Swiss Supreme Court confirms allocation of arbitration costs contained in closing order constitutes final award subject to appeal

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In *decision 4A_422/2015*, the Swiss Supreme Court considered a petition to set aside a decision on costs, on the ground of a violation of the right to be heard.

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Speedread

In a French-language decision dated 16 March 2016 and published on 23 March 2016, the Swiss Supreme Court set aside a decision of the arbitral tribunal in a domestic arbitration that the parties share the arbitration costs. This decision was part of a closing order and had been rendered after the claimant had refused to pay the respondent's share of the advance on costs. According to the Supreme Court, the tribunal's decision on costs constituted a final award which should have been rendered only after having heard the parties on this issue. As they had not made submissions on this issue, the parties' right to be heard had been violated, which led the Supreme Court to vacate the decision. This decision is slated for publication in the official court reporter. (*Decision 4A_422/2015.*)

Background

The following provisions of the Swiss Code of Civil Procedure (CCP) (which governs domestic arbitration) are relevant:

- Article 393(d) of the CCP provides that an award will be set aside if the parties' right to be heard and to equal treatment has been violated.
- Article 393(e) of the CCP provides that an arbitral award shall be set aside if it is arbitrary in its result because it is based on findings that are manifestly contrary to the facts as stated in the case files, or because it constitutes a manifest violation of law or equity.

Facts

In a domestic arbitration, the respondent refused to pay its share of the advance on costs. Therefore, the tribunal invited the claimant to pay the respondent's share or to indicate whether it wished to withdraw from the arbitration, pursuant to Article 178 al.2 of the CPC. The claimant notified its decision to withdraw from the arbitration. The tribunal then issued a procedural order that closed the proceedings and ordered the parties to equally bear the costs of the arbitration, without having first heard the parties on this issue.

The respondent (petitioner) challenged this decision before the Supreme Court and requested that the arbitration costs be entirely borne by the claimant and also sought compensation for its expenses. On a subsidiary basis, it requested that the decision be set aside and sent back to the original arbitral tribunal.

Decision

The Supreme Court upheld the petition and set aside the decision on costs.

It started by highlighting that in a domestic arbitration, only certain types of decisions may be challenged pursuant to Article 392 of the CPC, namely:

- Final or partial awards putting an end to the proceedings with regard to all or part of the dispute, on substantive or procedural grounds.
- Preliminary or interim awards in which the arbitral tribunal decides on one or several preliminary issues of procedure or substance.

Pursuant to Article 378 of the CPC, if one party fails to pay its share of the arbitration costs, the other party can advance this amount or withdraw from the arbitration. In this case, the tribunal can close the case and decide on the expenses and costs of the arbitration. The nature of this decision is the subject of debate in Swiss legal doctrine: some authors consider that this is a decision of inadmissibility (*décision d'irrecevabilité*; *Nichteintretensentscheid*); while others consider that it is a closing order without prejudice (*décision de radiation*; *Abschreibungsbeschluss*).

The Supreme Court indicated that the term "closing order without prejudice" is more appropriate, because it correctly reflects the fact that this kind of decision merely confirms the party's choice to withdraw from the arbitration, with the result that the proceedings must be closed, however, without giving up the right to start new arbitral proceedings or to submit the matter to a competent state court. More

importantly, the Supreme Court indicated that the decision on the allocation of costs contained in a closing order is, in itself, a final award because it definitively settles the issue of the arbitration costs. As such, it is subject to appeal on the grounds specified under Article 393 of the CPC, which include a violation of the right to be heard.

The petitioner's main argument was that its right to be heard had been violated because the parties were not given the opportunity to comment on the allocation of costs.

Referring to Article 242 of the CPC, which imposes an obligation on the court judge to hear the parties before rendering this kind of decision, as well as Article 72 of the Federal Law on the Federal Civil Procedure which provides the same obligation for the Supreme Court, the Supreme Court considered that in this case, the arbitral tribunal should have reverted to the parties before deciding on the allocation of costs. Because it failed to do so, the parties' right to be heard had been violated and the decision that constituted a final award had to be set aside.

The Supreme Court dismissed the petitioner's other argument that the decision constituted a manifest violation of law and equity (*Article 393(e), CPC*) because it disregarded Articles 107 and 108 of the CPC in the way it allocated the costs. Since a violation of the provisions of the CPC does not constitute a valid ground for challenging an award, the Supreme Court rejected this challenge. Similarly, the allocation of arbitration costs is not a valid basis for challenging an award either, except if such allocation is incompatible with the procedural ordre public, but this was not the argument made by the petitioner.

Comment

Although this decision was rendered in a domestic context, it is equally relevant for international arbitration. It qualifies the nature of a decision to end an arbitration after a claimant has refused to pay the respondent's share of the advance on costs and withdrawn from the arbitration. According to the Supreme Court, such a decision constitutes a closing order and, as such, cannot be challenged. However, confirming the views expressed in legal texts, the Supreme Court held that if the closing order includes a decision on the costs of the arbitration and the allocation of those costs, that part of the closing order constitutes a substantive decision and, therefore, an appealable final award. As with all awards, the parties' right to be heard must be respected and arbitral tribunals must give the parties the opportunity to express their view on the issue of costs contained in closing orders without prejudice rendered in this context.

Case

Decision 4A_422/2015 (Swiss Supreme Court).

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