The European Arbitration Review

2019

Switzerland

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The European Arbitration Review provides an unparalleled annual update – written by the experts – on key developments in the region. The 2019 edition includes new chapters on Limits to the Principle of 'Full Compensation', as well as country overviews on 17 jurisdictions. In addition the rest of the review has been revised in light of recent developments in arbitration, including analysis of the Court of Justice of the European Union's judgment in Slovak Republic v Achmea in Energy Arbitrations, the impact of Brexit in England & Wales and the protection of investments in international armed conflicts in Ukraine.

Switzerland

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Summary

MEASURING THE EFFICIENCY OF POST-AWARD PROCEEDINGS

The long-standing arbitration-friendliness of Switzerland is well known. This is reflected in its laws (the Swiss Private International Law Act, currently under revision, being the most relevant example), but also in the reports of arbitral institutions which demonstrate its ongoing popularity as a seat: Geneva and Zurich together are second only to Paris in the 2017 International Chamber of Commerce Court case statistics.[1] Swiss arbitrators are the third-most appointed (after the United Kingdom and France) when it comes to nationality (and first on a per capita basis),[2] and Swiss law among the top four chosen laws on the merits.[3]

In assessing the desirability of an arbitral seat, however, other highly salient factors are too often overlooked. These factors directly affect parties' interests, not only to a fair, efficient and cost-effective arbitral process. Once a (hopefully favourable) arbitral award is obtained, the hurdles that can stand in the way of its enforcement become the primary concern. The time taken for appeals to run their course – to a true final result – can at times erode the value of the award itself. Moreover, the uncertainty associated with the likelihood that the award will be set aside also stands in the way of finality. A high degree of certainty in an arbitral award's ultimate enforcement, and the expectation that it can be enforced without undue delay thereby increase the value of the end-to-end dispute resolution process.

In order to assess how well a given jurisdiction fares not only with respect to the support of a nascent or ongoing arbitral process (such as the availability and willingness of judges to assist with document production orders, and the like), it is necessary to take a close look at what happens after the award is rendered.

Felix Dasser and his research assistants have been doing this for some time. The most recent update by Dasser and Piotr Wójtowicz analyses data on challenges of Swiss arbitral awards as of 2017.[4] Their approach analyses three different data samples of decisions rendered by the Swiss Federal Court, the sole and final appeal instance for awards subject to Swiss lex arbitri. The first (and largest) sample concerns challenges of international arbitral awards pursuant to article 190(2) of the Swiss Private International Law Act (PILA). The second looks at request for revision of international arbitral awards, and the third focuses on challenges to domestic arbitral awards pursuant to article 389 et seqq of the Swiss Code of Civil Procedure (CCP) (which entered into force on 1 January 2011). A summary of Dasser and Wójtowicz's analysis is outlined below.[5]

CHALLENGES OF INTERNATIONAL ARBITRAL AWARDS

The Figures

Since 1989, 576 decisions on challenges have been rendered, with the past two years setting new records: 31 and 43 decisions in 2016 and 2017, respectively. These numbers mean that 2017 represents almost double the amount of 2008 or 2009, though the average has been on the rise over the past decade.

The high volume measured in recent years is due to a large number of decisions on challenges of sports arbitration awards rendered in 2017 (a peak of 21 sports cases). High numbers in sports cases have been known for some years, since the outset of that trend in 2010 (20 requests for the setting aside of sports awards were filed in 2010, compared to just 11 in 2009).

The aggregate record for the last decade (2008 through 2017) tallies 145 sports decisions (45 per cent) out of a total of 323 decisions rendered (178 non-sports). The sports awards have been almost exclusively rendered by the Court of Arbitration for Sport in Lausanne, Switzerland (the CAS).

The number of non-sports cases[6] also increased over the past 10 years, yet less impressively. Consequently, the overall yearly number of decisions and by implication challenges has remained high since 2010.

The total of 576 decisions entails 438 cases that were decided on the merits (76 per cent) (1989 through 2017); 78 challenges were dismissed due to lack of admissibility (14 per cent); 60 challenges were dismissed due to withdrawal (10 per cent).

Extent Of Success

Despite the increase in the number of challenges in 2016 and 2017, there was no notable increase in their success rate. Only three awards were set aside (one in 2016, and two in 2017). It is noteworthy that (for the first time in almost a decade) not a single challenge to a sports arbitration award succeeded over a two-year period. Accordingly, the yearly numbers of successful challenges appear, for the time being, to have plateaued on a low level.

In absolute terms (as one would expect), successful challenges grew more numerous since 1989 (the moment from which Dasser started tracking challenges), basically for two reasons:

- the number of challenges filed per year has inexorably risen over time, meaning that even a consistently low percentage of reversals leads to increased absolute numbers; and
- for several years, sports arbitration used to record a slightly higher frequency of successful challenges.

In recent years, the percentages of successful sports and non-sports challenges have converged. The success rate for non-sports arbitration cases has risen slightly from previous years but remains at a low 7.37 per cent (23 out of 312 cases), while 14 sports awards have been set aside at a rate of 7.94 per cent (10 out of 126 cases), a noteworthy drop from the 9.71 per cent just two years ago (10 out of 103 cases).

Dasser's very first study in 2007 referred to the 'magic seven' per cent of overall (partial) setting aside. This rule of thumb still appears to be valid as of 2017 (with 7.53 per cent of awards at least partially set aside).[7]

Grounds Of Challenge

The most successful avenue for challenging an award remains jurisdictional grounds (article 190(2)(b) PILA), with an 11.3 per cent success rate. Next comes a violation of equal treatment (or 'right to be heard', 190(2)(c)) at 5.5 per cent, followed by constitution of the arbitral tribunal (190(2)(a)) at 3.8 per cent, ultra or infra petita (190(2)(c)) at 2.9 per cent, and finally a decision against public policy (ordre public) at a mere 1 per cent (though the latter ground remains a popular means of challenge).

Duration Of Proceedings

Dasser and Wójtowicz calculate the duration of proceedings from the date on which the Federal Court receives a challenge. Not counting cases where the challenge was found procedurally inadmissible, they found that since 2009, the median duration until issuance of the decision increased from four to six months and appears to be settling below six months. Given the one-month period for filing a challenge,[8] parties can reasonably expect to know where they stand – from a final standpoint – within seven months of receiving the arbitral award.

Participation Of Foreign Parties

The research shows that Switzerland remains a prime neutral ground for dispute resolution between foreign parties by means of arbitration; ie, non-Swiss parties that at the time of the conclusion of the arbitration agreement had neither their domicile nor their habitual residence in Switzerland. The percentage of cases in which only foreign parties were involved has risen in the past decade, reaching 71 per cent as of 2015. As of 2017, it remains at a still high 69 per cent. In 327 out of the 472 cases with identifiable nationalities, all parties were foreign (in keeping with the percentage found in the first study in 2007.

Conclusion

While the numbers of challenges brought before the Federal Court per year has constantly been increasing and has peaked at 43 decisions in 2017, Dasser and Wójtowicz's data testifies to the very arbitration-friendly and efficient approach by the Swiss judiciary. The percentage of successful challenges in non-sports arbitration remains stable at around 7 per cent. As of 2017, the data for sports arbitration, too, suggest a chance of about 7 per cent of an award being set aside. With regard to individual grounds for successful challenges, there is a certain, maybe random, shift towards ground (b) (jurisdiction) of article 190(2) PILA.

The median duration of the procedure before the Federal Court is roughly six months. The median duration from the issuance of an award to the final determination of a challenge by the Federal Court is slightly longer than it was a decade ago. Yet, it is still short: seven months.

With a 7 per cent chance of a successful challenge, and a seven-month time span from issuance of the award until a final decision on the challenge, Dasser and Wójtowicz appropriately conclude that the Federal Court gives a high degree of deference to arbitral tribunals, with impressive efficiency, while remaining vigilant to violations of bedrock principles of international arbitration.

REVISION OF INTERNATIONAL ARBITRAL AWARDS

The Figures

The PILA is silent with regard to requests for revisions, however the Federal Court filled this gap in 1992, holding that a request for revision of an arbitral award is admissible and had to be addressed to the Federal Court.[9] A revision may be requested on two grounds:

- the award was affected by criminal offence; or
- preexisting material facts or decisive evidence have been discovered since the award.[10]

Since 1992, only 27 decisions have been rendered (including two each in 2016 and 2017). The percentage of admissible requests (ie, requests decided on the merits) remains similar

to the one for challenges, 74 per cent as compared to 76 per cent for challenges. All concern revisions to international arbitration awards.

Success Of Requests For Revision

Only three out of the 20 requests for revision that were admitted have been successful as of 2017 (in 2006, 2009 and 2016). None of them were sports-related. The number of cases is so low that it is difficult to draw reliable conclusions. That said, the success rate based on this small sample stands at 15 per cent, suggesting (as is the case for challenges) a high degree of deference by the Federal Court to arbitral awards.

Grounds For Revision

Excluding requests that were held to be inadmissible, the invocation of a criminal offence took place twice, both times successfully. On the other hand, when newly discovered facts or evidence were invoked (16 times), only one request was successful.

Duration Of Proceedings

The median duration of the 20 merits decisions on revision (approximately five months) is slightly shorter than the one for challenges. There is, however, considerable variation.

Conclusion

Dasser and Wójtowicz reasonably conclude that, given the rate of admissibility and the duration of the proceedings, similar trends to those for challenges of awards can be expected. However, given the paucity of revision cases, making any predictions is challenging. On the basis of the existing data, however, it does seem like the existence of criminal conduct is necessary to ensure success given the strong likelihood of failure on the only other available ground.

CHALLENGES OF DOMESTIC ARBITRAL AWARDS

General Principles And Figures

Parties can challenge domestic arbitral awards under article 389 of the Swiss Code of Civil Procedure (the CCP).[11]

By default, only the Federal Court is competent to hear such challenges (article 389 CCP). However, and contrary to international arbitration, the parties may designate the competent cantonal court of the canton where the arbitral tribunal has its seat to hear the case (article 390 CCP). Once designated, the cantonal court has exclusive powers to hear the case and its decision is final; there is no recourse to the Federal Court. The Dasser and Wójtowicz study does not record any such decisions of the cantonal courts.

The number of decisions in domestic arbitration has remained lower than in international arbitration. Since 2011, 79 decisions have been rendered in total (27 of them in 2016 and 2017), out of which 59 were on the merits.

The overall number of cases is low, however some nascent trends can be distinguished. The vast majority of cases concern commercial disputes. In addition, there are several employment-related cases (14 cases, or 18 per cent), while sports-related challenges are rare (five cases, or 6 per cent). The employment cases evidence the importance of arbitration in Swiss (collective) employment law.[12]

Success Of Challenges

As of 2017, the data indicates a rate of success of 19 per cent on the merits, with 11 out of 59 challenges being successful. No additional challenges of sports or employment awards were successful in the past two years, while two commercial decisions were successful in 2016 and one was in 2017.

The data thus indicates a historic chance of success of a challenge of 17.8 per cent for commercial and a strikingly similar 18.2 per cent for employment matters. On their own, the number of employment cases is too low to allow for predictions. Yet in light of the similar rate of success in commercial cases, a similar trend might at least be assumed. No serious predictions appear possible for sports arbitration given the marginal number of such cases (one successful out of three admitted challenges).

To date, numbers seem to indicate that the success rate of challenges in domestic arbitration might double or even triple the rate in international arbitration.

Dasser and Wójtowicz explain that the main reason for the higher numbers of reversals in domestic arbitration compared to international arbitration lies primarily in article 393(e) CCP (arbitrariness of an award). The Federal Court can review the arbitral tribunal's decision on merits under the test of arbitrariness which is far broader than the very narrow test of public policy pursuant to article 190(2)(e) PILA for international cases. Consequently, challenges based on arbitrariness are successful in 20 per cent of the cases (compared to a mere 1 per cent for challenges based on public policy in international cases).

Grounds Of Challenge

Under article 393(a)–(f) CCP, a domestic arbitral award may be challenged only on the following grounds:

(a) the single arbitrator was appointed or the arbitral tribunal composed in an irregular manner;

(b) the arbitral tribunal wrongly declared itself to have or not to have jurisdiction;

(c) the arbitral tribunal decided issues that were not submitted to it or failed to decide on a prayer for relief;

(d) the principles of equal treatment of the parties or the right to be heard were violated;

(e) the award is arbitrary in its result because it is based on findings that are obviously contrary to the facts as stated in the case files or because it constitutes an obvious violation of law or equity; and

(f) the costs and compensation fixed by the arbitral tribunal are obviously excessive.44

As of 2017, not a single challenge on grounds (a) or (c) was successful, while ground (f) (excessive fees and costs) has not yet been invoked. Conversely, the chances of a challenge based on ground (b) (jurisdiction), and (e) (arbitrariness), remain high (as of 2017, two out of nine, and seven out of 35, respectively). For the first time, ground (d) (equal treatment or the right to be heard) has been invoked successfully, in 2016 and again in 2017 (two out of a total of 16).

Duration Of Proceedings

The median duration of challenge proceedings before the Federal Court in domestic arbitration has been rising steadily since 2011 and, as of 2017, amounts to 145 days

(roughly 4.75 months, for 59 decisions on the merits). It remains shorter than in international arbitration. Thus, taking into account the 30-day period for the filing of a challenge, parties may expect a domestic award to be final less than six months after its issuance. However, the variance in duration is very high.

Conclusions

Dasser and Wójtowicz conclude that it is still early days for any empirical study on domestic arbitration under the CPC. The still rather low number of cases are much easier to challenge on the merits due to the relatively broad ground of arbitrariness, which is unavailable in international cases under the PILA. There have been no challenges based on allegedly excessive arbitration fees so far, in spite of the often-heard complaint about costs of arbitration.

Overall, apart from the challenges based on arbitrariness, challenges of domestic awards share most features with international cases, suggesting it may not matter that much whether a case turns out to be international or domestic under Swiss law. The current gentle reform of Swiss arbitration will align international and domestic arbitration even more, without compromising in any way the extremely liberal approach of the PILA.[13]

Taken together, the conclusions drawn from the study on challenges to international and domestic arbitral awards, as well as on the revision of international arbitration awards, jointly demonstrate an efficient system that is arbitration-friendly in all phases of the process, including in post-award challenges and revision requests that are dealt with within, on average, a seven-month time span from the issuance of the award.

Notes

[1] ICC Dispute Resolution Bulletin 2018 (Issue 2), p 60.

[2] Ibid, p 58.

[3] Ibid, p 61.

[4] Felix Dasser and Piotr Wójtowicz, Challenges of Swiss Arbitral Awards – Updated Statistical Data as of 2017, ASA Bulletin Volume 36, No. 2, 2018, pp 276–294.
Refer to ibid for the comprehensive analysis including illustrative charts.

[5] Includes commercial and occasional investment arbitration awards.

[6] For prior studies refer to Felix Dasser and Piotr Wójtowicz, Challenges of Swiss Arbitral Awards – Updated and Extended Statistical Data as of 2015, ASA Bulletin Volume 34, No. 2, 2016, pp 280–300; and Felix Dasser, International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis, ASA Bulletin Volume 25, No. 3, 2007, pp 444–472.

[7] Article 100(1) Swiss Federal Act on the Federal Court of 17 June 2005 (Swiss Federal Court Act), SR 173.110.
Decision BGE 118 (1992) II 199.

[8] Decision BGE 134 (2008) III 286.

[9] The CCP came into force on 1 January 2011, replacing previous cantonal codes of civil procedure and, with its third part on arbitration (articles 353 et seqq), the former cantonal Concordat on Arbitration that governed domestic arbitration.

[10] Cf Piotr Wójtowicz, Labour Law and ADR in Switzerland – Selected Topics. Mediation, Arbitration and Collective Employment Contracts, Arbitrability of Labour Law Claims, in: Themis Polska Nova 2015 / nr 1 (8), 209–222, 214–216.

[11] See www.ejpd.admin.ch/ejpd/de/home/aktuell/news/2017/2017-01-11.html. The Federal Council's bill to Parliament is scheduled for late summer 2018.

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