Judicial review of arbitral awards in Switzerland – balancing procedural flexibility and compliance with fundamental procedural rights

Arbitration is widely acclaimed as an efficient way of resolving commercial disputes, in particular in international settings. Besides enhanced international enforcement, one of its key features is its flexibility, in particular its ability to adapt to the differing needs and expectations of parties from diverse legal backgrounds and cultures, neutrality, expertise of the decision-makers.

1. Party autonomy in procedural proceedings – a foundation of arbitration

Most arbitration rules, such as the Swiss Rules, the ICC Rules, the LCIA Rules, the DIS Rules etc. do not regulate the arbitral proceeding in detail. International rules dealing with procedural matters, such as the IBA Rules on the Taking of Evidence in International Arbitration of 29 May 2010, have no legal binding unless the parties have agreed otherwise, which is rarely the case. Chapter 12 of the Swiss Private International Law Act (PILA) does not contain specific or detailed (default) rules regarding arbitral procedures.

Therefore, under Swiss law, parties enjoy extensive autonomy to choose and determine the arbitral procedure and to tailor the procedural rules to their needs\(^1\). Parties can choose the law governing the substance of the dispute, the seat of arbitration, the arbitration institution (if one is used) and rules as well as the arbitrator(s), and also take a range of other decisions that shape the jurisdictional scope and the proceeding of the arbitration. Such choices often result in important legal and tactical advantages. Among others, the choice of the applicable law, of the seat of the arbitration (which determines, e.g., the legal regime applicable for setting aside or injunctive relief proceedings), the choice of the arbitral institution (and thus of its arbitration rules), the person of the arbitrator, confidentiality, and timing issues in the shaping of the procedure are key elements to influence the course, and most probably also the outcome, of an arbitration\(^2\).

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\(^1\) see, e.g., the 2013 Queen Mary – PWC International Arbitration Survey: Corporate choices in International Arbitration Industry perspectives, p. 8

\(^2\) see also article 182(1) of the Swiss International Private Law Act (PILA)

\(^3\) see also the 2010 Queen Mary 2010 International Arbitration Survey: „Choices in International Arbitration“, p. 2
Under Swiss law, arbitral tribunals enjoy much discretion in shaping the arbitral procedure as well. Absent a party consent as to the procedure, the arbitral tribunal has the power to decide on procedural matters (article 182(2) PILA). Despite the extensive autonomy of the parties and arbitral tribunals having their seat in Switzerland, the principles of equal treatment of the parties and the right to be heard (article 182(3) of the PILA) must be observed.

2. Limitation of judicial review as a key asset of arbitration

A further key asset of arbitration for many businesses are the limited grounds for challenging an award. The grounds for annulment are very restrictive. Article 190(2)(a) – (e) PILA provides that an award can only be challenged based on the following five grounds:

(i) improper appointment of the sole arbitrator or improper constitution of the arbitral tribunal (including the appointment of an arbitrator who is not independent);
(ii) erroneous acceptance or denial of jurisdiction by the arbitral tribunal;
(iii) failure to decide all claims brought by the parties or decisions on matters beyond the claims submitted to the arbitral tribunal (infra/ultra petita);
(iv) violation of the principle of equal treatment of the parties or the right to be heard; or
(v) non-compliance of the award with substantive or procedural public policy.

The fact that the award may be arbitrary does not qualify as a reason for annulment under Article 190 PILA. This does not only emphasize the restrictive approach of judicial review of international arbitral awards by the Swiss Federal Tribunal, but also shows the importance of the choice of the arbitrators, the procedural rules by the parties and the conduct of the arbitral proceeding.

3. Protection of due process under Swiss law

Procedural flexibility and discretion for the stakeholders is only one side of the coin: It is imperative for parties that their fundamental rights in an arbitral proceeding are respected and that all parties and the arbitral tribunal play by commonly accepted and foreseeable rules.

In this article, we explore how Swiss law protects the parties in arbitral proceedings seated in Switzerland in terms of due process.

Recent studies have shown that only a tiny minority of appealed cases are set aside. It does not come as a surprise that not all grounds are equally popular among petitioners. A study of 2010 showed that the right to be heard (article 190(2)(d) PILA) was most often invoked, closely followed by public policy (article 190(2)(e) PILA). Over the last few years, the picture has not significantly changed. Jurisdictional issues are still third in line, followed by ultra/infra petita griefs and flaws in the constitution of the tribunal.

More interesting than the mere number of challenges per ground is the relative chance of success of each ground for appeal. Whereas the most popular ground for a challenge since 2005,
public policy, has only been successful twice, approximately 9.4% of all arbitral awards challenged before the Swiss Federal Tribunal on jurisdictional grounds (whereof many in sports arbitration), 5.5% on the right of equal treatment or the right to be heard, 3.6% regarding ultra/infra petita, 2.2% on grounds of unlawful constitution of the arbitral tribunal, and 1.3% for violation of the right to be heard were set aside by the Swiss supreme court⁴. Leaving aside sports arbitration, from 1989 to 2013, the average success rate of appeals for commercial arbitration was 6.88%⁵. This means that the Swiss Federal Court is very reluctant to intervene with arbitral awards, or to put it the other way round: parties must get it the first time right, namely in the arbitration, and not in the appeal.

The following brief overview of recent case law gives a flavor of the standard of review applied by the Swiss Federal Tribunal in terms of procedural discretion and the assessment of evidence:

- In a decision of 20 August 2014, the Swiss Supreme Court decided on the FIDIC Conditions of Contract and the jurisdiction of an arbitral tribunal to hear a dispute. The court found that the FIDIC dispute adjudication procedure is, in principle, mandatory and therefore a condition precedent to arbitration. A party may only refuse to go through the process if insisting on it would amount to an abuse of rights because it appears futile to an efficient resolution of the dispute, or where there has been inordinate delay in appointing the dispute adjudication board (DAB) by the other party (FTD 4A_124/2014). This decision shows that unless they have agreed otherwise on an ad hoc basis, the parties must follow the rules for the resolution of disputes they have agreed upon.

- Arbitral tribunals are entitled to refuse to allow certain questions a party wants to put to the opposing party’s expert. The tribunal may do so where it anticipates that the additional evidence obtained by further questioning could not affect their findings, or if the evidence in question is irrelevant or unsuitable to prove the facts in question (FTD 4A_544/2014). Thus, dilatory tactics by parties can be – unexpectedly – severely punished.

- A violation of a party’s right to be heard cannot be easily proven because under the Swiss Federal Tribunal’s case law, even if a tribunal did not expressly mention the relevant provision related to the interpretation of contracts under Swiss law, in case it has actually addressed the petitioner’s position on that issue and implicitly applied the relevant principles under Swiss law, the right to be heard is not violated (FTD 4A_486/2014).

- Also, in FTD 4A_636/2014 the Swiss Federal Tribunal confirmed an arbitral award regarding a penalty clause, the court found that instead of simply denying the other party’s position, the petitioner should have submitted its own evidence to support its own position. Therefore, parties may be required to submit counter-evidence; a simple objection against factual allegations made by the other side might not suffice if the arbitral tribunal considers the allegations of claimant as proven.

- The Swiss Federal Tribunal suggested in another decision, without formally deciding on the issue, that the right to be heard was not violated where, pursuant to agreed procedural rules,
a party could not call a witness for examination where the other party had waived their right to cross-examination (FTD 4A_199/2014).

- Furthermore, an arbitral tribunal may rely on facts which no party had argued without infringing the parties' right to be heard if they are on the file (FTD 4A_305/2013 of 2 October 2013).

- In view of the fact that the weighing of evidence cannot be challenged before the Swiss Federal Tribunal, these decisions emphasize the discretion arbitral tribunals seated in Switzerland enjoy in hearing evidence offered by a party.

- Contrary to the Swiss Civil Procedure Act (CPA), under the PILA, arbitrariness of an arbitral tribunal in assessing and weighing the evidence cannot be challenged. In its decision of 30 September 2014, the Swiss Federal Tribunal rejected an application to have a domestic arbitral award set aside on grounds of arbitrariness. It confirmed that under Swiss law, an award is only considered to be arbitrary from a factual point of view where an arbitral tribunal's findings are manifestly contradicted by the case's evidentiary record. By contrast, an arbitral tribunal's evaluation or assessment of specific evidence does not qualify as arbitrary. The Swiss Supreme Court also confirmed that only a clear violation of the law can amount to arbitrariness (see FTD 4A_274/2014, and FTD 4A_112/2014).

- In this context, it is noteworthy that the PILA permits parties to an international arbitration to opt-out and submit the procedure to the Swiss CPA, which governs domestic arbitration, allowing for the “arbitrariness” challenge.

- In another decision of 23 July 2014, the Swiss Federal Tribunal accepted an application to have a domestic arbitral award set aside on grounds of arbitrariness, finding that the sole arbitrator, in awarding interest on damages, had grossly misapplied Swiss law on default interest by granting interest for periods of time during which the relevant amounts had not yet become due (FTD 4A_117/2014).

In principal, the application of the law by an arbitral tribunal seated in Switzerland cannot be challenged before the Swiss Federal Tribunal. Swiss law does not know the “materially flawed” standard of English law. In FTD 4A_108/2009, the supreme Swiss court reminded the applicant that in an international arbitration held in Switzerland, there is no constitutional requirement that the parties be heard on the legal consequences to be drawn from the evidence on the file. It is only when the arbitral tribunal intends to rely on legal grounds which none of the parties argued and that they could not have reasonably expected that a violation of the right to be heard may be affirmed. Thus, the principle iura novit curia finds its limits in the violation of due process as far as arbitrations held in Switzerland are concerned.
4. Conclusions

The limited standard of review of arbitral awards by the Swiss Federal Tribunal adds to the efficiency of arbitration both in terms of costs and time, provided the following points are respected:

- International arbitration proceedings mostly involve stakeholders from different cultural and legal backgrounds, which means that the expectations about the “right” procedure may vary strongly. Choosing institutional arbitration adds a layer of procedural security to arbitral proceedings. In particular when the parties agree on ICC arbitration, the scrutiny procedure of the ICC helps to avoid procedural irregularities and materially flawed decisions. This is all the more important if the parties, and therefore most likely the arbitrators, have different cultural and legal backgrounds.

- Detailed procedural rules agreed upon by the parties and the arbitral tribunal add to the security of the parties in terms of procedural submissions and applications. The challenge in this regard is to strike a balance between flexibility of the proceeding and procedural security for the parties. Furthermore, in domestic arbitration, the parties may challenge arbitral awards for arbitrariness.

- The wide procedural discretion of arbitral tribunals urge arbitration users to play it safe: Procedural applications, including the submission of evidence (expert reports etc.), should be made in a non-equivocal and timely manner and in a form usual in international arbitration. Again, the challenge consists in protecting its rights on the one side, and avoiding a procedural “overkill” on the other side.

If these principles are applied, Swiss law not only provides for efficient arbitration, but also sufficiently protects parties arbitrating in Switzerland in terms of due process.