Enforcing parties' agreement to one round of written submissions does not violate right to be heard (Swiss Supreme Court)

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In *decision 4A_342/2015*, the Swiss Supreme Court considered whether and in what circumstances parties may validly agree to limit the first phase of arbitration proceedings to one round of written submissions and whether the arbitral tribunal, by enforcing that agreement and refusing to allow further submissions, violated the claimants' right to be heard.

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Speedread

In a French-language decision dated 26 April 2016 but only recently published, which is slated for official publication in the court reporter, the Swiss Supreme Court dismissed a challenge to a partial award rendered by the arbitral tribunal after only one round of written submissions. It held that, as the parties had agreed to such a limitation, the arbitral tribunal was entitled to reject the claimants' request to allow further submissions or rebuttal evidence. Unlike in state court proceedings, there is no absolute "right to respond" in international arbitration.

The decision provides useful guidance for arbitrators faced with this kind of issue. It should also serve as a warning to counsel to evaluate the risks of agreeing to a limitation of the proceedings and to ensure that they and their client are fully aware of the potential consequences of such an agreement. (*Decision 4A_342/2015.*)

Background

Article 190(2) of the Swiss Private International Law Act (PILA) provides that an award will be set aside if:

"[…]

(d) the principle of equal treatment of the parties or the parties' right to be heard was violated; or

(e) the award violates public policy."

Facts

The case concerns a dispute between four Turkish companies (X1-X4) (the claimants) that were part of the same group (Group X) and a German company (Z). Group X produced white and brown goods through various Turkish subsidiaries. The white goods were produced by company X6 and the brown goods by company A. In 2003, the Turkish companies sold their shares in company X6 to Z, which wished to consolidate its position in Turkey. According to the share purchase agreement (SPA) entered into between the parties, Z undertook to ensure that X6 would enter into a distributorship agreement (DA) with A (which had remained in the control of Group X) for the distribution of brown goods in Turkey, "for an indefinite period of time". The DA was signed later that year.

In 2008, Z terminated the DA. Five years later, the claimants initiated arbitration proceedings against Z under the International Chamber of Commerce (ICC) Rules, claiming that the DA and the SPA were "compound contracts" and, therefore, that the termination of the DA had automatically led to the termination of the SPA. They requested that the shares in X6 be returned and that the dividends paid out to Z be transferred to them.

Ahead of the case management conference, Z, the respondent, suggested that the proceedings be bifurcated, with the initial phase of the proceedings being limited to the issue of whether the termination of the DA triggered the rescission of the SPA, and that the arbitral tribunal decide that issue after the filing of Z's statement of defence. The claimants agreed to the bifurcation of the proceedings.

At the case management conference, the parties and the arbitral tribunal agreed on the terms of reference, the procedural rules and the procedural timetable. According to the procedural timetable, the parties were to file their statement of claim and statement of defence, respectively, together with witness statements and expert reports, after which the "next steps [were] to be determined by the Arbitral Tribunal in consultation with the parties". The arbitral tribunal, in a letter to the parties enclosing the procedural timetable, directed that they should, in their respective statements of case, set out their positions regarding the rescission of the SPA and the compound contract issue in detail and include witness statements, legal contractual analysis and evidence regarding the negotiation history and commercial purpose of the SPA. According to the terms of reference, the arbitral tribunal was to "decide, after the submission of the statement of defence, in an arbitral award whether the claimants had succeeded in establishing a legal basis for their claims".

The parties duly filed their statements of case together with supporting evidence. The statement of defence was submitted on 19 December 2014. On 4 February 2015, the arbitral tribunal declared the first phase of the proceedings closed. The next day, the claimants wrote to the arbitral tribunal indicating that they wished to produce rebuttal witness statements, a rebuttal expert opinion and to submit a statement of reply. They referred, in particular, to the last sentence in the procedural timetable which, they argued, left open whether there were to be further steps in the initial phase of the proceedings.

After allowing the respondent to answer the application, the arbitral tribunal rejected it on 10 February 2015, on the basis that the parties had clearly agreed that the tribunal would decide on the issue of the rescission of the SPA in a partial award after one round of submissions. The claimants then submitted a detailed request for reconsideration, to which the respondent gave an equally detailed response. On 4 March 2015, the arbitral tribunal rejected the request in a reasoned decision.

The arbitral tribunal issued a partial award on 27 May 2015. It came to the conclusion, based on the wording of the SPA and the DA, which it considered to be the “primary means of contractual interpretation”, that the parties had not intended to create a nexus between the two contracts and, therefore, the termination of the DA did not bring about the rescission of the SPA. On that basis, the claims were to be rejected. The arbitral tribunal then went on to examine the parties' pleadings regarding the surrounding circumstances and the negotiating history of the contracts, even though this step “was not strictly necessary” given the unambiguous wording of the contracts and did not alter the tribunal's findings in any way. Having found that the claimants had failed to establish a basis for their claims, the arbitral tribunal rejected those claims, reserving its decision on costs for the final award.

The claimants filed a petition with the Swiss Supreme Court to have the partial award set aside.

Decision

The Supreme Court rejected the petition.

The claimants main line of argument was that the arbitral tribunal had violated their right to be heard and the principle of equal treatment by failing to take into account relevant arguments that they had pleaded and refusing to allow them to file a reply and rebuttal evidence.

In the alternative, the claimants argued that, by refusing to allow the filing of a second round of submissions and rebuttal evidence, the arbitral tribunal had violated procedural *ordre public*.

Violation of right to be heard

Turning to the claimants' main line of argument, the Supreme Court started by providing a comprehensive overview of its case law regarding the parties' right to be heard. This overview contains several important clarifications and *obiter dicta*:

- There are a number of restrictions to the parties' right to be heard in international arbitration proceedings seated in Switzerland, namely:
  - the arbitral award (as opposed to a state court decision) need not include written reasons;
  - parties are not entitled to be informed of the prospective legal basis for the award, unless that legal basis was not pleaded and could not reasonably have been anticipated by the parties;
  - the arbitral tribunal is not required to notify a party of the decisive character of a fact on which it intends to rely in the award or invite a party to supplement its pleadings in that respect, to the extent that the fact was pleaded and established within the scope of the applicable rules.
- A party to an arbitration agreement cannot, when challenging an award before the Supreme Court, rely directly on the European Convention on Human Rights (ECHR), even if the principles that derive from the ECHR may serve to flesh out the due process guarantees contained in Article 190(2)(d) PILA.
- Parties to arbitration agreements are free to regulate the conduct of the proceedings as they see fit, including by reference to institutional rules, provided that the arbitral tribunal preserves the core content of their right to be heard.
- The strict case law of the Supreme Court (which in turn is based on the case law of the European Court of Human Rights) regarding the quasi-absolute right of a party to respond to any substantive pleadings submitted in state court proceedings in which it is involved does not apply, as such, in international or domestic arbitration.
- There is no absolute right to a second round of submissions in international arbitration proceedings, provided that the claimant has the opportunity to set out its position on the respondent's conclusions, in one form or another.
- An *ex ante* waiver of specific due process rights is valid to the extent that the parties were fully aware of the consequences and the waiver does not affect the very core of their right to be heard. The particular circumstances of the case will determine whether there has been a breach of a party's right to be heard. Therefore, the waiver of a specific right may be admissible in one case, but not in another.

The Supreme Court examined the petitioners' arguments in light of those principles.

First, it held that it was bound by the arbitral tribunal's finding that the parties had agreed to limit the first phase of the proceedings to one round of submissions. A finding of fact by the arbitral tribunal, even a finding regarding a procedural fact like here, is not subject to review by the Supreme Court. Therefore, the petitioners' criticism of that finding and their continued insistence that there was no such agreement were inadmissible.

Second, it held that there was no reason, in the present case, not to recognise the parties' agreement limiting the first phase of the proceedings to one round of submissions. When they agreed to this limitation, the facts and relevant contentious issues had been sufficiently ventilated to allow them to measure the consequences of the agreement, even if the claimants could not know specifically and in detail what the respondent would plead or what evidence it would submit. However, they could anticipate that the respondent would submit witness evidence going to the negotiation history of the contracts and should, in turn, have submitted all relevant evidence of their own in that regard. However, the claimants failed to do so and, in particular, chose not to submit a statement from the lawyer who conducted the negotiations on their behalf. To then complain of the consequences of an agreement that was consciously and freely entered into smacks of bad faith.

Third, the Supreme Court held that there was no inequality of treatment between the parties in this case, as both the claimants and the respondent were given the same opportunity to present their case in full in one written submission, with supporting evidence. The fact that the claimants set out their position first and the respondent its position second was both legitimate and logical.

Public policy

Lastly, the Supreme Court examined the claimants' argument that, even if there were an agreement limiting the first phase of the proceedings, the arbitral tribunal ought still to have allowed rebuttal witness evidence. The arbitral tribunal could, in principle, have disregarded the parties' agreement and given the claimants leave to submit additional evidence. Had it done so, this would not, per se, have constituted sufficient grounds to challenge the award. However, the arbitral tribunal found that, in this case, there was no need for additional evidence, as it already had sufficient elements at its disposal to render an award. This so-called "anticipated assessment of evidence" by the arbitral tribunal can only be reviewed by the Supreme Court to the extent that it violates procedural public policy.

The claimants repeated the same argument, namely that the arbitral tribunal's refusal to allow them to submit rebuttal witness statements or evidence deprived them of the faculty to plead their case. The Supreme Court rejected this argument summarily, pointing out that the claimants had not shown to what extent the award was contrary to public policy in this case.

Comment

This is the first decision in which the Supreme Court has confirmed that parties may validly waive certain aspects of their right to be heard, provided they are aware of the consequences, and that the arbitral tribunal may enforce that waiver even if a party subsequently seeks to reverse it.

The Supreme Court has recognised the importance of party autonomy in arbitration and that some of the strict principles and case law developed by state courts and the ECHR in relation to due process rights are not necessarily appropriate in arbitration. The core of the parties' right to be heard must of course always be guaranteed, but the parties have the freedom to decide on a number of points of procedure.

The flip-side is that parties must take responsibility for their decisions. The Supreme Court's ruling is very clear on the point that parties cannot rely on their autonomy then, if things don't go their way, turn around and ask the arbitral tribunal to protect them from their own decision.

The decision provides useful guidance for arbitrators faced with this kind of issue. It should also serve as a warning to counsel to evaluate the risks of agreeing to a limitation of the proceedings and to ensure that they and their client are fully aware of the potential consequences of such an agreement.

Case

Decision 4A_342/2015 (Swiss Supreme Court).

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