Swiss Supreme Court dismisses challenge of award based on ultra petita and affirms approach to challenges based on allegations of corruption

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Legal update: case report | Published on 30-Aug-2017 | Switzerland

In *decision 4A_50/2017*, the Swiss Supreme Court considered a petition to set aside an award on the grounds of *ultra petita* and violation of public policy.

In a French language decision dated 11 July 2017, published on 10 August 2017, the Swiss Supreme Court dismissed a challenge to an award, rejecting arguments of *ultra petita* (beyond the matters submitted to the tribunal) and violation of public policy.

The dispute concerned outstanding commission payments under two consultancy agreements in connection with the preparation of tender offers for rail projects. An International Chamber of Commerce (ICC) tribunal, seated in Geneva, rejected the respondents' defence that on-going corruption-related criminal investigations by US and UK authorities prevented payment, and concluded that there was no evidence of corruption. The petitioners appealed to the Supreme Court, arguing that the award was *ultra petita* insofar as its operative part explicitly held that the respondents' failure to pay constituted a breach of contract. They also contended that the award violated public policy by, among other things, ordering payments which violated their internal compliance rules and exposed them to serious criminal sanctions.

In relation to the public policy objection, the Supreme Court reiterated that an award can only be set aside for corruption where corruption is established and the arbitral tribunal refused to take these findings into account in its decision. That was not the case here and the Supreme Court dismissed the challenge.

It is worth mentioning that the Supreme Court cited no less than five cases in support of this principle, all brought by the same petitioners (or affiliated entities) and rejected by the Supreme Court. The Supreme Court expressed its surprise about such behaviour, seriously questioning whether it is still compatible with good faith.

The Supreme Court dismissed the petitioners' *ultra petita* objection even though it found that the arbitral tribunal was wrong to confirm the breach of contract in the operative part of the award. It held that the petitioners had no interest worthy of protection (a prerequisite for any appeal), as the superfluous findings in the award's operative part had no individual significance and did no harm.

Case: *Decision 4A_50/2017* (Swiss Supreme Court).

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