

Challenging Court Assistance in the Taking of Evidence in International Arbitration – the Swiss Perspective

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Court Assistance – Taking of Evidence – Court Assistance in the Taking of Evidence – Challenge of the Arbitral Award – Parties to the Arbitration – Third Parties – Right to be Heard – Public Policy – Swiss Perspective – Juge d'appui

I. Introduction

Unlike state courts, arbitral tribunals can exercise their powers solely within the framework of ongoing arbitral proceedings, and these powers are therefore limited to the parties to the respective arbitration. This is especially evident when it comes to the taking of evidence. While certain ‘sanctions’ may be imposed to persuade a party to produce evidence within its control (e.g. adverse inference and cost sanctions), the situation is rather more challenging when the evidence is in the hands of third parties. Although this rarely happens in practice, the importance of the evidence in question may justify resorting to state courts for assistance. In Swiss international arbitration, this dilemma is recognised by Art. 184(2) of the Private International Law Act (PILA CH),² which allows an arbitral tribunal or a party with the arbitral tribunal’s consent to seek court assistance at the seat of arbitration.³ The state court will then render assistance either according to

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² SR 291 (classified compilation of Swiss law).

³ For the German perspective see BEN STEINBRÜCK, *Die Unterstützung ausländischer Schiedsverfahren durch staatliche Gerichte: Eine rechtsvergleichende Untersuchung des deutschen, österreichischen, englischen, schweizerischen, französischen und US-amerikanischen Schiedsrechts*, Mohr Siebeck (2009).

his own (Swiss) law or – as proposed in the ongoing revision to the PILA’s 12th chapter – according to a foreign law.⁴

The present contribution looks at this process to consider whether third parties and the parties to arbitration can object to a decision of the state court. Where a request for assistance under Art. 184(2) PILA CH is granted or denied, the parties to the arbitration and third parties may have an interest in quashing the decision. This might be the case, for example, if a third party invokes a certain privilege or claims that the evidence is protected by professional confidentiality. For their part, the parties to the arbitration might argue that the state court has refused to force a third party to produce evidence even though it is crucial to the respective arbitration. So how can they respond?

The following discussion thus fleshes out two scenarios: challenging either *directly* the decision of the state court or *indirectly* attacking the arbitral award based on what happened (or did not happen) when court assistance in the taking of evidence was sought. While the former must be considered from the perspectives of both the parties to the arbitration and third parties, the latter obviously concerns only the parties to the arbitration.

II. Challenging the Decision of the State Court

In Swiss legal doctrine and jurisprudence, it remains uncertain whether decisions of the state court under Art. 184(2) PILA are in fact open to challenge.⁵ The PILA CH’s provisions on challenging decisions of the assisting state court are generally tailored very narrowly – whether in relation to the constitution of the arbitral tribunal or the appointment of arbitrator(s)⁶ (Arts. 179 and 180 PILA CH), interim measures (Art. 183 PILA CH), other forms of assistance⁷ (Art. 185 PILA CH), the deposit and certificate of enforceability, or recognition and enforcement of the arbitral award (Arts. 193 and 194 PILA CH). In fact, only Art. 180(3) PILA CH states, with regard to the challenge of an arbitrator, that in

⁴ Federal Council Dispatch About the Amendments of the PILA CH, 12th chapter: International Arbitration, 24 October 2018, Federal Law Gazette 2018, 7198, <https://www.admin.ch/opc/de/federal-gazette/2018/7163.pdf> (accessed 15 October 2019) (FCDisp PILA CH Revision (2018)).

⁵ See in general SOPHIE THORENS-ALDADJEM, *Le juge d’appui en matière d’arbitrage interne et international*, 35 ASA Bull. 530 et seqq. (2017).

⁶ DFT 138 III 270, cons. 2.2.1; CHRISTIAN OETIKER, Art. 180 PILA CH n. 40 et seqq., in: *Zürcher Kommentar zum IPRG, Band II, Art. 108-200*, 3rd ed., Schulthess (2018) (cited: ZK-OETIKER); WOLFGANG PETER & CHRISTOPH BRUNNER, Art. 180 PILA CH n. 33, in: *Basler Kommentar: Internationales Privatrecht*, 3rd. ed., Helbing Lichtenhahn (2013).

⁷ RAMON MABILLARD, Art. 185 PILA CH n. 19, in: *Basler Kommentar: Internationales Privatrecht*, 3rd. ed., Helbing Lichtenhahn (2013).

the interest of procedural economy, the decision of the judge at the seat of the arbitral tribunal is generally final and binding.⁸ In contrast, the Swiss Federal Tribunal (SFT) has held that if a state court refuses to appoint an arbitrator, this decision must be open to challenge, since otherwise arbitration becomes *de facto* impossible.⁹ The same applies to Swiss domestic arbitration if the state court refuses to appoint an arbitrator (Art. 362 Swiss Code of Civil Procedure (CCP CH))¹⁰, to extend the term of office of the arbitral tribunal (Art. 366(2) CCP CH) or to replace an arbitrator (Art. 371(2) CCP CH).¹¹ Furthermore, at least in domestic arbitration, there seems to be no problem in challenging the decision of a state court who assists in the taking of evidence.¹²

Aside from this question of whether an objection is possible at all, the PILA CH says nothing with regard to the competent appellate instance. The Swiss Supreme Court Act (FSCA CH)¹³ and the PILA CH set out only how to challenge (interim or final) arbitral awards.¹⁴ However, since the state court acts always as a sole cantonal instance – either as a regional or cantonal supreme court (second instance) – several authors consider that the SFT is the sole subsequent appellate instance and an internal cantonal appellate procedure is thus not possible.¹⁵ This opinion would appear to be correct. In order to ensure that the same court does not decide on matters of assistance during the arbitration while at the same time acting as the appellate instance, Art. 356 CCP CH appoints two different courts for each task.¹⁶

⁸ DFT 138 III 270, ASA Bull. 2/2013, p. 322 et seq., cons. 2.2.1.

⁹ DFT 4A_215/2008 of 23 September 2008, ASA Bull. 1/2009, p. 114 et seq., cons. 1.1.

¹⁰ SR 272.

¹¹ STEFANIE PFISTERER, Art. 356 CCP CH n. 19, in: *Berner Kommentar: Schweizerische Zivilprozessordnung, Band III*, Stämpfli (2014) (cited: BSK-PFISTERER).

¹² MARCO STACHER, Art. 356 CCP CH n. 14, in: *DIKE Schweizerische Zivilprozessordnung ZPO: Kommentar*, 2nd. ed., DIKE (2016) (cited: DIKE-STACHER); CHRISTOPHER BOOG & SONJA STARK-TRABER, Art. 375 CCP CH n. 143, in: *Berner Kommentar: Schweizerische Zivilprozessordnung, Band III*, Stämpfli (2014); PHILIPP HABEGGER, Art. 375 CCP CH n. 82, in *Basler Kommentar: Schweizerische Zivilprozessordnung (ZPO)*, 3rd. ed., Helbing Lichtenhahn (2017).

¹³ SR 173.110.

¹⁴ Art. 77 FSCA CH in connection with Art. 190 and 191 PILA CH.

¹⁵ Art. 356(2)(c) CCP CH by analogy; for instance, while the cantons of Zurich, Basel and Bern appoint a district court as the sole instance, Basel City declares the cantonal supreme court as competent – see BSK-WEBER-STECHER, Art. 356 CCP CH n. 21, in: *Basler Kommentar: Schweizerische Zivilprozessordnung (ZPO)*, 3rd. ed., Helbing Lichtenhahn (2017) (cited: BSK-WEBER-STECHER); DIKE-STACHER, Art. 356 CCP CH n. 14, BK-PFISTERER, Art. 356 CCP CH n. 19 and 21.

¹⁶ Federal Council Dispatch About the Swiss Code of Civil Procedure, 28 June 2006, Federal Law Gazette 2006, 7221 et seqq., (cited: FCDisp CCP CH (2006)), 7394, <https://www.admin.ch>

An objection in civil matters must be filed to the SFT within 30 days of notification of the state court's decision.¹⁷ Moreover, since there is no value in dispute, the threshold of CHF 30,000 does not apply to arbitral proceedings; otherwise, parties would be deprived of any right to object.¹⁸ Finally, there are special requirements regarding the right to object (Art. 76 FSCA CH) – that is, a legitimate interest in the court decision against which the party is objecting (Art. 75 FSCA CH) – and the decisions of arbitral tribunals that are subject to review (Art. 77 FSCA CH). All three of these conditions deserve a closer look, from the perspective of both third parties and the parties to the arbitration.

A. Third Parties

Since the PILA CH provides no further guidance regarding the right of third parties to challenge a decision of the respective state court, it might prove helpful to have a look at how the issue is dealt with in Swiss domestic arbitration. In an unpublished case from 2013, a party to arbitration requested that a third party, the Federal Road Office (FRO), produce certain documents.¹⁹ The evidence request was granted by the Cantonal Supreme Court of Ticino, a decision which the FRO unsuccessfully challenged on the grounds of professional confidentiality. The SFT reasoned that since the Cantonal Supreme Court of Ticino had decided as the court of sole instance (Art. 356(2)(c) CCP CH), its decision was final and not open to challenge. In addition, the SFT further held that the FRO lacked the capacity to object, since it is only one part of a larger federal department and thus does not have an independent right to object.²⁰ Unsurprisingly, this decision soon came in for criticism, mainly because of its implications for third parties.²¹

If this decision were applied in other cases, it would result in unequal treatment between arbitration and state court proceedings. While third parties in state court litigation always have the chance to object to an order forcing them to produce evidence (Arts. 165 et seqq. CCP CH), this would not be the case in international arbitration. Or, to put it another way, a third party would be deprived of the chance to object purely because the evidence request

/opc/de/federal-gazette/2006/7221.pdf (accessed 15 October 2019); BSK-WEBER-STECHER, Art. 356 CCP CH n. 1 et seqq.; DIKE-STACHER, Art. 356 CCP CH n. 1.

¹⁷ Art. 100(1) FSCA CH; for the formal requirements *see* Art. 42 FSCA CH.

¹⁸ Art. 74 FSCA CH; but *see* the proposed Art. 77(1) FSCA CH; FCDisp PILA CH Revision (2018), 7204.

¹⁹ DFT 4A_214/2012 of 10 January 2013; ASA Bull. 2017, p. 616 et seq.

²⁰ Art. 76(2) FSCA CH *e contrario*; DFT 142 II 324, cons. 1.3.1.

²¹ BEYELER, note on DFT 4A_214/2012 of 10 January 2013, BR DC online Nr. 303 (2013); GÖKSU, note on DFT 4A_214/2012 of 10 January 2013, 376, 41 BR DC 375 (2016).

stemmed from an arbitral tribunal, instead of a state court. This consequence could not have been intended by the Swiss legislature. One might even argue that a third party faced with an evidence request from an arbitral tribunal pursuant to Art. 184(2) PILA CH should have the same appellate possibilities as in state court proceedings; as a result, there should be both a cantonal instance (i.e. a cantonal supreme court) and a federal instance (the SFT). However, in the interest of procedural efficiency, it would seem proportionate to accept this shortcoming in legal protection and reduce the appellate remedies to a single instance (i.e. the SFT).

Thus, pursuant to the conditions stated in Arts. 75–77 FSCA CH, the following discussion will confirm that there is no reason why third parties cannot object to a decision of the state court.

1. Legitimate Interest

First of all, a third party must show that it is particularly affected by the decision and has a legitimate interest in seeking to change or quash it. This condition requires that the third party be affected by the decision more than anyone else – which is the case if the respective third party is the sole target of the evidence request.²² Furthermore, if a party can show that – despite its general duty to cooperate²³ – production of the requested evidence would violate privilege or professional confidentiality, a legitimate interest will indeed exist.²⁴ What is more, since a third party is not itself a party to the arbitration, this represents its only chance to object. This also follows from the right to object under Art. 29a of the Swiss Constitution, according to which everyone has the right to have his or her case determined by a judicial authority.²⁵ As a consequence, since an objection in civil matters to the SFT normally has no suspensive effect, it should be granted; otherwise, the third party's right to object would be meaningless.²⁶

2. Challenging an Interim Decision

Second, and quite obviously, a decision on court assistance in the taking of evidence is not an arbitral award (i.e. a final decision) in the sense of Art. 77(1)(a) FSCA CH read with Arts. 190–192 PILA CH. Rather, because this is merely one procedural stage within the arbitral proceedings, the subsequent

²² DFT 142 II 80, cons. 1.4.

²³ Art. 160(1) CCP CH.

²⁴ Art. 165 et seqq. CCP CH.

²⁵ SR 101; GÖKSU, *note on DFT 4A_214/2012 of 10 January 2013*, 376, 41 BR DC 375 (2016).

²⁶ Arts. 103(1) and (3) FSCA CH.

decision may be qualified as an interim decision.²⁷ Pursuant to Art. 93(1) FSCA CH, such decisions can be challenged only if the notification happened independently and they threaten to cause irreparable harm. This is the case, for example, where professional confidentiality is concerned.²⁸

3. Lower Courts

Finally, a problem relating to decisions of the lower courts must be resolved. Art. 75(2) FSCA CH states that an objection in civil matters is possible only against a decision of the *higher* cantonal courts, except where a federal act appoints a single cantonal instance. As previously discussed (*see II supra*), court assistance in the taking of evidence is usually rendered either by regional courts or by cantonal supreme courts, depending on where assistance is sought. As a result, it remains unclear whether decisions of lower cantonal courts can be challenged if they act as the sole cantonal instance. In DFT 141 III 444, this question was answered in the affirmative regarding the refusal of a sole cantonal instance to appoint an arbitrator.²⁹ Although this case concerned a Swiss domestic arbitration, the decision can easily be applied to the issue at hand. It would thus appear that an objection in civil matters to the SFT should be allowed even where the assisting state court acted as a sole lower cantonal instance, provided that the other conditions to object to the SFT are fulfilled.

4. Result

The foregoing discussion suggests that as long as the conditions under the FSCA CH are met, third parties should be allowed to object to the SFT.³⁰ To hold otherwise would deprive third parties of their right to object solely because the evidence request was made in the context of arbitration rather than litigation. It thus seems very unlikely that the SFT will refuse to hear third-party objections to decisions of a state court, as in the previous decision of the Supreme Court of Ticino.³¹ This is even more so the case since the latter

²⁷ DFT 5A_171/2009 of 15 October 2009, cons. 1.5; KATHRIN KLETT & MATTHIAS LEEMANN, Art. 77 FSCA CH n. 1c, in: *Basler Kommentar: Bundesgerichtsgesetz*, 3rd. ed., Helbing Lichtenhahn (2018) (cited: BSK-KLETT/LEHMANN); *contra* MARKUS, 517, *Rechtsmittel gegen Entscheide des juge d'appui bei der internationalen Schiedsgerichtsbarkeit in der Schweiz*, 31 ASA Bull. 504 (2013).

²⁸ DFT 4A_64/2011 of 1 September 2011, cons. 3.1; DFT 129 II 183, cons. 3.2.2.

²⁹ DFT 141 III 444, ASA Bull. 3/2017, p. 737 et seq., cons. 2.3; *see also* DFT 142 III 230 where the SFT stated that regarding the appointment of an arbitrator by a sole cantonal instance, appellate possibilities are excluded (cons. 1.4.4). It added that the decision of the assisting state court to appoint an arbitrator can be challenged only if the same court decides simultaneously on another request to reject an arbitrator (cons. 1.4.3).

³⁰ *Contra* BSK-KLETT/LEEMANN, Art. 77 FSCA CH n. 1b.

³¹ DFT 4A_214/2012 of 10 January 2013; ASA Bull. 3/2017, p. 616 et seq.

decision is unpublished – that is, it is not considered a decision of ‘fundamental importance’.³² Moreover, in that case the right to object was denied primarily because the respective third party was part of the federal administration and thus lacked the capacity to object.³³

B. Parties to the Arbitration

While it makes sense to allow third parties which are not parties to arbitration to object to a decision of the state court, the same does not necessarily apply to the parties themselves. The parties might wish to object if, for example, the assisting state court refuses to force a third party to reveal evidence or takes evidence contrary to an agreement between the parties (e.g. if the state court allows cross-examination where this has been explicitly excluded by the parties).

Once again, the conditions of the FSCA CH must be examined. As previously discussed with regard to third parties, the conditions of Art. 75 FSCA CH regarding lower courts can likewise be applied to the parties to the arbitration (*see* II.A.3. *supra*). As a consequence, only legitimate interest and the conditions to object to interim decisions are explored below. But first, the jurisprudence of the SFT deserves a closer look.

1. Jurisprudence of the SFT

Unfortunately, the SFT decision on third parties that was previously discussed says nothing further in relation to a possible objection in civil matters to the SFT. In addition, it remains questionable whether the SFT’s jurisprudence regarding the appointment and challenge of arbitrators could be applied by analogy to allow an objection where an evidence request has been refused or to refuse it where the request has been allowed.³⁴ The general approach taken here seems to be that an objection in civil matters is possible only if the parties would otherwise be deprived of their choice to settle their dispute through arbitration. The taking of evidence, by contrast, is merely one procedural part of the arbitral proceedings, and a refusal to provide court assistance will not render impossible the conduct of arbitration and the issue of an award. Aside from that, in the

³² The fact that the decision is formulated in the form of ‘that’ sentences (*Dass-Entscheidung*) strenghtens this assumption; Art. 58(1) Federal Supreme Court Regulations (SR 173.110.131).

³³ Art. 76(2) FSCA CH *e contrario*.

³⁴ DFT 142 III 230, ASA Bull. 3/2016, p. 701 et seq., cons. 1.4.4.

interest of procedural efficiency, the SFT will usually exclude the possibility to object to a decision of the state court.³⁵

2. *Legitimate Interest*

Second, as previously discussed (*see* II.A.1. *supra*), a party to the arbitration will have to show that it is particularly affected by the decision and has a legitimate interest in changing or quashing it. As a consequence, a party must demonstrate not only that it is more affected by the decision than anybody else, but also that it has a ‘current and practical interest’ in changing or quashing the state court’s decision.³⁶ This might be the case, for instance, if the arbitral tribunal either expressly allows a party to object to the state court’s decision or rejects it without good reason.

As an example of the former, one might think of a situation where crucial evidence is in the hands of a third party which has successfully invoked privilege. In this case, both the arbitral tribunal and the parties might have a special interest in trying to force the third party to reveal the evidence by objecting to the SFT. Since the arbitral tribunal has the discretion to decide on the relevance of a piece of evidence, its consent should first be obtained in order to show a legitimate interest. In practice, the arbitral tribunal will usually have enough evidence to decide on the merits of the case. However, if certain evidence is indispensable, the arbitral tribunal should not be too hesitant to allow an objection to the SFT.

With regard to the latter, if the arbitral tribunal does not allow a party to object without sufficient reasons (i.e. despite the fact that crucial evidence is being withheld), the SFT should allow an objection nonetheless. As the SFT has held, court assistance in the taking of evidence should be granted if the arbitral tribunal refuses a request for assistance without justification;³⁷ the same should thus apply where approval to object to the SFT is withheld without justification. In such case, the party that is objecting to the state court’s decision must show why crucial evidence must be gathered despite the arbitral tribunal’s reluctance. Obviously, this course of action should be allowed only in extreme cases which come close to or are in fact a denial of justice.

3. *Challenging an Interim Decision*

Third, with regard to challenging an interim decision, the discussion set out above regarding third parties (*see* II.A.2. *supra*) also applies, by and large, to the parties to the arbitration. Thus, in order to challenge an interim decision,

³⁵ *See* II *supra*.

³⁶ DFT 143 III 578, ASA Bull. 1/2018, p. 173 et seq., cons. 3.2.2.2.

³⁷ DFT 4P.217/1992 of 15 March 1993, cons. 7b, in: ASA Bull. 3/1993, 408.

one must demonstrate a risk of irreparable harm.³⁸ From the point of view of the parties to the arbitration, they must therefore show that it is absolutely crucial to take the evidence in question – for example, because otherwise there is a risk that it might be lost or destroyed.

4. *Result*

In contrast to third parties, the possibility for the parties to the arbitration to object to the SFT is much more limited. The SFT's approach is therefore to exclude the parties' right to object in the interest of procedural economy (i.e. to ensure swift and efficient arbitration). Nonetheless, if one can show that the arbitral tribunal supports an objection to the SFT because of the importance of the evidence, or if the arbitral tribunal has refused such support without justification, the parties should be allowed to object to the SFT. Of course, since they will be challenging an interim decision, they must show a risk of irreparable harm.

III. Challenging the Arbitral Award

Because it is difficult for the parties to the arbitration to directly challenge a decision of the assisting state court, they might consider challenging the arbitral award based on what happened (or did not happen) during court assistance in the taking of evidence.³⁹ For instance, they might claim either that the procedural rules on which they had agreed were violated during court assistance, or that the arbitral tribunal refused to seek assistance from state courts. These allegations usually relate to the assessment of evidence by the arbitral tribunal, which is also described as a pillar of international arbitration.⁴⁰

In general, procedural violations must be addressed immediately and it is against good faith to attempt to set aside an arbitral award because of alleged procedural violations which could have been highlighted earlier in the proceedings.⁴¹ As a consequence, it would be abusive for a party to hold back on claiming an alleged violation and do so only once it was about to lose the

³⁸ Art. 93(1)(a) FSCA CH.

³⁹ However, this is not possible if the parties fully excluded all possibilities to challenge the arbitral award according to Art. 192 PILA CH.

⁴⁰ DFT 4A_214/2013 of 5 August 2013, ASA Bull. 1/2014, p. 118 et seq., cons. 4.1; DFT 4A_538/2012 of 17 January 2013, cons. 5.1; BERGER/KELLERHALS, n. 1356, *International and Domestic Arbitration in Switzerland*, 3rd. ed., Stämpfli (2015).

⁴¹ DFT 119 II 386, cons. 1a.

case.⁴² As this principle is already enshrined in Swiss domestic arbitration,⁴³ it should also be enshrined in the PILA CH. Accordingly, in the interest of legal security, the Swiss legislature intends to amend Art. 182 PILA CH to include a new paragraph 4, which provides that a party cannot claim a violation of procedural rules at a later point in the proceedings if it was previously aware of the violation, or could have been with due attention.⁴⁴

Moreover, in order to ensure that arbitral awards enjoy a high degree of finality, the PILA CH sets out strict requirements to set aside arbitral awards and the grounds listed in Art. 190(2) PILA CH are thus tailored very narrowly.⁴⁵ If a party wishes to address the assessment of evidence by challenging the arbitral award, it will usually invoke a violation of the right to equal treatment or the right to be heard (lit. d), or even an incompatibility with public policy (lit. e). The latest data shows that arbitral awards rendered in Switzerland are successfully set aside in just 7–10% of cases (as of 2017).⁴⁶ This rate is even lower for applications to set aside based on Art. 190(2)(d) (5.5% success rate) and Art. 190(2)(e) PILA CH (1% success rate).⁴⁷

A. Unequal Treatment of the Parties

The right to equal treatment requires that parties be treated equally in comparable situations.⁴⁸ Theoretically, the parties should therefore have the same chances to participate and to present their view of the case, and what is granted to one party should also apply to the other.⁴⁹ Notably, however, this

⁴² DFT 4A_438/2018 of 17 January 2019, cons. 4.3; DFT 143 III 578, ASA Bull. 01/2018, p. 173 et seq., cons. 3.1.2; DFT 136 III 605, ASA Bull. 1/2011, p. 80 et seq., cons. 3.2.2; DFT 135 III 334, cons. 2.2; ANDREAS BUCHER, Art. 182 PILA CH n. 40, in: *Commentaire Romand: Loi sur le droit international privé*, Helbing Lichtenhahn (2011) (cited: CR-BUCHER); MICHAEL E. SCHNEIDER & MATTHIAS SCHERER, Art. 182 PILA CH n. 71, in: *Basler Kommentar: Internationales Privatrecht*, 3rd. ed., Helbing Lichtenhahn (2013) (cited: BSK-SCHNEIDER/SCHERER).

⁴³ Art. 373(6) CCP CH.

⁴⁴ FCDisp PILA CH Revision (2018), 7197.

⁴⁵ ZK-OETIKER, Art. 190 PILA CH n. 1; BSK-PFISTERER, Art. 190 PILA CH n. 2a; MANUEL ARROYO, Art. 190 PILA CH n. 3, in: *Arbitration in Switzerland: The Practitioner's Guide*, 2nd ed., Kluwer Law International (2018) (cited: Arroyo-ARROYO).

⁴⁶ DASSER/WÓJTOWICZ, 280, *Challenges of Swiss Arbitral Awards: Updated Statistical Data as of 2017*, ASA Bull. 2/2018, p. 276 (2018).

⁴⁷ *Ibid.*, 281.

⁴⁸ ZK-OETIKER, Art. 182 PILA CH n. 35; Arroyo-ARROYO, Art. 190 PILA CH n. 83.

⁴⁹ DFT 4A_236/2017 of 24 November 2017, ASA Bull. 2/2018, p. 434 et seq., cons. 4.1 BSK-SCHNEIDER/SCHERER, Art. 182 PILA CH n. 65; Arroyo-ARROYO, Art. 190 PILA CH n. 84.

right is not absolute; certain inequalities must be accepted.⁵⁰ As a result, parties cannot expect to be given the exact same amount of time to examine a witness; or that because the arbitral tribunal has accepted a request for further evidence from one party, this will automatically apply to the other party, too.⁵¹ However, with regard to court assistance in the taking of evidence, unequal treatment may be invoked based on the fact that assistance was granted to one party, but denied to the other. This touches on not only the right to equal treatment, but also the assessment of the evidence (i.e. the right to be heard).

B. Violation of the Right to be Heard

Unlike the English or German *lex arbitri*, Art. 190(2) PILA CH does not allow for an arbitral award to be challenged on the grounds that the arbitral tribunal failed to conduct the proceedings in accordance with the procedure agreed by the parties.⁵² Moreover, because under Swiss law the arbitral tribunal need only ensure that the right to equal treatment and the right to be heard are observed (Art. 182(3) PILA CH), it follows *e contrario* that non-compliance with the rules as agreed by the parties is no reason to challenge an arbitral award based on Art. 190 PILA CH. As a consequence, in order to prove a violation of the right to be heard, one must demonstrate that the arbitral tribunal did not take into account elements of the case at hand, pieces of evidence or legal opinions of the parties, and that this violation influenced the arbitral award.⁵³ More specifically, with regard to court assistance in the taking of evidence, a party must show that the arbitral tribunal refused to seek assistance without justification, despite the relevance of the respective evidence.⁵⁴

Ultimately, the parties' right to be heard must be considered together with the arbitral tribunal's right to assess the evidence. On the one hand, the parties enjoy the right to present evidence, as part of their right to be heard; but on the other hand, the arbitral tribunal enjoys the right to freely assess the evidence without violating the right to be heard.⁵⁵ In this regard, mention is

⁵⁰ ZK-OETIKER, Art. 182 PILA CH n. 35; CR-BUCHER, Art. 182 PILA CH n. 51.

⁵¹ DFT 4A_407/2012 of 20 February 2013, ASA Bull. 3/2013, p. 659 et seq., cons. 3.4; DFT 4A_236/2017 of 24 November 2017, cons. 4.2.2; DFT 4A_360/2011 of 31 January 2012, cons. 4.1.

⁵² But see § 1059(2)(1).(d) German Code of Civil Procedure; S. 68(1)(c) English Arbitration Act 1996; see also Art. 34(2)(a)(iv) UNCITRAL Model Law.

⁵³ DFT 4A_592/2017 of 5 December 2017, cons. 4.1.2.

⁵⁴ DFT 4P.217/1992 of 15 March 1993, cons. 7b, in: ASA Bull. 3/1993, p. 408; see also DFT 142 III 360, ASA Bull. 1/2017, p. 178 et seq., cons. 4.1.1; DFT 133 III 235, ASA Bull. 3/2007, p. 592, cons. 5.2.

⁵⁵ DFT 143 III 297, cons. 9.3.2.

made of the ‘anticipated assessment of evidence’, which is part of the free assessment of evidence.⁵⁶ This concept allows an arbitrator to assess evidence even before it has been taken – for instance, where there is a choice between several different pieces of evidence or where enough evidence has already been gathered.⁵⁷ In the interest of procedural efficiency, the arbitral tribunal can establish the facts based on the evidence it considers suitable and substantial.⁵⁸ The SFT has stated that as long as the right to be heard is not ignored, which would result in a denial of justice, even an incorrect assessment of evidence cannot be challenged.⁵⁹ This is possible only on the limited grounds of a violation of public policy.⁶⁰

In sum, an arbitral award can be challenged based on a violation of the right to be heard in the taking of evidence only if a party can show that it was denied this right without justification, despite the importance of the evidence.

C. Violation of Public Policy

As discussed, the assessment of evidence by the arbitral tribunal can be contested based only on a violation of public policy (Art. 190(2)(e) PILA CH) – the sole grounds on which an arbitral award may be challenged on its merits.⁶¹ Thus far, the SFT has set aside just two arbitral awards based on a violation of public policy.⁶² This might be explained by the fact that, according to the SFT, Arts. 190(2)(a–d) PILA CH take precedence over a violation of public policy, pursuant to lit. e.⁶³ While substantive public policy demands, among other things, respect for the sanctity of contracts and compliance with the rules of good faith, its procedural counterpart protects, for instance, the

⁵⁶ Art. 157 CCP CH; Arroyo-ARROYO, Art. 190 PILA CH n. 137; ZK-OETIKER, Art. 182 PILA CH n. 47 et seqq.; BERGER/KELLERHALS, n. 1357.

⁵⁷ FRANZ HASENBÖHLER, Art. 157 CCP CH n. 32, in: *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO)*, 3rd ed., Schulthess (2016); JÜRGEN BRÖNNIMANN, Art. 152 CCP CH n. 57, in: *Berner Kommentar: Schweizerische Zivilprozessordnung, Band II*, Stämpfli (2012); FRANZ HASENBÖHLER, n. 5.71 et seqq., in: *Das Beweisrecht der ZPO: Allgemeine Bestimmungen, Mitwirkungspflichten und Verweigerungsrechte*, Schulthess (2015).

⁵⁸ DFT 4A_427/2017 of 22 January 2018, cons. 5.1.1; DFT 4A_178/2014 of 11 June 2014, ASA Bull. 4/2014, p. 782 et seq., cons. 5.1.

⁵⁹ DFT 127 III 576, ASA Bull. 3/2002, p. 473 et seq., cons. 2e and 2f; DFT 121 III 331, ASA Bull. 4/1995, p. 708 et seq., cons. 3a.

⁶⁰ Art. 190(2)(e) PILA CH; DFT 142 III 360, cons. 4.1.1; DFT 4A_544/2014 of 24 February 2015, ASA Bull. 2/2017, p. 443 et seq., cons. 3.2.1.

⁶¹ ZK-OETIKER, Art. 190 PILA CH n. 91.

⁶² DASSER/WÓJTOWICZ, 280.

⁶³ DFT 4A_682/2011 of 31 May 2012, ASA Bull. 1/2014, p. 137 et seq., cons. 4.3.

principles of *res judicata* and *ne bis in idem*.⁶⁴ As a result, even the erroneous or arbitrary application of the agreed procedural rules does not constitute a reason to annul an arbitral award based on a violation of public policy.⁶⁵

In light of this very restrictive application, the chances of annulling an arbitral award based on a violation of public policy during court assistance in the taking of evidence are minimal at best.

D. Result

The previous examination has showed that, as a consequence of the PILA CH's aim of ensuring that arbitral awards have a high degree of finality, the chances of setting aside an arbitral award based on procedural violations during court assistance are very small. For instance, a party cannot claim that the arbitral tribunal failed to conduct the arbitral proceedings in accordance with the procedural rules as agreed by the parties; and it is almost impossible to challenge the arbitral tribunal's assessment of the evidence. Therefore, the only cases in which an arbitral award may be set aside based on what happened (or did not happen) during court assistance in the taking of evidence are those involving a denial of justice. This also applies to violations of public policy, which are rarely affirmed.

IV. Conclusion

To conclude, it is clear that third parties that are forced to produce evidence further to a request for court assistance under Art. 184(2) PILA CH should be able to object to the SFT if the respective conditions are met. The SFT will thus examine whether the evidence in question is actually protected by the privilege invoked by the third party. In addition, the threshold for an objection to the SFT should not be set too high, given that this is the only chance for the third party to defend itself. It remains to be seen whether the number of objections to the SFT will increase in future, given that if the

⁶⁴ DFT 141 III 229, ASA Bull. 3/2015, p. 599 et seq., cons. 3.2.1; see also BERNHARD BERGER, *No Force of Res Judicata for an Award's Underlying Reasoning. Note on 4A_633/2014 of 29 May 2015*, ASA Bull. 3/2015, p. 642 et seq.; DFT 138 III 322, ASA Bull. 3/2012, p. 591 et seq., cons. 4.1; DFT 4A_236/2017 of 24 November 2017, ASA Bull. 2/2018, p. 434 et seq., cons. 5.1.

⁶⁵ DFT 4A_438/2018 of 17 January 2019, cons. 5.2.2; DFT 4A_308/2018 of 23 November 2018, ASA Bull. 2/2019, p. 494 et seq., cons. 5.3.1.

proposed Art. 185a(2) PILA CH is passed, court assistance will also become available to foreign arbitral tribunals with their seat outside of Switzerland.⁶⁶

In the interest of procedural efficiency, the possibilities for the parties to the arbitration to object are understandably more restrictive. As a result, just as the consent of the arbitral tribunal must first be obtained in order to seek court assistance (Art. 184(2) PILA CH), the same should apply if a party wishes to resort to the SFT. Moreover, the SFT has reduced appellate remedies to cases in which a request for court assistance is denied without justification despite the relevance of the evidence in question. In such case, an objection to the SFT should also be allowed, irrespective of the arbitral tribunal's unwillingness.

It is also clear that a challenge to an arbitral award on the grounds that the arbitral tribunal did not agree to seek court assistance or that the agreed procedural rules were violated during court assistance stands little chance of success. Here again, the arbitral award will be set aside only in the case of a denial of justice.

Lorenz RAESS, *Challenging Court Assistance in the Taking of Evidence in International Arbitration – the Swiss Perspective*

Summary

This contribution sheds some light on how to challenge decisions of the assisting state court under Art. 184(2) PILA CH. It begins by discussing the possibilities for a direct objection to such decisions. Both third parties which are the target of an evidence request and the parties to the arbitration themselves may have an interest in challenging such decisions – either because a third party must reveal evidence which it claims is covered by, for example, professional confidentiality; or because the state court refuses to assist despite the importance of the evidence in question.

As an alternative, the decision may be contested indirectly by challenging the arbitral award based on what did (or did not) happen during court assistance in the taking of evidence. Thus, by looking at the jurisprudence of the Swiss Federal Tribunal (SFT), the contribution considers how parties can address the arbitral tribunal's assessment of the evidence. In this regard, it is shown that the SFT will usually uphold the arbitral tribunal's discretion to tailor the arbitral proceedings as it deems fit.

⁶⁶ FCDisp PILA CH Revision (2018), 7199.