

Switzerland—no set-aside for ICC award on public policy ground (A SpA v B SpA)

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Arbitration analysis: In a decision issued on 18 January 2022, the Swiss Federal Tribunal (the Swiss Supreme Court) rejected an application requesting the setting aside of an International Chamber of Commerce (ICC) award on the ground that the arbitral tribunal had allegedly ruled *ex aequo et bono* instead of applying particular set of rules, in this case Italian substantive law. The Swiss Federal Court denied any violation of public policy by the arbitral tribunal. Written by Pierre Ducret, partner at CMS von Erlach Partners Ltd.

A SpA v B SpA [4A_418/2021](#)

What are the practical implications of this case?

With this decision, the Swiss Federal Tribunal reiterated that it is not an appellate court: the scope of review of international arbitral award is limited by Swiss arbitration law and, as such, does not allow it to review an arbitral tribunal's assessment on the merits. Attempts to circumvent the strict limitations provided in Swiss arbitration law are generally doomed to fail. Before engaging in such attempts, practitioners should be aware of the very significant costs imposed by the Swiss Federal Tribunal in setting-aside applications against international arbitral awards.

What was the background?

The case involved a group of Italian companies. In 2001, A SpA and B SpA entered into a share purchase agreement, by virtue of which A SpA sold to B SpA the entire share capital of E SpA, which held the entire share capital of F SpA a company active in the field of fluorine and oxygen-based products. The contract included, among other things, a warranty clause according to which the seller guaranteed that the sites operated by E SpA and F SpA complied with topical environmental protection regulations.

In 2012, relying on the arbitration clause provided in the contract, B SpA initiated arbitration proceedings. An arbitral tribunal was constituted under the aegis of the ICC, with its seat in Geneva. B SpA claimed, in substance, the payment of damages for breach of contract. After the arbitral procedure had been suspended due to criminal proceedings in Italy relating to water and soil contamination, the arbitral tribunal issued a partial award ordering A SpA to pay B SpA €91.5m for the losses and damages incurred until 31 December 2016 due to A SpA's breaches of representations and warranties under the contract. The arbitrators found that F SpA violated the topical environmental protection regulations by refraining from disclosing important information concerning the serious contamination affecting certain production sites.

A SpA filed a setting-aside application with the Swiss Federal Tribunal on the ground that the award was incompatible with public policy because the arbitral tribunal had allegedly ruled *ex aequo et bono* instead of applying the applicable law, in this case Italian substantive law.

What did the court decide?

The Swiss Federal Tribunal swiftly rejected the application to set aside the award. While noting that deciding on a case *ex aequo et bono* instead of applying specific set of rules constituted an irregularity, the Swiss Federal Tribunal refrained from deciding the controversial issue of whether this could constitute a case of violation of public policy.

In the case at hand, the Swiss Federal Tribunal found that the conditions for admitting a violation of public policy were clearly not met. It observed that A SpA, under the guise of an alleged usurpation of the power to rule *ex aequo et bono*, tried to lead the judges in the realm of the application of substantive law. However, this is not the task of the Swiss Federal Tribunal, which is not an appellate court. Wrong application of the law is therefore not sufficient ground as such to overturn an arbitral award. The material judicial review of the Swiss Federal Tribunal is limited to the question as to

whether the arbitral award is consistent with public policy. As defined by case law, an award is incompatible with public policy if it disregards the essential and broadly held values of which, according to the prevailing conceptions in Switzerland, should constitute the basis of any order.

Finally, the Swiss Federal Tribunal stated that the arbitral tribunal had relied on legal considerations to make its ruling and, consequently, did not ruled *ex aequo et bono*. The appeal was therefore dismissed. As a result, A SpA was ordered to pay the court's costs (CHF 200,000) and a contribution towards B SpA legal costs (CHF 250,000).

Case details

- Court: Swiss Federal Tribunal
- Judges: Kiss (chairwoman), Rüedi and May Canellas
- Date of judgment: 18 January 2022

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