Swiss Supreme Court refuses to review the merits of a manifestly inadmissible petition to set aside two procedural orders

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In *decision 4A_524/2016*, the Swiss Supreme Court considered whether to review the merits of a manifestly inadmissible petition to set aside two procedural orders issued by a tribunal.

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Speedread

In a French-language decision dated 20 September 2016 and published on 4 October 2016, the Swiss Supreme Court, in simplified proceedings and without hearing the defendant or the arbitral tribunal, refused to review the merits of a manifestly inadmissible petition to set aside two procedural orders issued by the tribunal.

The petition to set aside the two procedural orders was the second challenge brought by the respondent in ad hoc arbitration proceedings seated in Geneva. In the first petition to set aside a jurisdictional award, the Supreme Court overturned the jurisdictional award for failure to comply with a contractually agreed mandatory pre-arbitral dispute resolution procedure. It ordered a stay of proceedings in order for the parties to conduct the contractually agreed conciliation (*Decision 142 III 296*). The second challenge was brought against procedural orders ordering the arbitration proceedings to resume following the stay and the ensuing unsuccessful conciliation attempt.

This decision is a new example of the Supreme Court's efficiency and effectiveness in cases where a challenge is manifestly inadmissible, and aims at disrupting or unnecessarily delaying the arbitration. This stance should further discourage unmeritorious applications to set aside arbitral awards in Switzerland. (*Decision 4A_524/2016.*)

Background

Pursuant to Article 108(1)(a) of the Federal Supreme Court Act (FSCA), the President of the Supreme Court can decide, in simplified proceedings, not to review the merits of a petition where the petition is manifestly inadmissible.

Article 76(1)(b) of the FSCA provides that a petition is admissible if the petitioner has a legitimate interest in having the challenged decision amended or set aside.

Article 77(1)(a) FSCA provides that only decisions by arbitral tribunals pursuant to Article 190 Private International Law Act (PILA) can be challenged before the Supreme Court.

Facts

An ad hoc arbitration seated in Geneva under the *UNCITRAL Arbitration Rules (www.practicallaw.com/8-503-0371)* is currently pending between X (respondent) and Y (claimant). Y initiated arbitration proceedings on 16 January 2015 after considering that the pre-arbitral conciliation, which it had filed before the International Chamber of Commerce (ICC) ADR Centre on 8September 2014, had terminated.

In the arbitration, X argued that the tribunal lacked jurisdiction because a mandatory pre-arbitration conciliation step had not been complied with. In a partial award on jurisdiction dated 13 October 2015, the tribunal rejected this objection and affirmed its jurisdiction.

On 16 November 2015, X filed a petition before the Swiss Supreme Court to set aside the award on jurisdiction, arguing that the tribunal should have declined jurisdiction *ratione temporis (*for being out of time*)*. By a decision dated 16 March 2016, which was partially published in the Supreme Court's official register as a "leading case", the Supreme Court granted X's application and set aside the jurisdictional award. It also found that the arbitration proceedings should be stayed pending compliance with the pre-arbitral conciliation stage.

Following and referring to the Supreme Court's decision, by Procedural Order No. 5 (dated 31 March 2016) the tribunal ordered the stay of the arbitration proceedings and invited the parties to resume the conciliation. On 31 May 2016, the conciliation terminated, without the parties reaching an amicable settlement.

Although not expressly stated in the Supreme Court's decision, it appears that X then requested that the tribunal hold a further procedural hearing to determine the next steps of the arbitration, given that in X's view the Supreme Court's decision (annulling the award on jurisdiction of 16 March 2016) had also annulled all previous decisions and procedural orders made by the tribunal. By Procedural Order No. 6 (dated 14 July 2016), the tribunal noted that Phase 2 of the arbitration proceedings, regarding the termination of the contracts between the parties, had resumed on 1 June 2016, and rejected X's request to hold a further procedural hearing. The tribunal confirmed

that Procedural Orders No.1 to 5 continued to apply and indicated that the procedural timetable relating to Phase 2 would be dealt with in a future procedural order. In its reasoning, the tribunal outlined the following in relation to the sanctions attached to the violation of a mandatory pre-arbitration step:

- The solution decided upon by the Supreme Court in its decision of 16 March 2016 (the stay of the arbitral proceedings pending the completion of the conciliation process) aims at preserving the tribunal's autonomy and, above all, ensuring the continuity of the arbitration. The annulment of the award does not call into question the procedural decisions taken by the tribunal in the past.
- The consequence of a violation of a pre-arbitral stage of dispute resolution is limited to the stay of the arbitration proceedings. The tribunal's previous decisions are not called into question and the tribunal is not deprived of its jurisdiction.

X applied to the tribunal for reconsideration and amendment of procedural order No. 6 on 28 July 2016, attaching an expert opinion confirming its position as to the purported legal effects of the Supreme Court's decision.

By Procedural Order No. 7 (dated 11 August 2016), the tribunal rejected X's request to reconsider and amend Procedural Order No. 6. It confirmed its decision not to organise a procedural hearing and to decide the question of the termination of the contracts on the basis of the parties' written submissions and exhibits previously filed, including one witness statement. The tribunal thereby terminated the evidence taking regarding Phase 2 of the arbitral proceedings.

On 14 September 2016, X filed a new petition requesting that the Supreme Court annul Procedural Orders No. 6 and 7 and declare that the tribunal lacked jurisdiction *ratione temporis* between 22 May 2015 and 1June 2016.

The Supreme Court did not invite Y or the tribunal to comment on X's petition but immediately rendered its decision on 20 September 2016, a mere six days after the petition was filed.

Decision

The Swiss Supreme Court rejected X's application on two grounds.

First, pursuant to Article 77 FSCA and Articles 190 to 192 of the Private International Law Act (PILA) read together, challenges are only admissible if directed against an arbitral award, be it final, partial or interim. Therefore, procedural orders, such as orders to stay the arbitration proceedings, are not subject to setting aside proceedings, except where the tribunal, by rendering the procedural order, implicitly rules on its jurisdiction. In such circumstances, procedural orders can be challenged on the basis that the tribunal wrongly affirmed or declined jurisdiction within the meaning of Article 190(3) PILA. The Supreme Court confirmed the general principle that in determining whether a decision is open to a petition to set aside, it is the content of such decision that is decisive, rather than its denomination.

According to the Supreme Court, in the present case both Procedural Orders No. 6 and 7 were manifestly not decisions pertaining to the tribunal's jurisdiction and, as such, were not open to setting aside proceedings before the Supreme Court. The Supreme Court considered that the reasoning of the tribunal, as set out in Procedural Order No. 6 was nothing but consistent with the Supreme Court's decision of 16 March 2016. Likewise, Procedural Order No. 7 was of a very similar nature and "quite obviously" did not impliedly rule on a question of jurisdiction. For this reason alone, the Supreme Court found that the application was inadmissible.

Second, the Supreme Court confirmed that in accordance with Article 76(1)(b) FSCA, the petitioner must have an interest worthy of protection to have the challenged decision annulled. The setting aside of the award in question must prevent the petitioner from suffering prejudice of an economic, tangible or intangible or other nature that the challenged decision would cause. The interest must be an actual interest, not only at the time of the initiation of the challenge but also when the decision on the challenge is rendered.

The Supreme Court found that in the present case X had failed to demonstrate what interest worthy of protection was affected by the challenged procedural order. The fact that X waited until the last day of the deadline to file the application, given the judiciary summer holidays, may in the Supreme Court's view even show X's intention to further delay the arbitration proceedings, which the Supreme Court found to be an intention not worthy of protection. For this separate reason, too, the application was declared inadmissible.

As a consequence, given its manifest inadmissibility, the Supreme Court dismissed X's application in simplified proceedings in accordance with Article 108(1)(a) FSCA.

Comment

Following its very detailed and thorough *decision 142 III 296*, discussed in *Legal update, Failure to comply with mandatory pre-arbitral tier can result in stay of arbitration (www.practicallaw.com/5-626-4025)* , on the consequences of the violation of a multi-tiered dispute resolution clause, the Supreme Court has rendered the present decision within six days of receipt of X's application. It rejected the application in simplified proceedings, that is, without reviewing the merits, and without giving Y or the tribunal an opportunity to comment on the application.

This decision is a new example of the Supreme Court's efficiency and effectiveness in cases where the challenge is manifestly inadmissible, and aims at disrupting or unnecessarily delaying the arbitration. This stance should further discourage unmeritorious applications to set aside arbitral awards in Switzerland.

Case

Decision 4A_524/2016 (www.practicallaw.com/w-004-7200) (Swiss Supreme Court).

Resource information

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