Swiss Supreme Court examines jurisdictional and public policy challenge

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In *decision 4A_392/2015*, the Swiss Supreme Court examined a challenge to an award based on lack of jurisdiction and public policy grounds.

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The Swiss Supreme Court has rejected a challenge to an arbitral award based on lack of jurisdiction and public policy grounds. The court found the petitioner was precluded from relying on the jurisdictional challenge because he had failed to raise the challenge in the arbitration proceedings. The court rejected the public policy arguments, finding that an arbitrator's failure to comply with procedural rules as agreed by the parties can only amount to breach of procedural public policy if the rules in question are "essential to ensure fair proceedings", that is, that they constitute fundamental rules of due process. The petitioner had failed to demonstrate that this was the case here. This decision serves as another a reminder that the Supreme Court will not accept a jurisdictional or public policy challenge lightly. (*Decision 4A_392/2015.*)

A dispute arose between two business partners, an Israeli national (claimant) and a Swiss national (respondent), which they agreed to submit to arbitration. Each party signed a power of attorney mandating a lawyer registered in Geneva, and known to the claimant, to act as sole arbitrator. On the basis of the parties' respective explanations regarding the facts of the case, the sole arbitrator drafted a preliminary summary of those facts. The parties then signed an arbitration agreement which explicitly referred to that summary and set out further terms, such as the seat and language of the arbitration and the applicable law.

The claimant commenced the proceedings before the sole arbitrator, requesting that the respondent be ordered to pay an amount in excess of US$7 million. The respondent, after filing one brief submission, failed to take part in the proceedings. In an award dated 10 June 2015, the sole arbitrator found in favour of the claimant. The respondent filed a petition to the Swiss Supreme Court requesting that the award be set aside.

The respondent's main argument was that the subject-matter of the dispute was not determined, and neither could it be determined, on the basis of the powers of attorney and the arbitration agreement signed by the parties. This, according to the respondent, meant that the arbitration agreement was invalid and, therefore, that the sole arbitrator lacked jurisdiction to decide the claim and the award should be set aside pursuant to Article 190(2)(b) Swiss Private International Law Act (PILA).

The Supreme Court did not analyse the jurisdictional objection. Rather, referring to its long-standing practice and to Article 186(2) PILA, according to which a jurisdictional challenge must be raised before any argument is entered on the merits, the Supreme Court pointed out that the respondent ought to have raised his challenge in the arbitration proceedings. As he had failed to do so, he was precluded from relying on this argument in support of a challenge to the award.

The respondent also raised a public policy challenge, arguing that the arbitrator had issued procedural rules that were not "usual for international arbitration" and had then failed to comply with those procedural rules. The Supreme Court rejected those arguments as well. It held that issuing particular procedural rules or failing to comply with procedural rules agreed by the parties can only amount to breach of procedural public policy if the rules in question are "essential to ensure fair proceedings", that is , if they constitute fundamental rules of due process. The respondent had failed to demonstrate that this was the case here.

This decision serves as a reminder that the Supreme Court will not accept a jurisdictional or public policy challenge lightly. A party who fails to raise issues of procedure or jurisdiction in the course of the arbitration is nearly always precluded from raising those points before the Supreme Court. In addition, it highlights the fact that a failure by the tribunal to apply procedural rules, even those agreed by the parties, will not justify setting aside the award unless those rules can be qualified as fundamental rules of due process.

Case: *Decision 4A_392/2015* (Swiss Supreme Court).

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