A decision ex aequo et bono without authority may be incompatible with public policy (Swiss Supreme Court)

by ***Practical Law Arbitration***, with ***Schellenberg Wittmer Ltd***

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In *Decision 4A_418/2021*, the Swiss Supreme Court dismissed an application to set aside an ICC partial award, made on the ground that the arbitral tribunal had decided ex aequo et bono (according to general principles of equity), despite having no authority to do so. The applicant argued that this violated public policy.

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In a recently published French-language decision, the Swiss Supreme Court rejected a motion to set aside an ICC partial award made under article 190(2)(e) of the Swiss Private International Law Act (PILA), which allows parties to challenge awards that are incompatible with public policy.

The underlying dispute concerned a share purchase agreement (SPA) governed by Italian law made between three Italian limited companies (sellers and buyer) for the purchase of the share capital in another Italian limited company (target company) whose subsidiary ran various chemical production plants in Italy.

Contamination was subsequently observed under two of the target company's facilities and surrounding areas. The buyer initiated ICC arbitration proceedings in Geneva alleging that the sellers had breached the SPA, in which the sellers had warranted that the target company and its subsidiary had complied with relevant environmental regulations.

The tribunal issued a partial award ordering the sellers to pay the buyer EUR91 million in damages incurred until 2016, reserving claims for further losses to a future quantum phase.

The sellers challenged that award, arguing that it violated substantive public policy because the tribunal had ignored Italian law and decided in equity (*ex aequo et bono*).

The Supreme Court indicated, referring to its own precedents in *Decisions 4A_14/2012* and *4A_525/2017* (see *Legal updates, Swiss Supreme Court: arbitral tribunal competent to make new award after original award annulled* and *Decision in equity not violation of right to be heard as it is part of applicable substantive law (Swiss Supreme Court)*), respectively, that if a tribunal decides in equity rather than applying the law chosen by the parties, this may amount to a breach of public policy, although this is subject to debate.

The court rejected the challenge and underscored that in this case the tribunal had undertaken a thorough analysis of Italian law on the relevant issues. While the tribunal had referred to custom and practice in mergers and acquisitions, and to the arbitrators' own experience, it did so only to support the reasoning underpinning its interpretation of Italian law. Further, the sellers were merely criticising the reasoning of the award, without establishing that the award's outcome was contrary to public policy.

The standard to set aside an award for incompatibility with public policy remains high and whether or not a decision in equity, without authority, would meet that standard, remains open.

Case: *Decision 4A_418/2021 (Swiss Supreme Court) (18 January 2022)*.

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