Swiss Supreme Court sets aside second award of same tribunal

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In *decision 4A_426/2015*, the Swiss Supreme Court considered whether an arbitral tribunal had rendered a second arbitrary award after the matter had been remanded to it.

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Speedread

In a German-language decision dated 11 April 2016 and published on 3 May 2016, the Swiss Supreme Court allowed a challenge to a domestic award. It held that the arbitral tribunal, which was deciding on the matter on remand from the Supreme Court after its first award had been set aside, had disregarded the binding effect of the Supreme Court's previous ruling. Therefore, it considered the new award to be arbitrary and remanded the matter to the tribunal for a second time.

Although this case pertains to a domestic arbitration, it also contains some valuable lessons for international arbitration. (*Decision 4A_426/2015*.)

Background

Article 393(e) of the Swiss Code of Civil Procedure (SCCP), which governs domestic arbitration, provides that an arbitral award shall be set aside if it is arbitrary because it is based on findings that are manifestly contrary to the facts in the case file or because it was rendered in manifest disregard of the law or of equity.

Article 395(2) of the SCCP provides that, if an award is set aside, the arbitral tribunal must render a new award that is in line with the findings in the setting-aside decision.

Article 190(2)(e) of the Swiss Private International Law Act (PILA), which governs international arbitration, provides that an award may be set aside if it is incompatible with public policy.

Facts

In the 1990s, a Swiss commodities trading company (B) purchased copper concentrate from a state-owned company operating a copper mine in Georgia (C). After several years, B contacted another Swiss-based company (A) specialising in producing, processing and trading commodities, in particular copper from Georgia, to discuss the future of the mine.

The parties agreed that B would no longer receive direct deliveries of copper concentrate from C. Instead, A would purchase the copper concentrate from C and then re-sell it to B. In February 2004, A and B entered into an assignment agreement and an agency agreement (AA Agreements). Under the assignment agreement, A assigned its claims for deliveries pursuant to its supply agreement with C to B. Under the agency agreement, B undertook, in return, to pay an agency fee and an assignment fee to A. The AA Agreements both contained clauses allowing for termination by either party with 60 days' notice.

Two weeks after signing the AA Agreements, B extended its contracts with C for direct delivery of copper concentrate, without notifying A. In May 2004, A requested that B pay the assignment and agency fees for March, April and May 2004. In a letter dated 8 June 2004, B refused to make payment, arguing that the AA agreements were null and void. In the alternative, B purported to terminate the AA agreements with 60 days' notice.

In April 2011, relying on the arbitration clause contained in the AA Agreements, A initiated arbitration proceedings against B before the Zurich Chamber of Commerce, claiming an amount in excess of US$100 million for allegedly outstanding agency and assignment fees. On 19 February 2014, the arbitral tribunal awarded A US$26 million for fees from March 2004 to December 2008, plus interest at 5% per annum.

B successfully petitioned the Swiss Supreme Court to have the award set aside (see *Legal update, Swiss Supreme Court once again considers meaning of arbitrariness in domestic arbitration (www.practicallaw.com/7-597-8665)*). The matter was remanded to the arbitral tribunal, who on 30 June 2015, rendered a new award ordering B to pay the exact same amount as in the award that had been set aside. B challenged the new award before the Swiss Supreme Court.

Decision

The Supreme Court considered the new award to be arbitrary and it therefore allowed the challenge and set aside the new award, remanding the matter to the arbitral tribunal for a second time. It held that the arbitral tribunal, by repeating, and only slightly elaborating on, the reasoning that it had adopted in its original award, had disregarded the binding effect of the Supreme Court's previous ruling, in manifest disregard of the law.

Pursuant to Article 395 (2) of the SCCP, when an award is set aside and the matter is returned to the arbitral tribunal, the latter is bound by the Supreme Court's findings, including any findings as to the law. Therefore, the arbitral tribunal is prohibited from examining and retaining legal bases that have been explicitly rejected by the Supreme Court in its ruling.

The arbitral tribunal had found in its original award that B had breached certain provisions of the AA Agreements by extending its contract with C. Therefore, B's termination of the AA Agreements was supposedly "contrary to good faith" and void. The arbitral tribunal had provided scant reasons to support this position and the Supreme Court had, in its previous decision, come to the conclusion that the award was arbitrary. In particular, the Supreme Court pointed out that the arbitral tribunal had not even tried to explain why a breach of contract would prevent a party from relying on a termination provision, especially where the provision in question made no reservation to that effect. The tribunal had also not explained how B's behaviour was "contrary to good faith", choosing instead to make only a general reference to the concept.

In its new award, the arbitral tribunal provided some more detailed reasons for its argument that B had acted in bad faith. However, in essence, those reasons were identical to the ones contained in the original award. The arbitral tribunal again held that the simple fact that B had extended its distribution agreement with C shortly after entering into the AA Agreements prevented it from terminating the AA Agreements.

Comment

Although this case pertains to a domestic arbitration, it contains some valuable lessons for international arbitration as well. Indeed, according to the case law of the Supreme Court, an international arbitral tribunal is also bound by the Supreme Court's findings if its award has been set aside and the matter remanded to it. However, PILA (which governs international arbitrations seated in Switzerland) contains no provisions that are equivalent to Articles 395(2) and 393(e) of the SCCP and as yet, there is no case law as to whether, and if so on what grounds, an international award could be set aside in circumstances such as the ones here.

In the authors' opinion, the "binding effect" of the Supreme Court's findings is a matter of procedural public policy. While an arbitral tribunal, to which a matter has been remanded by the Supreme Court, need not necessarily reach a decision that is substantially different from its original award, it cannot simply disregard or even contradict the findings of the Supreme Court which led to the original award being set aside. To do so would be a breach of fundamental principles of procedure. Therefore, the proper ground for challenging an international award rendered in such circumstances would be Article 190(2)(e) of the PILA.

This decision shows that the Supreme Court can and will enforce these principles, even if it means that the case must be dealt with a third time by the same arbitral tribunal.

Case

Decision 4A_426/2015 (Swiss Supreme Court).

Resource information

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