Swiss Supreme Court rejects jurisdictional challenge based on a complex contractual setting

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In *decision 4A_34/2016*, the Swiss Supreme Court considered a request to set aside an arbitral award for wrongful acceptance of jurisdiction in a case involving complicated underlying contractual relationships and complex dispute resolution clauses. The case is also of political importance, as the challenged award dealt with the supply of gas from Egypt to Israel as part of the two countries' peace efforts.

Speedread

The Swiss Supreme Court has rejected a request to set aside an award in which the arbitral tribunal declared itself competent to decide a dispute arising out of a gas supply contract between Egypt and Israel. The contract was concluded in the aftermath of the two countries' peace agreements of 1979.

The case concerned the export of gas from Egypt to Israel. The intermediary sued the suppliers under both the supply contract, as well as under a tripartite agreement, for failure to provide the agreed minimum amounts. Given the complex contractual structure of the deal, the competence of the arbitral tribunal under the tripartite agreement was disputed and following the tribunal's award in 2015, the suppliers petitioned the Supreme Court to set aside the award.

The Supreme Court held that the petitioners failed to establish that the claimant has sued under the wrong contract and arbitration agreement. In passing, the Supreme Court also addressed procedural issues such as the law applicable to preliminary questions of the validity of the arbitration agreement and the scope of arguments which can be made in the second round of briefs in the setting aside proceedings before the Supreme Court. (*Decision 4A_34/2016.*)

Background

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

- If the arbitral tribunal wrongly accepted or declined jurisdiction (*Article 190(2)(b)*).
- If the principle of equal treatment of the parties or the right of the parties to be heard was violated (*Article 190(2)(d)*).

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Facts

After the peace agreement of 1979 between Egypt and Israel, the two countries sought to extend their commercial relationships and concluded a "Gas for Peace Deal" on 30 June 2005. A joint venture of two Egyptian state-owned companies (B) operated a gas pipeline and exported gas from Egypt to countries in the region. In order to deliver gas to Israel, B constructed an underwater pipeline between the two countries, which was completed in 2008. B had an intermediary (X), also an Egyptian company, for exporting natural gas to the eastern side of the Mediterranean Sea.

The Gas for Peace Deal guaranteed the delivery of gas to an Israeli state owned entity and the country's biggest electricity provider (Y). Several other contracts were also concluded:

- A "Gas Supply and Purchase Agreement" (the Gas contract) between B and X, providing for arbitration at the Cairo Regional Center For International Commercial Arbitration (CRCICA).
- An "On-Sale Agreement" between X and Y.
- A tripartite agreement between B, X and Y, which was attached as an annex to the Gas contract, providing for International Chamber of Commerce (ICC) arbitration in Geneva.

Article 1 of the tripartite agreement read "B and A [the joint venture] hereby guarantee the commencement and continuation of supply of up to 2.2. BCM annually of Natural Gas to Y through fulfilling their obligations to X under the Source Contract [being the Gas Supply and Purchase Agreement]."

All three contracts contained minimum delivery quantities and contained different dispute resolution clauses that referred, in rather complex terms, to the other contracts or gave certain dispute resolution clauses precedence over others.

Once the pipeline to Israel was constructed, the supply of gas commenced. However, the quantities delivered were inferior to the minimum quantities provided in the Gas contract. Moreover, the events at the beginning of 2011 in the Middle East, known as the "Arab Spring", led to a series of attacks on the pipeline, resulting in major interruptions of the gas supply from B to X. In March 2012, B stopped delivering gas to X and, as a result, no gas was delivered from X to Y. Accordingly, X delayed paying B's invoices, finally leading to B's termination of the Gas contract in April 2012. X contested the validity of B's termination and, in turn, proceeded itself to terminate the Gas contract. As a consequence, Y then declared that the tripartite agreement was equally terminated, given that the Gas contract would no longer be executed.

On 6 October 2011, X commenced arbitration proceedings against B and Y under the International Chamber of Commerce (ICC) rules under the tripartite agreement, asking for declaratory relief that all damages suffered by Y were the sole responsibility of B and not X. X based the tribunal's competence on the dispute resolution clauses of both the Gas contract and the tripartite agreement. Y, as one of the respondents to these proceedings, issued counterclaims against B. B, in turn, opposed the arbitral tribunal's jurisdiction, claiming that X had based its claim on the wrong arbitration clause.

The ICC arbitral tribunal rendered its award in December 2015, declaring itself competent for all claims stemming from the tripartite agreement and declining jurisdiction for claims pertaining to the Gas contract. It awarded X over USD230 million for "repudiatory breach" and over USD57 million for "delivery breaches", plus interest. To Y it awarded over USD1 billion for "repudiatory breach" and over USD113 million for "delivery breaches", plus interest.

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Beside the aforementioned ICC proceedings, two further sets of proceedings were commenced. A second arbitration, in which a tribunal was never constituted, as well as a third arbitration under the Gas contract between X and B commenced under the Cairo Regional Center For International Commercial Arbitration (CRCICA) rules, with a seat in Cairo, in which the tribunal rendered an award on 11 November 2013.

In its request to the Swiss Supreme Court to set aside the ICC award, B argued that the arbitral tribunal in the ICC proceedings wrongfully accepted jurisdiction, violated its right to be heard with regard to important arguments and applied the law in a surprising manner, without having heard the parties' positions on these issues.

Decision

The Swiss Supreme Court rejected the request to set aside the award.

At the core of the jurisdictional challenge was the interpretation of Article 1 of the tripartite agreement.

In the arbitration, B had argued that the tripartite agreement did not confer any rights and duties onto X and thus did not give X the right to claim under the arbitration agreement of the tripartite agreement. However, the arbitral tribunal found that the tripartite agreement did confer rights and duties on X. It ruled that the three parties intended to provide for a neutral forum (that is, an ICC arbitration seated in Geneva) for the resolution of all disputes between them.

Before its jurisdictional analysis, the Supreme Court clarified that the most favourite law clause contained in Article 178(2) of the Swiss Private International Law Act does not apply to the interpretation of clauses other than the arbitration clause, even if they form part of preliminary questions pertaining to the arbitrability of the dispute.

The Supreme Court then addressed each of the petitioners' six (alternative) arguments in support of the allegation that Article 1 of the tripartite agreement did not confer any rights onto X, criticising however the petitioners' method of splitting the arguments into 6 individual ones, given that the Supreme Court applies a "global analysis" to jurisdictional questions. It also assessed the arguments of X and Y who maintained that it would be enough for X to claim for damages under the tripartite agreement in order for the arbitral tribunal to be competent, irrespective of the merits of such claim. Before rejecting all of the petitioners' six arguments on different grounds, the Supreme Court noted that the arbitral tribunal had to assess X's standing to sue as part of its jurisdictional analysis, given that this question was of double relevance; both for the merits of the claim and for the jurisdiction of the arbitral tribunal. Against this background, the Supreme Court held that the arbitral tribunal rightfully concluded that the tripartite agreement included X as a party proper to the agreement. Hence, the arbitral tribunal duly declared itself competent to hear the dispute.

The Supreme Court also rejected the petitioners' alternative argument that X should have commenced arbitration under the Gas contract because Y was not party to the dispute. In these circumstances, the CRCICA rules would apply. According to the finding of the Supreme Court, Y was a party to the dispute. It had filed counterclaims against B and it had also filed claims against X.

The Supreme Court concluded its analysis with the finding that according to the parties' submissions and the documentary evidence, it was their "well-established will" to have a neutral forum for all tripartite claims. Thus, it upheld the jurisdictional decision of the arbitral tribunal.

Turning to the petitioners' arguments regarding the alleged violation of their right to be heard, the Supreme Court rejected all four instances in which the petitioners had alleged that the arbitral tribunal did not deal with their

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arguments or applied surprise reasoning. The court found that the petitioners either failed to argue these grounds in the arbitration proceedings altogether or did not argue them in a sufficiently clear manner before the arbitral tribunal.

The Supreme Court further held that the arbitral tribunal did not surprise the parties with their reasoning, as the challenged parts of the award either belonged to the interpretation of the contract (which per se cannot be deemed a surprise application of the law) or to the finding of facts, which does not form part of the invoked principle of surprise decisions.

Throughout its analysis of the petitioners' arguments, the Supreme Court repeatedly emphasised that the second round of briefs in setting aside proceedings may not be used to amend or change the parties' arguments contained in their initial briefs and that it therefore disregards such changes or amendments.

Comment

This case is obviously of political importance and the amounts awarded were considerable. Besides the very complicated facts relating to the underlying issues, this is probably the reason why the Supreme Court issued a rather long decision on this challenge, as the legal findings of the Supreme Court were neither surprising nor ground-breaking. Nevertheless, it reflects that in such high stake cases, parties may insist on filing a request to set aside independently of whether there is a realistic chance of success.

Seizing such a “last chance” is understandable, since the costs of the setting aside procedure and the amount of legal costs to be paid to the other two parties who successfully resisted the setting aside, while considerable, consisted of a fraction of the amount of costs awarded by the tribunal in the proceedings. That said, that is not to say the setting aside costs before the Supreme Court should be higher. Such costs are already at the higher end and they should not be so prohibitive so as to deter parties from accessing the only remedy they have against arbitral awards.

Finally, the decision serves as a reminder that setting aside proceedings before the Supreme Court are "one-shot-proceedings", meaning that the petitioner must make all relevant arguments in its first brief, without the possibility to add further argument or substantially add to arguments already but insufficiently made in the second round of briefing.

Case

Decision 4A_34/2016 (Swiss Supreme Court).

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