Swiss Supreme Court rejects challenge and reiterates principles of right to a tribunal appointed expert

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In decision 4A_277/2017, the Swiss Supreme Court considered a challenge brought for a violation of the right to be heard, allegedly caused by the refusal of the arbitral tribunal to appoint an independent expert.

Speedread

The Swiss Supreme Court has rejected a challenge for violation of the right to be heard, which was based on the tribunal's refusal to appoint an independent expert. By doing so, the Supreme Court clarified that, in principle, the appointment of a tribunal appointed independent expert is a right of the parties. However, that right is subject to certain conditions. In the present case, these conditions were not met, which is why the refusal to appoint an independent expert was not in violation of the petitioner's right to be heard.

It is noteworthy that the court emphasised that parties must make express requests for the appointment of an independent expert, in order not to forgo such right. Moreover, the court appeared to add a new requirement that parties submit the core documentary evidence on which the expert opinion will have to rely, together with the request to appoint an expert.

Finally, the court explained that its power to review the tribunal's appreciation of evidence from the viewpoint of a potential violation of the right to be heard is very limited. In fact, the right to be heard is only violated, if the refusal of a tribunal to admit evidence has a potential influence on the tribunal's decision. Without such influence, the Supreme Court held it cannot revisit the tribunal's decision in this regard, thereby qualifying its power to review. *(Decision 4A_277/2017.)*

Background

Article 190(2)(d) of the Private International Law Act (PILA) provides that an award may be set aside if the principle of equal treatment of the parties or the right of the parties to be heard was violated;

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Facts

The petitioner and claimant in the arbitration started ICC arbitration proceedings in 2008 based on a contract for four tourism projects concluded in 1977. In a partial award, the tribunal first declared that the respondent has violated the contract for not executing two out of the four tourism projects. In a final award, rendered in 2017, the chairperson of the tribunal in essence rejected all of the parties' claims on quantum, with both co-arbitrators issuing a dissenting opinions.

During the arbitration, the petitioner requested the tribunal to appoint an independent expert to evaluate its claim for loss of profit, resulting from the two abandoned tourism projects, which it quantified at more than USD 300 Million. In support of its request, the petitioner submitted four documents: a report by a bank, a feasibility study by a private expert, an update to the aforementioned feasibility study and a further, undated report.

The tribunal held that the submitted documents in support of the request for an independent expert were, among other reasons, not to be considered by the tribunal, as they were in its view created after the arbitration had been initiated and with the sole purpose of distracting the tribunal's attention from the real facts of the case. The tribunal further held that the petitioner failed to clearly set out its position with regard to the appointment of the independent expert. The tribunal considered that while on the one hand, the petitioner at times requested the appointment of an expert, on the other hand, it demanded the swift resolution of the case on the merits. Against this background, the tribunal held that it was within its discretionary powers, granted by the applicable arbitration rules, to refrain from appointing an expert if it did not consider it to be necessary. Finally, the tribunal noted the absence of a sufficient factual basis for an expert to render an opinion. The tribunal considered that the negative repercussions for failing to file to the record direct and credible sources of evidence would have to be borne by the petitioner, given that it bore the burden of proving its alleged loss of profit.

The petitioner challenged the final award, arguing that its right to be heard was violated in that its right to the appointment of an independent expert to evaluate its claim for loss of profit was denied.

Decision

The Swiss Supreme Court found that the petitioner's right to be heard had not been violated.

It reiterated that one's right to be heard include, among others, the right to timely submit relevant evidence in accordance with the applicable formal requirements. The Court then set out the conditions which have to be met in order for a party to have a right to the appointment of an independent expert by the tribunal, which reflects the long standing case law of the Court:

- Express request by a party;
- Abidance with formal requirements and timeliness of the request (i.e. in accordance with the applicable procedural rules and procedural timetable);
- Advance payment by the requesting party of the costs of the expert;
- Submission of documents allowing the initial instruction of an expert; and

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- Relevancy of the expertise to the tribunal's ultimate decision.

With regard to the last requirement, the Court clarified that an expertise is relevant and required, if (cumulatively):

- The underlying facts are technical or require otherwise specialized knowledge; and
- The underlying facts cannot be established in a different manner; and
- The arbitrators do not have the needed expert-knowledge.

The Court clarified that by making the relevancy of a fact a requirement for the right to adduce evidence, the significance of the purely formal character of the right to be heard is essentially reduced. That means that a judge seized with the petition to set aside an award based on the refusal to appoint an expert, will have to look at whether such expertise would have potentially influenced the outcome of the case, in order to analyse whether the right to adduce evidence, and in turn, the right to be heard, was violated. This leads to a very limited review of the tribunal's appreciation of the submitted evidence under the heading of the right to be heard, much like the limited review regarding public policy violations.

In addition, the Court held, a tribunal can refuse to admit evidence without violating a party's right to be heard if:

- The evidence in question is not capable of proving the alleged fact;
- The alleged fact is already sufficiently proven;
- The alleged fact is not relevant for the tribunal's decision; or
- The tribunal, by an anticipated appreciation of the evidence, is convinced that such evidence would not influence the tribunal's decision.

Comment

In this decision the Swiss Supreme Court confirmed that parties in an arbitration seated in Switzerland have the right to an independent, tribunal-appointed expert. At the same time, the Court set out the rather strict conditions which need to be met in order for a tribunal to grant a request to appoint an expert.

Three aspects are noteworthy in the present decision:

First, the Court clarified that a party seeking the appointment of an expert must make an express request in that regard. Although this clarification is welcomed, it seems difficult to reconcile this with the negative (cumulative) requirement for appointment of an expert that the tribunal must lack the relevant expert knowledge. Given that parties will, as a rule, not be sure whether the tribunal really has all the needed expertise, it is recommendable to make an explicit request for an independent expert in any event.

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Second, the form requirements pursuant to which an expert can be requested seem to include the filing of the indispensable documents on which the expertise will have to be conducted. This seems to be a new aspect. Against this background, parties in arbitrations seated in Switzerland can no longer rely on a submission of the relevant documents after the instruction of an expert, but are well advised to submit core documents together with their request for appointment of an expert.

Third and finally, the Court explicitly stated that it interprets the right to be heard not as a purely formal right with respect to the appreciation of evidence by the tribunal. Rather, a potential (formal) violation of the right to be heard will remain without consequence if it has no potential influence on the tribunal's decision.

Case

Decision 4A_277/2016 (Swiss Supreme Court).

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