No violation of a party's right to be heard where a tribunal does not address arguments that it considers to be irrelevant (Swiss Supreme Court)

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In *Decision 4A_520/2015*, the Swiss Supreme Court considered an application to set aside an award where the party had argued that the tribunal had violated its right to be heard by failing to address an argument that the tribunal considered to be irrelevant.

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Speedread

The Swiss Supreme Court has rejected an application to set aside an International Chamber of Commerce (ICC) award. The court held that the tribunal had not violated the petitioner's right to be heard, by deciding, for reasons of procedural economy, to limit its analysis to one decisive argument. Therefore, the court did not rule on the other argument, even though that argument was raised consistently by the petitioner during the arbitration proceedings.

This decision is noteworthy as it confirms, in no uncertain terms, the Supreme Court's long-standing case law regarding the parties' right to a reasoned award, which, as the Supreme Court puts it in this decision, has "not changed one iota" since the 2007 Cañas decision (*DFT 133 III 235*). The Supreme Court underlined in this regard that, contrary to the petitioner's assertions, it was not minded to broaden the scope of its review of international arbitral awards. The court reiterated that it is not an appellate court: the scope of review of international arbitral awards has intentionally been limited by the Swiss legislator and, as such, does not entitle the Supreme Court to review a tribunal's assessment on the merits. (*Decision 4A_520/2015.*)

Background

Article 190(2)(d) of the Private International Law Act (PILA) provides that an award will be set aside if the parties' right to be heard or the principle of equal treatment has been violated.

Facts

On 16 October 2012, B and A entered into a Share Purchase Agreement (SPA), by virtue of which B sold to A the shares it held in one of its subsidiaries, X. The overall operation was subject to the condition imposed by Y and Z (institutions whose prior approval of the operation was necessary) that B recapitalise X for an amount of EUR 3 billion prior to the closing of the operation, which B eventually did. The SPA included, amongst other things, a clause providing for an adjustment mechanism, should the recapitalisation injected by B exceed Y's requirements. In particular the adjustment mechanism would be used, if, at the time of the closing, the relevant ratio used to measure the financial health of a bank was below the 10% rate anticipated during the negotiation phase. On 28 March 2013, Y's executive committee fixed the ratio at 9% with effect from 31 March 2013.

Relying on the arbitration clause in the SPA, B initiated arbitration proceedings against A seeking payment of approximately EUR 161 million (plus interest), in application of the adjustment mechanism provided for in the relevant clause of the SPA. A opposed the claim arguing that the relevant clause of the SPA was not applicable to the circumstances of the case as it provided for an adjustment in favour of B only if Y were to lower its requirements with respect to X's minimum capital needs (which had not occurred). Alternatively, in the event the tribunal were to disagree with this interpretation of the clause of the SPA, A argued that this provision was not valid in the light of relevant overriding mandatory rules (*lois de polic*e) and rules of public policy.

By an award dated 31 August 2015, the tribunal granted B's claim in its entirety. The tribunal found that the relevant clause of the SPA was clear and, therefore, did not need to be interpreted, thereby providing a solid basis for B's claim. The tribunal then turned to the issue of the validity of the adjustment clause, as raised by A. It found that the issue of whether the clause was invalid pursuant to certain overriding mandatory rules was irrelevant in view of the approvals by Z and Y (as well as other institutions) of the transaction. The tribunal concluded that the issue of the validity of the adjustment clause at issue in light of certain "*lois de police*" or public policy provisions of law was "not determinant to its decisions".

A subsequently challenged the award before the Supreme Court, arguing that the tribunal had breached its right to be heard. According to A, the tribunal should have addressed the issue of the validity of the relevant adjustment clause in light of certain "*lois de police*" or public policy provisions of law. A also argued that the arbitral tribunal had "sidestepped" this issue by wrongly declaring it to be irrelevant.

Decision

The Supreme Court rejected the petition to set aside the award.

The court restated that, whilst the parties' right to be heard under Article 190(2)(d) PILA does not require that an international arbitral award be reasoned, it does impose on tribunals a minimum duty to examine and address all relevant issues that are material to the outcome of the case. According to Swiss case law, the right to be heard is violated if, inadvertently or due to a misunderstanding, the arbitral tribunal fails to take into consideration allegations, arguments or evidence that had been put on record by a party and that were apparently important to the outcome of the case. However, tribunals have no obligation to respond to each and every argument raised by the parties. There is no violation of the parties' right to be heard if the arbitral tribunal did not address, even implicitly, an argument raised by the parties that is irrelevant. The Supreme Court further reiterated that it is not its role to decide whether the tribunal should have found merit in the allegation, argument or evidence that it considered to be irrelevant.

In this context, the Supreme Court rejected A's contention that the court's recent case law was indicative of a willingness to broaden the scope of its review of international arbitral awards under Article 190(2)(d) PILA in instances where a tribunal failed to address certain issues. The court explained that a wider scope of review was not being considered, in particular as the Supreme Court is now faced with an increased number of challenges based on an alleged violation of the parties' right to be heard that are, in effect, attempts by parties to obtain a re-examination of the merits of their case . The Supreme Court emphasised again that it is not an appellate court and that its scope of review of international arbitral awards was limited by the Swiss legislator intentionally.

Turning to the case at hand, the Supreme Court observed that the tribunal had not "sidestepped" the issue of the validity of the adjustment clause of the SPA, as suggested by A. Rather, the tribunal found this issue to be "irrelevant" or "not determinant … in the instant case" because of Z's and Y's approval of the transaction (Z and Y having been held to be state or state-related entities). Therefore, the Supreme Court found that the tribunal had dealt with the issue of the validity of the disputed adjustment clause by explaining, in no uncertain terms, why it was in fact not required to examine further its validity. The Supreme Court found that the tribunal's approach was consistent with the parties' right to be heard within the meaning of Article 190(2)(d) PILA. The court specified that it is not its role to verify, in setting aside proceedings, whether the tribunal had found correctly that it could base its decisions on dispositive arguments that rendered moot the examination of other issues. Doing so would, in effect, amount to reviewing the merits of the case, or at least, inappropriately extending the scope of review that is granted to the Supreme Court by the PILA.

As a final point, the Supreme Court noted that one could consider its approach to be rather strict, in particular for a party who devoted considerable time to developing arguments that were subsequently declared irrelevant, rightly or wrongly. Nevertheless, the Supreme Court explained that this approach was the necessary consequence of the legal system in place in Switzerland, which limits the grounds on the basis of which a party can seek to challenge an international arbitral award rendered in Switzerland before the Supreme Court.

Comment

With this decision, the Supreme Court reaffirmed its established case law that a party may not challenge an award for an alleged violation of its right to be heard on the basis that the tribunal failed to address an issue, where in reality the tribunal deliberately disregarded this issue because it limited its analysis to one decisive point, thus rendering the other argument irrelevant to its findings. The Supreme Court specifically rejected the petitioner's argument that the Supreme Court had recently shown willingness to broaden the scope of its review.

The Supreme Court's confirmation of its earlier case law provides further legal certainty for arbitration in Switzerland. Practitioners would be well advised to read into the lines of this decision the determination of the Supreme Court to discourage petitioners from seeking to have a "second bite at the apple" and having the merits of their case reassessed in the context of setting aside proceedings.

This decision confirms that arbitral tribunals, like courts, can limit their analysis to one dispositive argument. This corresponds to the principle of procedural economy that is also often applied by courts. But also arbitral tribunals should be aware that parties most often have no possibility of a "second bite" and should therefore consider carefully if they really want to limit their reasoning to one decisive argument - particularly in high value cases where only a "yes or no" decision is possible. It follows from the excerpts of the award in this decision that the arbitral tribunal considered the analysis of the issue of the public policy of the clause at issue as being "complex". Had it nevertheless conducted that analysis and come to the same conclusion as with its first and main argument, there would probably have been a higher acceptance of the award by the parties and no reason to appeal it. If the public policy analysis had come out differently, this might well have prompted the tribunal to carefully balance the two outcomes against one another, which would lead to a more solid decision.

Case

Decision 4A_520/2015 (Swiss Supreme Court).

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