
Setting Aside of Arbitral Awards: Switzerland

Dr. Peter Straub, LL.M
Partner

14 November 2013

+41 44 498 98 98
peter.straub@walderwyss.com

walderwyss attorneys at law

Overview

- The five grounds of Art. 190 para. 2 PILS
- Statistical analysis of setting aside proceedings
- Basics and function of the public policy clause
- Substantial and procedural public policy
- Other matters of the public policy clause
- Conclusion

The Five Grounds of Art. 190 para. 2 PILS

- a. if the sole arbitrator was not properly appointed, or if the arbitral tribunal was not properly constituted;
- b. if the arbitral tribunal wrongly accepted or declined jurisdiction;
- c. if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
- d. if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
- e. if the award is incompatible with public policy.**

Statistics of Setting Aside Proceedings (1)

- Until 2009: **289 setting aside decisions** by the Swiss Federal Supreme Court (“FSC”)
- 80% decisions on the merits
- Only 15 decisions found to be successful (5,19%)
- Most popular ground: Art. 190 para. 2 lit. d PILS (equal treatment of parties/right to be heard)
- **Second most popular ground: Art. 190 para. 2 lit. e PILS (public policy clause)**

Statistics of Setting Aside Proceedings (2)

- Until 2009: **142 out of 289 decisions** dealt with the public policy clause
- 2010-2013: Approx. **50** more public policy clause decisions
- Public policy clause is mostly invoked together with other grounds of Art. 190 para. 2 PILS
- Since 2006, public policy is the most popular ground for a challenge
- Until 2009: Out of all public policy challenges, **no award was set aside**
- Since 2010: **two landmark decisions** of the FSC:
 - April 2010: First annulment of an award due to a breach of procedural public policy
 - March 2012: First annulment of award due to a breach of substantive public policy

Basics & Function of Public Policy Clause

- According to the FSC, an award is incompatible with public policy when it:
 - violates **fundamental legal principles** and
 - Is therefore incompatible with **Swiss law and values** (DFC 117 II 604)
- **Two differentiations:**
 - National and international public policy
 - Substantive and procedural public policy

National and International Public Policy

- FSC: The question must be approached pragmatically (DFC 120 II 155)
- **Starting point:** Swiss legal order
- Foreign, supranational and universal public policy should be taken into account in certain cases, particularly where foreign law is applicable to the merits

Substantive Public Policy

- Public policy clause should be constructed **narrowly**
- Only **core legal principles** are ground for the challenge of awards
- **Core principles:**
 - Pacta sunt servanda
 - principle of good faith
 - prohibition of abuse of rights
 - prohibition of discrimination
 - prohibition of expropriation without compensation
 - protection of the incapacitated
- **Landmark case:**
 - DFC 138 III 322 of 27 March 2012 (Brazilian player Matuzalem against the Fédération Internationale de Football Association, FIFA): First annulment of an award due to a breach of substantive public policy

Procedural Public Policy

- FSC: “Fundamental and generally acknowledged procedural principles” (DFC 126 III 249)
- **Case law:**
 - Wrong application of arbitral code of procedures
 - inner contradiction of operative parts of an award
 - missing reasoning
 - res iudicata
- **Landmark case:**
 - DFC 136 III 345 of 13 April 2010 (Spanish soccer club Atlético de Madrid SAD vs. Portuguese soccer club Sport Lisboa E Benfica): First annulment of an award due to a breach of procedural public policy

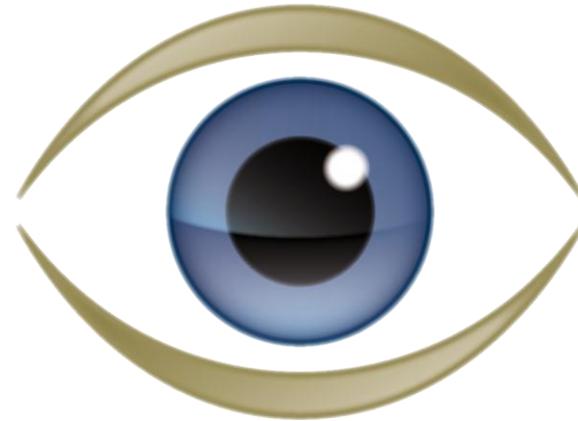
Other Matters of the Public Policy Clause

- Foreign mandatory rules
- Special reservation clauses (e.g. awarding punitive or multiple damages?)

Conclusion

- Public policy clause has grown to be the most popular of the five grounds for the challenge of an award in Switzerland
- Despite the two landmark decisions between 2010 and 2012, chances of setting aside of awards due to breaches of public policy are still very low
- Nevertheless growing case law of the FSC, which may play a more decisive role in the future

Thank you for your attention



walderwyss attorneys at law