Appellant's contradictory behaviour in breach of good faith renders annulment application inadmissible (Swiss Supreme Court)

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In *decision 4A_500/2015*, the Swiss Supreme Court considered whether the appellant's behaviour in arbitral and annulment proceedings was contradictory and in violation of the principle of good faith.

In a French language decision of 18 January 2017, the Swiss Supreme Court declared inadmissible an application to set aside an award for violations of the right to be heard. In the award, the sole arbitrator rejected a claim for penalty payments under an alleged share purchase agreement between a Belize company and a Jordanian investment fund, based on his finding that the defendant's signature on the agreement was forged. Therefore, there was no valid agreement between the parties.

Given that the parties had waived their rights to judicial review in the share purchase agreement, the Supreme Court examined whether the challenge was admissible at all. The Supreme Court confirmed its case law with regard to such waiver clauses and determined that the waiver clause was valid. Whilst not objecting to the validity of the waiver as such, the appellant argued that both the arbitration agreement and the waiver were not applicable, since the arbitrator based his jurisdiction on the defendant's unconditional appearance rather than on the arbitration clause.

The Supreme Court did not analyse the effect of the unconditional appearance because it held that, in any event, the appellant's behaviour was contrary to the principle of good faith. In particular, the court explained that the appellant's behaviour was contradictory to its previous behaviour (*venire contra factum proprium*) because:

- In the arbitral proceedings the appellant argued that the agreement was valid in order to obtain payment under the agreement.
- In the setting aside proceedings, it argued that the agreement, which it had signed and on which signature it had relied before the arbitrator, did not exist in order to escape the waiver of annulment proceedings.

Therefore, the court declared the challenge inadmissible.

Case: *Decision 4A_500/2015* (Swiss Supreme Court).

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