284/2009 of 24 November 2009, ASA Bull. 1/2020, p. 179.

Swiss Federal Supreme Court, Decision 4F_16/2018 of 31 August 2018, ASA Bull. 1/2020, p. 188.

Swiss Federal Supreme Court, Decision 4F_8/2013 of 10 December 2013, ASA Bull. 1/2020, p. 193.

3 Swiss Federal Supreme Court, Decision 4A_287/2019 of 6 January 2020, based on a CAS decision, ASA Bull. 1/2020, p. 212. According to a recent press release, CAS has now upheld WADA's appeal and banned the athlete for a period of eight years: https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_6148_decision.pdf.

4 On the same ground, the swimmer had already challenged the arbitrator without success before the International Council of Arbitration for Sport (ICAS). When he sought to annul the ICAS decision before the Supreme Court, the arbitrator stepped down. The Supreme Court struck the case from the docket (Decision 4A_265/2019).

5 4A_287/2019, para 5.3.2.

6 4A_287/2019, para 5.4.

The CAS proceedings continued. The swimmer requested the removal of WADA's counsel,[7] and resisted CAS' jurisdiction on the ground that the notice of appeal and the appeal brief were filed by counsel who was not authorized to act and thus late, and that the arbitral tribunal lacked jurisdiction ratione temporis. The CAS rejected the requests. The swimmer seized the Supreme court again.

The Court held[8] that **the decision on the incapacity to act as a party's representative is not a decision on jurisdiction**. **The same was true for the decision on the allegedly late filing of the appeal to the CAS**. The deadline in the CAS Code was a point of **admissibility** of the appeal,[9] not of jurisdiction of the appellate arbitral tribunal. This was not a foregone conclusion. Earlier rulings of the Supreme Court on **the validity of an arbitration agreement in time** (for instance, if the arbitration clause provides for a time limit to file for arbitration) were less clear. In this instance, the Court seems to have drawn a distinction between "normal" arbitration and sports arbitration, where appeals of a sport federations' internal decisions to an appellate arbitral tribunal are common.

17. In Switzerland, financial intermediaries can adhere to a self-regulation body (Selbstregulierungsorganisation) to comply with anti-money laundering legislation. Case 5A_1027/2018[10] deals with a (domestic) arbitration between a financial intermediary and such a body, which was organized as an association under the Swiss Civil Code. The **by-laws of the association encompassed an arbitration agreement**. The association seized the arbitral tribunal successfully seeking to enforce a fine against the intermediary. The intermediary sought to set aside the award. He argued that the arbitral tribunal was not competent because he had in the meantime

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7 In principle an arbitral tribunal could elect to exclude counsel in certain extreme circumstances. See for instance, Hrvatska Elekropriveda d.d. v. Republic of Slovenia (ICSID ARB 05/24) where the tribunal removed a QC whose involvement had been announced shortly before the hearing and who was in the same barrister chambers as one of the arbitrators. A potential conflict arose also in Rompetrol v. Romania (ICSID Arb 06/3). After the departure of claimant's counsel, one of her partners took over the case. As it turned out, he had been in the same firm as claimant's arbitrator. The tribunal refused to remove counsel, but confirmed that it had the power to do so.

8 Swiss Federal Supreme Court, Decision 4A_413/2019 of 28 October 2019, based on a CAS award, ASA Bull. 1/2020, p. 204.

9 See also Marco STACHER, *Jurisdiction and Admissibility under Swiss Arbitration Law – the Relevance of the Distinction and a New Hope*, ASA Bull. 1/2020, p. 55.

10 5A_1027/2018 based on a domestic ad hoc award ASA Bull. 1/2020, p. 224. See Hans-Ueli VOGT, Patrick SCHMIDT, *Schiedsklauseln in Vereinsstatuten. Bemerkungen zum Bundesgerichtsurteil 5A_1027/2018 vom 22. Juli 2019 und zur Revision des 12. Kapitels des IPRG und des Aktienrechts*, ASA Bull. 1/2020, p. 75.

cancelled his membership. Moreover, he took the view that the association's goal was not commercial. Commercial disputes such as the recovery of a fine fell outside the scope of the arbitration clause. The Supreme Court rejected all arguments. First of all, the intermediary had failed to explain specifically how his wholesale grievances met the requirements of article 393 of the applicable Code of Civil Procedure.[11] Second, the arbitration clause in the by-laws had been accepted by the intermediary when he joined the association. The by-laws provided that the member status only expired once all pending matters and investigations were terminated. The failure to pay the fine was such a matter and remained within the reach of the arbitration agreement even after the resignation of the intermediary as a member. The Court left open the hypothesis of a fine that was null and void, but that had not been argued by the intermediary.

Introduction to the Case Law Section 2/2020

1. In 2015 a German conglomerate launched a tender for the supply of several million thin-film transistor displays for 2017-2021. A South Korean company submitted an offer. The German side made a counter offer which both parties signed. **The parties then negotiated specific terms of contract, as well as a whole group of contracts including a framework agreement, but ultimately could not agree on final terms. Other than the counter offer, the supplier had also signed a quality assurance agreement (QAA). The QAA contained an arbitration clause.** In 2017 the supplier informed the purchaser that it abandoned the display business and did not consider itself bound by any delivery obligations. The German company initiated arbitration based on the ICC clause in the QAA. **The supplier took the view that the QAA only covered disputes under the QAA itself, not disputes arising under other contracts, which, in addition, had not even been signed.** These other contracts would have been subject to arbitration under the arbitration agreements they contained. In a "Partial award on jurisdiction and liability" the arbitral tribunal rejected this view. It found that the parties had meant to provide for the all-encompassing jurisdiction of an ICC arbitral tribunal sitting in Zurich. This was also supported by the fact that when the purchaser submitted its general terms of sale providing for the jurisdiction of the courts in Stuttgart, the supplier objected, and requested that to general

[11] In the Supreme Court's words: «Nicht speziell zielführend ist dabei, in süffisanter Art die Angelegenheit als solche, die Gegenpartei oder Dritte mit Äusserungen wie «abgekartetes Spiel», «die noblen Herren der [Gegenpartei]», «schikanöses Vorgehen», «Vendetta der verantwortlichen Personen», «Unverfrorenheit», «inszeniertes Affentheater», «hinterhältige Art» zu verunglimpfen.»

terms be aligned with the other agreements, which contemplated ICC arbitration. **The fact that the contracts were ultimately not signed was not decisive. The arbitration clause contained in the QAA was found to also apply to contract disputes not directly related to the QAA**. The supplier could not in good faith assume that the other contracts would remain subject to the jurisdiction of the state courts if they were not signed (a possibility neither party had even considered at the time). The Supreme Court confirmed the award.[12]

The decision does not provide full details of the underlying facts. If the arbitral tribunal admitted liability of the supplier under the unsigned contracts, it could presumably also have relied on the arbitration agreement in those contracts, as an alternative to **construing an overarching arbitration agreement from the one contained in the signed QAA**.

2. In case 4A_143/2018[13] the Federal Supreme Court confirmed an arbitral award rendered by a judicial body, the **conciliation commission for rental disputes**. Exceptionally the commission had rendered an arbitral award, as it had been designated as arbitral tribunal by the parties pursuant to **article 361(4) of the Federal Code of Civil Procedure**.

3. In ICC arbitration no. 22443 a Qatari agent sought payment of fees from a Turkish principal. The arbitral tribunal found that it had no jurisdiction because the **agent lacked the requisite powers under Turkish law to sign the arbitration agreement**.[14]

4.-6. In the last Bulletin you found a **survey** by Catherine A. KUNZ of decisions rendered by the Swiss Supreme Court over the last decade (2009-2019) on requests for the **revision of arbitral awards**[15]. In this Bulletin we publish a few more:

4. An athlete was sanctioned by the Court of Arbitration for Sport (CAS) to eight years disqualification for violation of anti-doping regulations and saw his competition results annulled. In its award, which was rendered in expedited proceedings, the CAS rejected the athlete's argument that the

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12 Swiss Federal Supreme Court, Decision 4A_342/2019 of 6 January 2020, based on an award in ICC proceedings no. 23188/FS, ASA Bull. 2/2020, p. 440. An English translation is available on www.swissarbitrationdecisions.com.

13 Swiss Federal Supreme Court, Decision 4A_143/2018 of 4 April 2018, based on a domestic award rendered by a conciliation commission for rental disputes (art. 361(4) Federal Code of Civil Procedure), ASA Bull. 2/2020, p. 452.

14 Swiss Federal Supreme Court, Decision 4A_386/2018 of 27 February 2019, based on an award in ICC proceedings no. 22443, ASA Bull. 2/2020, p. 456.

15 See Catherine A. KUNZ, *Revision of Arbitral Awards in Switzerland: An Extraordinary Tool or Simply a Popular Chimera?*, ASA Bull. 1/2020, p. 6.

doping tests had been manipulated for lack of supporting evidence. A few years later, the athlete sought to annul the award by initiating revision proceedings before the Swiss Supreme Court. In support of his revision request, the athlete relied on an expert report that had been established in subsequent criminal proceedings and showed an anomalous DNA concentration in the urine sample used for the doping tests, which according to the athlete confirmed his theory that the tests had been manipulated. The Supreme Court found that the alleged manipulation of the tests was not a new fact that could justify a revision of the award; it was merely an allegation that the athlete had failed to establish during the arbitration. The Court further recalled that **revision could not be based on evidence created subsequently to the award**. **Nor can revision be used to remedy any possible limitations to the parties' right to adduce evidence resulting from the expedited nature of the CAS proceedings**.[16]

5. Is a request for revision filed before the Swiss Supreme Court in a language other than one of the official languages of Switzerland automatically declared inadmissible? This question was addressed by the Supreme Court in decision 4F_8/2018[17]. As a rule, the Supreme Court cannot immediately declare such a request inadmissible. Rather, it must set a deadline for the requesting party to submit a translation of the request in one of the official languages. There are, however, exceptions to this rule, in particular in the event of an abuse of rights. This decision provides an example of such an **abuse of rights: the request was filed in English even though the requesting party had filed submissions in one of the official languages in prior setting aside proceedings** and was specifically **refused permission to file his revision request in English** by the Court.

6. Decision 4A_386/2015[18] also concerns a request for revision of an award. The request was based on the subsequent discovery of a ground for challenge of the sole arbitrator, who was a partner in the Zurich office of the CMS network. In the revision proceedings, the requesting party claimed to have discovered from a press release, issued after the award had been rendered, that a German office of the CMS network had represented a company that was affiliated to the company which had prevailed in the

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16 Swiss Federal Supreme Court, Decision 4A_597/2019 of 17 March 2020, ASA Bull. 2/2020, p. 464.

17 Swiss Federal Supreme Court, Decision 4F_8/2018 of 14 March 2018, ASA Bull. 2/2020, p. 469.

18 Swiss Federal Supreme Court, Decision 4A_386/2015 of 7 September 2016, ASA Bull. 2/2020, p. 474. An English translation is available on www.swissarbitrationdecisions.com.

arbitration (both part of the German group Bosch) in an unrelated matter when the arbitration was still pending.

The Supreme Court recognized that although the **subsequent discovery of a ground for challenge of an arbitrator was not a ground for revision** under existing law, revision was the only effective remedy in such a situation. The Court however considered it better for this lacuna in the law to be addressed by the legislator in the context of the ongoing revision of Chapter 12 PILA governing international arbitration.

Of greater interest to practitioners are the reasons that led the Supreme Court to conclude that there was, in any event, no ground to challenge the sole arbitrator in this case. The Supreme Court first recalled that the **IBA guidelines on conflicts of interest** are a useful tool but that the circumstances of a given case will always be decisive to determine whether there exists a conflict of interest. The Court then found that the size of law firms and their global activities were a reality of international arbitration that could not be ignored. This had been taken into account by the drafters of the IBA Rules in general rule 6(a), which specifies that the activities of the arbitrator's firm do not necessarily give rise to a conflict. Turning to the case at hand, the Court found that the law firms forming part of the CMS network remained legally independent of each other and were not financially integrated. Importantly, they did not share fees except for a one-off collaboration in a specific case. In such circumstances, the law firm of the Zurich and German offices of CMS, even if they were part of the same network, could not be considered part of the same law firm for the purpose of determining the existence of a conflict.

7. Two Swiss lawyers entered into a partnership agreement containing an arbitration clause. Three years into their partnership, a dispute arose and one of the lawyers initiated domestic arbitration proceedings to recover payments owed by his partner and prevailed. His partner first unsuccessfully sought to set aside the award before the Swiss Supreme Court.[19] He claimed that the arbitral tribunal had violated his right to be heard by ignoring the set-off defense he had raised in the arbitration. The Supreme Court, however, considered that the set-off defense was not substantiated and that, given the deep animosity that marked the dispute between the two lawyers, the arbitral tribunal could reasonably have viewed it merely as yet a further recrimination rather than as a serious defense.

[19] Swiss Federal Supreme Court, Decision 4A_539/2018 of 27 March 2019, ASA Bull. 2/2020, p. 496.

Within the two months following service of the Court's decision on his setting aside application, the unsuccessful lawyer then applied for the revision of that decision on the basis that the Court had ignored the reply he had submitted in the setting aside proceedings and was irregularly constituted. The Supreme Court rejected the revision request. Indeed, the Court not only mentioned the reply in its decision, it is also under no obligation to refer to specific sections or arguments of the parties' written submissions. The Court also rejected the argument that it had wrongly substituted itself to the arbitral tribunal and decided a substantive issue: its finding that the set-off defense was not a serious defense was merely reached as part of its analysis of the alleged violation of the lawyer's right to be heard, not as part of a review of the merits of the underlying dispute. The Court also recalled that **revision cannot be sought on the ground of an irregular constitution of the Supreme Court** when the composition of the Court is determined following an assessment of the merits, such as whether or not the matter raises a question of principle.[20]

Introduction to the Case Law Section 3/2020

1. On 12 March 2020[21], the High Court of the Canton of Zurich (ZH High Court) rendered an interesting judgment in relation to the **extension of an arbitral clause to a third party** (*Drittwirkung einer Schiedsklausel*). In essence, the ZH High Court decided that an **arbitration agreement entered into by a limited partnership is also binding on the partnership's general partner**.

2. A Turkish construction group had entered into a trilateral agreement ("TLA") with an Iranian state bank and an Iranian company controlled by the Iranian Ministry of Roads and Urban Development. The Turkish side undertook to build 20'000 housing units. The TLA contained an **arbitration agreement that was basically copied from the Iran-Turkey investment protection treaty**. A dispute arose which prompted two companies in the Turkish group to initiate arbitration against the Iranian parties. In the absence of agreement by the parties, the arbitral tribunal decided that Geneva was to be the place of arbitration. The UNCITRAL Rules applied.

The arbitral tribunal found that the arbitration clause was not applicable, despite the fact that its **terms appeared to be clear.** In fact, the evidence before the arbitral tribunal showed that the Iranian side had never agreed to arbitrate under the arbitration clause. This was known to the

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20 Swiss Federal Supreme Court, Decision 4F_7/2019 of 27 August 2019, ASA Bull. 2/2020, p. 501.

21 Zurich High Court, Decision LB190029-O/U of 12 March 2020, ASA Bull. 3/2020, p. 685.

Turkish negotiators. Therefore, there was **no meeting of minds, and no agreement to arbitrate (*offener Dissens*)**.

The Swiss Federal Supreme Court upheld the award[22]. The Court clarified[23] that while it had the power to freely review (*freie Kognition*) the legal grounds on which jurisdiction is based, it was bound by the arbitral tribunal's factual findings. The only exception is where the factual findings themselves are challenged on one of the grounds mentioned in article 190(2) PIL Act (public policy and due process being obviously the primary ones). The arbitral tribunal's conclusion that the parties did not have a common intention to arbitrate was factual, and thus binding on the Supreme Court.

The Iranian defendant had argued that the arbitration clause operated as a bar to the annulment request under **art. 192 PIL Act (waiver agreement).** The Supreme Court found that this question would only arise if there was an arbitration agreement to start with.[24]

3. A football player's agent sought the payment of a transfer commission before a CAS Tribunal. The commission was based on the football player's salary. The arbitrator ordered the football player to pay a commission for the period ending on 31 December 2018. The agent requested a rectification of the award stating that the arbitrator had missed that the player's employment contract ended in December 2019. The arbitrator issued a **rectified award** (which replaced the original award) explaining that he had intentionally omitted to consider 2019 because the agent's **prayer for relief was limited** to the 2017-2018 period.

The agent filed for annulment of the award before the Federal Supreme Court for violation of due process and public policy. The Court pointed out that the arbitrator had explained in the rectified award why he had omitted the year 2019. Thus, a violation of the right to be heard was excluded. Neither was there a violation of public policy.

Arguably, there might have been case of infra petita, if the arbitrator had left a prayer for relief undecided, but this had not been argued in the

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22 Swiss Federal Supreme Court, Decision 4A_418/2019 of 18. Mai 2020, based on an award in PCA Case no. 2018-01, ASA Bull. 3/2020, p. 690.
See also Laurent HIRSCH, *Odd Arbitration Clause, Reflecting Disagreement, Held to Be Inexistent. Note on the Judgment of the Swiss Federal Supreme Court of 18 May 2020*, ASA Bull. 3/2020, p. 675.

23 4A_418/2019, para 3.2.3.

24 4A_418/2019, para 2.2.

annulment proceedings. It will be left to the agent to seize the CAS again to claim the balance of his commission.[25]

4. In decision 4A_238/2018[26] the Supreme Court recalled that content prevails over form, and that **a simple letter can actually be an award**. In that case a letter from the Vice Director General of the Court of Arbitration for Sport declaring that a notice of appeal to the CAS was late was found to be an award. It can (and indeed must) be challenged before the Supreme Court by the dissatisfied party.

The requirement that such notice can be filed electronically but a hard copy still needs to be filed on the following working day is not excessively formalistic.

5. 4A_636/2018[27] deals with a **failed attempt at extending an arbitration agreement to a non-signatory**. A Turkish construction joint venture sued a **state-controlled entity** as well as the State (Libya) in relation to an abandoned infrastructure project (Man-Made River). The arbitral tribunal found that it had **no jurisdiction over the State**, be it under Libyan or Swiss law. The State had not signed the arbitration agreement and interference in the contract had not been demonstrated. It was not sufficient that the State controlled the project company and might be liable for its actions in certain circumstances.

6.-9. Procedural Orders in case 4A_294/2017[28], 4A_512/2018[29], 4A_3/2019[30], and 4A_266/2018[31], provide insight into **the calculation of the Supreme Court's fees and the indemnity of the defendant's legal fees in case of withdrawal** of an annulment request.

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25 Swiss Federal Supreme Court, Decision 4A_70/2020 of 18 June 2020, based on a CAS award, ASA Bull. 3/2020, p. 710.

26 Swiss Federal Supreme Court, Decision 4A_238/2018 of 12 September 2018, based on a letter award by the CAS Vice Director General, ASA Bull. 3/2020, p. 719..

27 Swiss Federal Supreme Court, Decision 4A_636/2018 of 24 September 2019, based on a partial award in ICC Case no. 21137, ASA Bull. 3/2020, p. 726. An English translation is available on www.swissarbitrationdecisions.com.

28 Swiss Federal Supreme Court, Decision 4A_294/2017 of 25 September 2018, based on a Partial Final Award in ICC case n° 19900/MCP/DDA, ASA Bull. 3/2020, p. 735.

29 Swiss Federal Supreme Court, Decision 4A_512/2018 of 19 February 2019, ASA Bull. 3/2020, p. 738.

30 Swiss Federal Supreme Court, Decision 4A_266/2018 of 27 September 2018, based on Swiss Rules arbitration Case No. 600281-2011, ASA Bull. 3/2020, p. 742.

31 Swiss Federal Supreme Court, Decision 4A_3/2019 of 11 April 2019., ASA Bull. 3/2020, p. 740.

10. In this edition of the Bulletin Niels SCHIERSING reports on earn-out disputes.[32] This is a good opportunity to publish a Supreme Court decision rendered in 2018[33] which deals with precisly such a post M&A case involving a contentious **earn-out mechanism**.

11. In its decision 4A_426/2017[34], the Federal Supreme Court rejected an annulment request filed by a football club from Cameroon against a CAS award. The club had tried to stop the round robin for the qualification to the World Cup in Russia, arguing that the national federation (FECAFOOT) was not properly represented by its president, and had not aligned the best team. The background of the dispute was probably that clubs participate in revenues created by the World Cup and players of the plaintiff had not been lined up. The CAS Tribunal rejected the request amongst others because **the club had no standing to challenge decisions taken by the international federation (FIFA)** that organized the World Cup qualification. The Supreme Court rejected the club's annulment request for want of a legally protected interest (or interest **"worthy of protection" "schutzwürdiges Interesse" "intérêt digne de protection"**). In addition it found that stopping the World Cup qualification or the World Cup itself was utopical

Introduction to the Case Law Section 4/2020

1. In the early 2000s Turkey was hit by a severe bank crisis. The State, via a guarantee fund, paid deposits to customers of failed banks. Whether the guarantee also encompassed deposits outside Turkey was controversial. In 2007, a foreign investor bought a Turkish bank from a Turkish pension fund. A **post M&A dispute** arose over the seller's obligation to indemnify the buyer for liabilities related to offshore deposits. In the arbitration (Geneva; Turkish law) the buyer made the following prayer: « *Respondent must indemnify [Y. Bank], alternatively Claimant, from any liabilities, costs, losses and/or damages incurred by [Y. Bank] in connection with Offshore Cases including without limitation any and all amounts awarded to Offshore Accountholders in connection with Offshore Cases*. »

The arbitral tribunal treated this prayer as a request for declaratory relief since it contained no amounts whatsoever. Thus, the arbitral tribunal analysed the circumstances in which a party was entitled to ask for

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[32] See also Niels SCHIERSING, Earn-Out Disputes – An Introduction, ASA Bull. 3/2020, p. 580.

[33] Swiss Federal Supreme Court, Decision 4A_56/2017 of 11 January 2018, based on Swiss Rules Arbitration (SCAI) 600406-2014, ASA Bull. 3/2020, p. 749.

[34] Swiss Federal Supreme Court, Decision 4A_426/2017 of 17 April 2018, based on CAS award 2016/A/4830, ASA Bull. 3/2020, p. 764.

declaratory relief, rather than monetary relief or a relief for specific performance. It identified **three conditions**: (1) the legal situation is in dispute; (2) the declaration is required to properly resolve the dispute; and (3) there is a practical goal behind the request. The arbitral tribunal found the second condition to be met in part only. In its award, the arbitral tribunal granted the prayer but added a condition:

« (3) It is declared that under Article 2.9 (b) of the [SPA] of 18 June 2007 [X.] is obliged to compensate [Y. Bank], alternatively [Y.], for any losses and damages incurred by [Y. Bank] in connection with Offshore Cases including without limitation any and all amounts awarded to Offshore Accountholders in connection with Offshore Cases, it being understood that any such losses and damages must result from valid and final claims of [Y. Bank] (or [X.]) against [U.] under the [STA] of 9 August 2001 which [U.] has failed to satisfy. »

The buyer sought to set aside the award before the Swiss Federal Supreme Court on the grounds of *infra petita*, the right to be heard and public policy. The Court rejected the challenge.[35] It held that it was not improper for the arbitral tribunal to characterize the request as declaratory. The Court recalled that **granting less than requested is not a case of *infra* or *extra petita***, and that making the relief subject to conditions is granting less. Further, the buyer's due process argument that the finding had been unpredictable and that it had been taken by surprise, was also rejected.

2. In case 4A_424/2017 the Supreme Court rejected a squash player's challenge against a doping ban.[36] The player argued that the arbitral tribunal had failed to address a subsidiary prayer (***infra petita***) where he had sought a reduction of the ban. The Supreme Court found that the arbitral tribunal had determined the duration of the ban and rejected all other or further claims in the operative part of the award. This showed, read in conjunction with the reasoning in the body of the award, that the arbitral tribunal had dealt with the subsidiary prayer. The Court also recalled that *infra petita* **only concerns omitted formal prayers for relief, not an arbitral tribunal's oversight of points or arguments made by a party**. Such instances can be challenged as a violation of the right to be heard.

The player had also argued that the tribunal had not considered a provision of the World Squash Federation (WSF) anti-doping rules allowing

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35 Swiss Federal Supreme Court, Decision 4A_404/2017 of 26 July 2018, based on award in ICC case n° 20344/AGF/ZF/AYZ, ASA Bull. 4/2020, p. 958.

36 Swiss Federal Supreme Court, Decision 4A_424/2017 of 23 October 2017, based on CAS 2016/A/4919, ASA Bull. 4/2020, p. 968. An English translation is available on www.swissarbitrationdecisions.com.

for a reduction of the ban. The application depends on the discretionary acceptance by both WSF and the World Anti-Doping Agency (WAFA). WSF had consented. WAFA had not. The award stated that WSF had not given its consent. The Court found that this was plainly wrong and surmised that it was an innocuous *quid pro quo*.[37] Ultimately, it was not relevant because WAFA had undisputedly not consented.

3. A lucky player's agent had a CAS tribunal confirm a EUR 4 million commission for a transfer of the player. For good measure the agent claimed 24% interest. The CAS tribunal reduced it to 17%. The club had argued that the interest provison in the contract should be disregarded entirely.

The Supreme Court rejected the club's challenge to the award[38] and its arguments that the contract was against public policy for having been concluded under coercion and that the right to be heard had been violated. The club had also asserted that the arbitral tribunal had decided *ultra petita*; rather than cancelling the interest provision the tribunal had merely reduced the interest rates. The Court ruled that **a party cannot rely on *ultra petita* merely because it gets less than it claimed**. Moreover, the award had stated **«** *all other motions or prayers for relief are dismissed* ». According to the Court, **this prevented any *ultra petita* argument**. That is questionable, but indeed standing case law.

4. A Qatari agent brought an ICC arbitration against a lift manufacturer following the termination of the agency agreement. In its award, the sole arbitrator allotted no costs to the agent, even though he admitted that there had been no clear winner. The Supreme Court rejected the agent's challenge of the arbitral award.[39] Indeed, **international arbitral awards cannot be attacked on the basis of an allegedly unequal cost decision.**

The agent also argued that the arbitrator had been extremely "stingy" with its request for extensions while being very generous with the other party. The Supreme Court dismissed this argument as well. The agent had not elaborated on this argument properly nor explained how this had affected its case. Moreover, the Court stated that the **right to equal treatment does not encompass a right to equal treatment of extension requests**.

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37 « Il n'est pas interdit d'envisager ici l'hypothèse, sinon d'une erreur sur la personne, à tout le moins d'un lapsus calami ayant conduit la Formation à se référer à la WSF au lieu de l'AMA. »

38 Swiss Federal Supreme Court, Decision 4A_98/2018 of 17 January 2019, based on CAS 2016/O/4548 and CAS 2016/O/4728, ASA Bull. 4/2020, p. 974.

39 Swiss Federal Supreme Court, Decision 4A_450/2017 of 12 March 2018, based on an award in ICC case n° 20794 / ZF/AYZ, ASA Bull. 4/2020, p. 980. An English translation is available on www.swissarbitrationdecisions.com.

Lastly, the agent complained that the **arbitrator had refused to appoint an expert**. This argument was bound to fail; the reasons for the refusal were set out in the arbitral award.

5. The termination order in case 4A_64/2019[40] deals with the court and legal fees following the **withdrawal of the annulment request**.[41] The plaintiffs had challenged an award on jurisdiction. The Supreme Court ordered the plaintiffs to provide security for the defendants' costs and **stayed the arbitration pending the annulment proceedings**. The Court also rejected a challenge to the capacity of one of the defendants' attorneys. Thereafter, the **plaintiffs entered into a settlement with one of the three defendants and withdrew the annulment request**. The second defendant was granted a token amount for its legal fees (CHF 500) because his submissions had been filed on the last day of the deadline by telefax through a lawyer in London. The original with the required signature was sent the day after, and hence late. The Court also noted that the second defendant had filed the same brief thrice, which was limited to the issue of a stay of the arbitration, and had omitted to address objections to the capacity of his attorney. The third defendant had not proceeded and was thus not entitled to fees.

6. An **agent sued a principal for a commission under a cooperation agreement**. The agent (a corporation) argued that it had been instrumental for a settlement that the principal had reached with a third party. It claimed USD 89 million. An arbitral tribunal under the auspices of the Swiss Rules found the agreement to be an intermediary contract pursuant to article 412 ff of the Code of Obligations (*Mäklervertrag*). The agent was awarded USD 40 million. The principal sought to annul the award. The Swiss Federal Supreme Court rejected the request in its decision 4A_74/2019.[42] The principal had taken issue with the fact that the **arbitral tribunal had (i) heard a witness tendered by the agent without having requested a witness statement, and (ii) refused to request a witness statement from the agent's former CEO who had authored a letter on which the tribunal relied heavily**. The arbitral tribunal had considered the letter to be documentary evidence. The principal argued that the former CEO had been paid for writing the letter, and should have been treated as a witness, compelled to file a witness statement, and made available for cross-examination.

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40 Swiss Federal Supreme Court, Decision 4A_64/2019 of 3 December 2019, ASA Bull. 4/2020, p. 985.

41 See also four other similar orders published in ASA Bull 3/2020.

42 Swiss Federal Supreme Court, Decision 4A_74/2019 of 31 July 2019, based on an award in Swiss Rules case SCAI n° 300386-2016, ASA Bull. 4/2020, p. 988. An English translation is available on www.swissarbitrationdecisions.com.

The Supreme Court rejected the due process and equal treatment complaints. It noted that there is no hierarchy of means of evidence in the Swiss Rules. According to Art. 24(2) of the Swiss Rules: « *The arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence* ». **Documentary evidence and witness testimony are on the same footing**. The arbitrators were not required to ask the former CEO to testify. It was in the realm of assessing and weighing evidence. The result of the assessment of evidence could not be challenged before the Supreme Court.

Regarding the **individual who had actually been called as a witness**, the relevant procedural order provided that « [T]he Arbitral Tribunal may order a witness to give testimony at the hearing if such testimony is relevant to the case and material to its outcome ». The Court noted that **the arbitral tribunal did not require the parties' consent nor did it have to call for a witness statement**. It flows from the decision that there had been only 24 days to the hearing which the arbitral tribunal considered insufficient to obtain a witness statement. The Court also noted that the witness had been questioned by the arbitral tribunal and then been made available for cross-examination by both parties. At the hearing the principal had made no objections but merely requested a break between the arbitral tribunal's questions and the cross-examination.

7. In 4A_202/2020[43] the Supreme Court declared an annulment request (against a CAS award) inadmissible for formal reasons. **The plaintiff had failed to elect a Swiss domicile for service purposes** (*Zustellungsdomizil; domicile de notification*) as required by the Law on the Swiss Federal Supreme Court (Art. 39(3)).

8. *Clorox v Venezuela*[44] is **the only case to date where the Swiss Federal Supreme Court set aside an investment treaty award**. In the

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[43] Swiss Federal Supreme Court, Decision 4A_202/2020 of 5 August 2020, based on a CAS award, ASA Bull. 4/2020, p. 995.

[44] Swiss Federal Supreme Court, Decision 4A_306/2019 of 25 March 2020, based on PCA Case No. 2015-30, ASA Bull. 4/2020, p. 998.
See also Andreea NICA, *Case Note on the Decision of the Swiss Federal Tribunal in* Clorox v. Venezuela*,* ASA Bull. 4/2020, p. 884; Matthias SCHERER, *Mission Impossible? – Challenging Investment Treaty Awards before the Swiss Federal Tribunal*, in Müller/Besson/Rigozzi (Eds), New Developments in International Commercial Arbitration 2020, p 27; Matthias SCHERER, Angela CASEY, *Domestic Review of Investment Treaty Arbitrations: the Swiss Experience Revisited,* ASA Bull. 4/2019, p. 805; Bernhard BERGER, *Die Schweiz als Schiedsort für Investitionsstreitigkeiten – Erkenntnisse aus der neueren Rechtsprechung des Bundesgerichts*, Teil I, ASA Bull. 1/2020, p. 32, Teil II, ASA Bull. 2/2020, p. 296.

view of the Supreme Court, the arbitral tribunal in that case had wrongfully denied jurisdiction.

The claimant was a Spanish affiliate of the large US household cleaning products company Clorox. Clorox (Spain) had been founded in 2011 by Clorox US who sold all the shares in Clorox (Venezuela) to the newly constituted company. Clorox (Spain) did not have to pay any consideration for the shares. The arbitral tribunal found that all the know-how and actual investment in Venezuela had been made by two US companies. Clorox (Spain) had made no such investment and had not paid anything for the acquisition of the investment (Clorox (Venezuela)). Under these circumstances the arbitral tribunal denied that Clorox (Spain) was an investor for the purposes of the Spain-Venezuela BIT. Analysing the terms of the BIT, the Supreme Court concluded that it provided for the investor's nationality as only a threshold requirement. Likewise, the eligible investments were defined very broadly. The Court refused to consider that there was an implied prohibition of treaty shopping. **The problem of treaty shopping was well known, and it would have been open to Spain to provide adequate language in the BIT** (as it had done in other instances). The **absence of such language in the Spain-Venezuela BIT was construed as absence of threshold requirements other than the nationality of the investor**. Introducing additional requirements not envisaged in the BIT in order to block a Spanish party's claim was therefore improper. The matter was remanded to the arbitral tribunal for a full analysis of Venezuela's jurisdictional objections: the arbitrators had not dealt with Venezuela's fall-back argument that the claim was barred, not only by the terms of the BIT, but also by the general principles of prohibition of abuse of process.

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