Swiss Supreme Court declares two domestic "awards" null and void

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In a joint decision concerning cases *4A_618/2015* and *4A_634/2015*, the Swiss Supreme Court considered whether two domestic awards were null and void.

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In a joint decision, the Swiss Supreme Court declared two domestic awards null and void because the arbitrator had based his jurisdiction on an implied consent to arbitrate in a manner that the court found to be "far-fetched", "brash" and "presumptuous".

The decision illustrates that, in very rare cases, the Supreme Court is prepared to declare an award null and void. Whenever it does, this "non-award" is the direct consequence of the fact that certain decisions or declarations cannot and do not constitute an award even if they purport to. Whilst the present decision related to domestic arbitral proceedings, the petition to declare an award null and void must, in principle, also be available as a remedy in international settings. (*Decisions 4A_618/2015 and 4A_634/2015.*)

In a joint decision, the Swiss Supreme Court declared null and void two domestic "awards" rendered by an incompetent "arbitrator", despite the apparent absence of a valid arbitration agreement.

The Supreme Court held that an arbitral award may only be held null and void (as opposed to being set aside), when it obviously suffers from a grave defect and its voidance does not, as such, jeopardise legal certainty. This may in particular be the case for awards rendered in the complete absence of a valid arbitration agreement, that is, where jurisdiction was accepted in a virtually presumptuous manner.

In this joint decision, the "arbitrator" based his jurisdiction on the respondent's failure to reply in a timely manner to an unsolicited letter by the claimant suggesting the arbitrator for appointment. The "arbitrator" considered that this amounted to an implicit agreement regarding both the arbitration and his nomination. Despite the respondent's subsequent express objections and continuous non-participation, the "arbitrator" went on to render a "preliminary award" formally accepting jurisdiction, followed by a "final award" granting the claimant more than CHF2 million in compensation in connection with the termination of an employment agreement.

The respondent appealed to the Supreme Court to have the two "awards" declared null and void or, alternatively, set aside. The Supreme Court held that an arbitration agreement must always be made in writing or by any other means that permits it to be evidenced by text (*Article 178, Swiss Private International Law Act* and *Article 358, Swiss Code of Civil Procedure*), highlighting that this requirement as to form applies to all parties to the arbitration. Thus, in Switzerland, neither domestic nor international arbitrations can be based on implied consent to arbitrate. Accordingly, in the words of the Supreme Court, the "arbitrator's" finding based on an implied consent to arbitrate was "far-fetched", "brash" and "presumptuous".

The decision illustrates that, in very rare cases, the Supreme Court is prepared to declare an "award" null and void. Whenever it does, this "non-award" is the direct consequence of the fact that certain "decisions" or "declarations" simply cannot and do not constitute an award even if they purport to. In Switzerland, the situation is essentially the same for decisions rendered by state courts. This parallelism has now been confirmed by the Supreme Court resulting in what appears to be its first ruling ever to reject the very existence of an arbitral award. This approach is appropriate and effectively protects parties in scenarios where the arbitral process is obviously being abused in one party's favour.

Whilst the present decision was rendered in a domestic arbitration, the petition to declare an "award" null and void must, in principle, also be available as a remedy in international settings. Indeed, this was already accepted as a general notion by the Supreme Court in an *obiter* (*DFT 130 III 125, considered at paragraph 3.1*). Finally, in the case at hand, the Supreme Court did not need to decide whether a petition to declare an "award" null and void must be also made within the 30-day deadline applicable to a petition for setting aside. However, there are good reasons to argue that a such a petition is neither subject to the 30-day deadline, nor indeed to any time limit.

Case: *Decisions 4A_618/2015 and 4A_634/2015* (Swiss Supreme Court).

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