

# Swiss Supreme Court sets aside explanatory award issued by rabbinical arbitral tribunal due to violations of right to be heard and right to equal treatment

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

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In *Decision 4A\_603/2023*, the Swiss Supreme Court set aside an explanatory award issued by a rabbinical arbitral tribunal. The Supreme Court held that the tribunal had violated the petitioner's right to be heard and right to equal treatment.

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In a recently published German-language decision, the Swiss Supreme Court (SSC) granted an application to set aside an explanatory award, finding the arbitral tribunal violated the petitioner's right to be heard and right to equal treatment.

The rabbinical arbitral tribunal, seated in Zurich and applying Jewish procedural law, had previously rendered an award that did not contain factual findings or legal reasons. The respondent party challenged that award, but the SSC rejected the challenge on the basis that, in the absence of findings of fact or law by the tribunal, it was not in a position to effectively assess whether the alleged grounds for setting-aside were fulfilled (see *Legal update, Swiss Supreme Court refuses to set aside award containing no reasons issued by rabbinical arbitral tribunal*).

Several months later, the arbitral tribunal issued an explanatory award, with a significantly expanded operative part, at the request of the claimant. The respondent, who was not made aware of the claimant's request or heard before the explanatory award was issued, challenged that award before the SSC.

The respondent first argued that there was a breach of procedural public policy and specifically of article 189a(1) of the Swiss Private International Law Act (PILA), which provides that unless agreed otherwise, a party may request an explanatory decision within 30 days of notification of the award. The court rejected this argument, finding that the parties had agreed that Jewish procedural law would apply and that in any event, the deadline set out in article 189a(1), PILA did not amount to a fundamental and generally recognised norm that was part of public policy.

However, the SSC found that the arbitral tribunal had violated the respondent's right to be heard and right to equal treatment by issuing the explanatory award without providing him with the claimant's request and without hearing him at all, and set aside the explanatory award.

Although the SSC usually requires parties challenging an arbitral award on due process grounds to demonstrate that the outcome of the arbitration could have been different if there had been no breach, the court held here that this could not be required of a party that was not given any opportunity to be heard at all.

Parties frequently rely on an alleged breach of due process to challenge an award, but the SSC will usually only step in and reverse an award where, as here, the breach was egregious.

Case: [Decision 4A\\_603/2023 \(25 March 2024\)](#) (Swiss Supreme Court).

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