Right to be heard, change of procedural practices, dissenting opinions and tribunal submissions (Swiss Supreme Court)

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In *Decision 4A_322/2015*, the Swiss Supreme Court considered a petition to set aside an award for violation of the right to be heard.

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The Swiss Supreme Court has rejected a challenge against a US$1.12 billion award for violation of the right to be heard. The court found that the tribunal had based its decisions on grounds argued by the parties. It also rejected the petitioner's argument that the tribunal violated its right to be heard by not applying the allegedly established practice of putting specific questions to the parties, before rendering a decision.

Furthermore, the court confirmed its standing case law that dissenting opinions, whether formally integrated into the decision or not, do not form part of an arbitral award and will not, therefore, be taken into consideration by the court when deciding challenges.

In addition, comments submitted by a tribunal chair, will not be taken into consideration, for, on their own, they cannot be attributed to the majority of the tribunal.

This is the latest decision in a 27-year dispute arising out of several agreements and company structures concerning the delivery of oil from Iran to Israel and is part of a multitude of complex arbitrations, all with critical political components. (*Decision 4A_322/2015.*)

Background

Article 190(2) of the Swiss Private International Law Act (PILA) provides that an award will be set aside if:

"[…]

(d) the principle of equal treatment of the parties or the parties' right to be heard was violated; or

[…]."

The case at hand concerns a dispute which lasted 27 years about deliveries of Iranian oil to Israel gone awry following the Islamic revolution in 1978/1979. The dispute has already been subject to a long history of proceedings and earlier decisions rendered by the Swiss Supreme Court between the parties involved (or their subsidiaries) in 2013 and 2014, respectively (see Legal update, Swiss Supreme Court confirms "regular constitution" of arbitral tribunal where French courts had appointed arbitrator (www.practicallaw.com/8-524-8412) and Jus cogens raised against enforceability of arbitral award (www.practicallaw.com/2-558-5646)).

Facts

On 13 January 1989, a Liechtenstein subsidiary (Y) of an Iranian entity (Z Company) initiated arbitration proceedings against a Panama entity (X) jointly established and owned by the state of Israel and Z Company through respective subsidiaries. In essence, Y claimed over US$445 million for unpaid invoices for 50 oil deliveries between September and December 1978.

In 2004, after several years of establishing the arbitral tribunal and a first phase of the proceedings, X filed three counterclaims concerning non-deliveries under different contracts (or contracts that were never entered into) and sought to join Z Company and a third company to the arbitration.

The final award was only rendered in May 2015, because the chairman of the tribunal had to be replaced after passing away in 2012. In a two-to-one decision, the arbitral tribunal awarded Y over US$1.12 and declared its jurisdiction over Z Company whilst denying it over the third company. The tribunal annexed the third arbitrator's dissenting opinion to the final award.

X challenged the award arguing that its right to be heard was violated by the arbitral tribunal with regard to two decisive issues relating to the calculation of damages on legal and factual grounds that were not argued by the parties. According to the petitioner, the arbitral tribunal's reasoning was surprising and hence in violation of its right to be heard. The first ground related to the date the damage occurred and the second ground was in relation to the hypothetical will of the parties as to delivery dates. The petitioner further argued that the arbitral tribunal violated its right to be heard by not applying the allegedly established practice of putting specific questions to the parties, before rendering a decision.

The chairman of the arbitral tribunal submitted his comments, rejecting the petitioner's arguments in the challenge proceedings and stated explicitly that said submission was not made in the name of the arbitral tribunal, but rather in his capacity as chairman.

Decision

The Supreme Court rejected the petition.

By way of a preliminary comment, the Swiss Supreme Court reiterated its jurisprudence with regard to the right to be heard. In particular, the court distinguished situations where parties are not heard regarding factual issues from those where legal issues are at stake. Whilst the parties have a right to present their case as to all factual matters, for issues of law, the principle of jura novit curia ("the court knows the law" and therefore the parties do not need to prove it) is generally applicable. An arbitral tribunal is therefore free to decide legal questions, provided its jurisdiction is not limited by the arbitration clause to the parties' legal positions. If the legal ground invoked by the arbitral tribunal is not one argued by either party, the aforementioned general rule is however limited in that the tribunal's application of the law or legal rule should not come as a surprise to the parties.

On the merits, the Swiss Supreme Court held that, as to the first contested ground, the situation was far from meeting the high threshold of surprise stipulated by the court's own jurisprudence. The court's examination of the arbitral award revealed that the tribunal had in fact based its reasoning on one of the grounds argued by the petitioner. Similarly, with regards to the second contested ground, the court held that the tribunal based its reasoning on one of the respondents' arguments, as well as on the testimony of one of the petitioner's own witnesses. Again, the Swiss Supreme Court excluded the possibility of surprise and held that the petitioner could and should, respectively, have expected the tribunal's legal reasoning.

The Swiss Supreme Court also dismissed the petitioner's argument with respect to the allegedly established practice. It held that, in any event, the extent to which questions were put to the parties by the tribunal was in line with, and did not go beyond, the normal customs in complex arbitration proceedings. Furthermore, the Swiss Supreme Court concluded that even if an established practice were assumed, that could only amount to a ground for challenge if the violation was also a violation of the right to heard, which had already been dismissed by the court.

The Swiss Supreme Court addressed two further issues. First, the court confirmed its standing case law that dissenting opinions, whether formally integrated into the decision or not, do not form part of the arbitral award. Therefore, dissenting opinions will not be taken into consideration by the court when deciding challenges. Second, the court held with respect to the comments submitted by the chairman that this submission would also not be taken into consideration, because, on its own, it could not be attributed to the majority of the tribunal.

Comment

Beside its political component, the decision contains a couple of issues addressed by the Swiss Supreme Court worth pointing out.

First, arbitral tribunals sitting in Switzerland may take note of the clear position of the court regarding the legal value of dissenting opinions and submissions made by tribunal chairs. Whereas the former will not be considered by the Supreme Court when rendering a decision, the latter must represent at least the majority opinion of the arbitral tribunal in order to be taken into consideration.

Second, when elaborating on the right to be heard, the Supreme Court clarified that the principle according to which arbitrators are free to weigh evidence is a pillar of international arbitration and may not be undermined by either restricting the tribunal's liberty with regard to the probative value of certain pieces of evidence or by requesting tribunals to solicit the parties' submission on each and every evidentiary matter.

Finally, the Supreme Court held that a violation of the agreed procedure may only be considered a ground for challenge pursuant to Article 190(2)(d), if such violation is simultaneously deemed a violation of the right to be heard. This threshold is substantially higher than the one set in Article V(1)(d) of the New York Convention, according to which recognition and enforcement of an award can be denied, if the arbitral procedure was not in accordance with the agreement of the parties.

Case

Decision 4A_322/2015 (www.practicallaw.com/8-632-7385) (Swiss Supreme Court).

Resource information

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