Swiss Supreme Court finds that party cannot unilaterally dictate procedure

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In *decision 4A_42/2016*, the Swiss Supreme Court considered a petition to set aside an award based on an alleged violation of the petitioner's right to be heard.

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The Swiss Supreme Court has refused to set aside an arbitral award rendered by a sole arbitrator under the Swiss Rules of Arbitration. It held that a party does not have the right to unilaterally dictate the procedure of the arbitral process and that a tribunal's denial of a request to bifurcate proceedings and issue a preliminary ruling on an issue does not deprive the requesting party of the right to be heard. The Supreme Court also confirmed that it is bound by the factual findings of the tribunal, including in relation to the procedure of the arbitration.

This decision should serve as a reminder to parties to elaborate their arguments in full and that they are not entitled to insist that arbitral tribunals relieve them of that burden by giving preliminary views or rendering preliminary awards narrowing the scope of the dispute. (*Decision 4A_42/2016*).

In a decision of 3 May 2016, the Swiss Supreme Court gave short shrift to a petition in which a party claimed to have been unfairly treated by a sole arbitrator acting under the Swiss Rules of Arbitration.

The dispute concerned a brokerage agreement according to which the claimants were to refer potential investors to the respondent in exchange for commissions on the investments. The respondent terminated the agreement with immediate effect. In the final phase of the arbitration proceedings, the parties were to identify which investments would have fallen under the brokerage agreement and address the quantum of the claims. The claimants' pleadings included detailed calculations of the commissions that they considered due. However, the respondent chose to dispute its liability as a whole and not to submit any calculations on quantum in the alternative.

At the evidentiary hearing, the respondent argued that the arbitrator should first decide, in a preliminary award, specifically which investments served in principle as a basis for the respondent's liability. Only then would the respondent be able to submit its detailed calculations on the quantum of the commissions. The arbitrator after inviting the respondent to indicate whether it had any additional objections in this respect, proceeded to render an award in favour of the claimants in which he essentially adopted the claimants' quantum calculations.

The respondent challenged that award before the Swiss Supreme Court, arguing that the arbitrator had violated the respondent's right to be heard. The Supreme Court first confirmed that it is not for a party to unilaterally dictate how an arbitral tribunal should conduct the proceedings. It then rejected the respondent's allegation that it had made its request for bifurcation at the start of the final phase of the proceedings, as that allegation was not borne out by the factual background as set out by the sole arbitrator in the award.

The Supreme Court thereby confirmed that it is bound by the arbitrators' findings of fact, even findings regarding procedural facts such as, for example, statements made in the course of the proceedings (see *Legal update, Enforcing parties' agreement to one round of written submissions does not violate right to be heard (Swiss Supreme Court) (www.practicallaw.com/3-630-3438)*). Arbitrators would do well to be mindful of this case law when drafting the procedural history of a case.

In addition, this decision should serve as a reminder to counsel that, where appropriate, they should elaborate alternative or subsidiary lines of argument in their submissions and that they are not entitled to insist that arbitral tribunals relieve them of that burden by giving preliminary views or rendering preliminary awards narrowing the scope of the dispute.

Decision 4A_42/2016 (www.practicallaw.com/w-003-2015) (Swiss Supreme Court).

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