Swiss Supreme Court reminds petitioners to challenge all alternative reasons on which a particular decision is based

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In *decision 4A_497/2015*, the Swiss Supreme Court considered alleged violations of the right to be heard and public policy as well as whether an arbitral tribunal had rightly refused to order a non-signatory to the arbitration agreement to hold a shareholders' meeting.

In an Italian language decision, the Swiss Supreme Court rejected an application to set aside an award denying the petitioner's request to order a company (which was not a signatory to the arbitration agreement) to call a shareholders' meeting. It also rejected challenges based on public policy grounds and on alleged violations of the right to be heard.

The parties founded a jointly-owned company for the commercialisation of a pharmaceutical product. In the shareholders' agreement, the parties agreed not to distribute dividends during a blocking period at the end of which, the company would hold a shareholders' meeting to approve the company's balance sheet. Only after such approval could the parties use their best efforts to determine the future dividend policy. As the defendant exercised its call option under the shareholders' agreement in April 2014 and since then now wholly owns the company, the relevant shareholders' meeting was never called.

With regard to the arbitral tribunal's refusal to order that the shareholders' meeting of the company be called, it remained unclear to the Supreme Court whether the petitioner argued that the award was *infra petita* (had failed to decide the issue) or that the tribunal wrongfully denied jurisdiction. However, given that the arbitral tribunal based its decision in this respect on a number of alternative reasons, and that the petitioner challenged only one, the court left this question open, but took the opportunity to note that a petitioner must challenge every alternative argument on which a tribunal relies in its reasoning with respect to the particular decision being challenged.

When addressing the alleged violation of the right to be heard, the court, in line with previous case law, held that a tribunal was within its right to refuse to hear a witness based on an anticipatory assessment of the evidence.

Finally, as far as public policy is concerned, the court found that, although the principle of *pacta sunt servanda* (agreements must be kept) forms part of public policy, that principle was not violated in this case.

Case: *Decision 4A_497/2015* (Swiss Supreme Court).

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