Swiss Supreme Court rejects application to set award aside due to inarbitrability where petitioner had no interest worthy of protection

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In *decision 4A_12/2017*, the Swiss Supreme Court considered whether to set aside an award based on the arbitral tribunal's lack of competence and violations of the right to be heard.

Speedread

In a French-language decision dated 19 September 2017, published on 4 October 2017 and slated for publication in the official court reporter, the Swiss Supreme Court has rejected a petition to set aside an award in which the arbitral tribunal, seated in Geneva under the auspices of the Swiss Chambers' Arbitration Institution, had explicitly held, in the operative part of its award, that the arbitral proceedings had validated a freezing order which the claimant had obtained against the respondent (petitioner).

The petitioner applied to the court to have the award set aside, arguing that the arbitral tribunal's ruling on the validation of a freezing order did not fall within its competence, as this particular issue is inarbitrable. The petitioner further argued violations of its right to be heard.

The court acknowledged that the validation of a freezing order is a matter reserved for the debt enforcement authorities and, therefore, the arbitral tribunal was not competent to rule on this point. Nonetheless, the court held that the arbitral tribunal's finding did not harm the petitioner. Therefore, the petitioner had no interest worthy of protection in requesting that the award be set aside, based solely on a superfluous finding in the award's operative part.

In respect of the challenge based on the right to be heard, the court also made interesting comments regarding the limitations of requiring written witness statements. The procedural modalities had required a written statement of a witness prior to the examination of that witness. The court rejected the petitioner's arguments that this prevented it from cross-examining a key witness, because the opposing party had not submitted a written witness statement for this individual. The petitioner had not demonstrated that it had made any effort during the arbitration proceedings to have that witness heard, for example, by applying to the tribunal to have the witness examined anyway or by seeking assistance in the taking of evidence from the competent state court judge and was, therefore, precluded from raising the objection at this stage. (*Decision 4A_12/2017.*)

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Background

Article 279 of the Swiss Debt Enforcement and Bankruptcy Act (DEBA) provides that to uphold a freezing order, a creditor must validate it by initiating enforcement proceedings or file a petition to confirm his claim within ten days of service of the freezing order on the debtor.

Article 76(1)(b) of the Federal Supreme Court Act (FSCA) provides that a petitioner must have an interest worthy of protection in having an arbitral award set aside.

The following articles of the Private International Law Act (PILA) are also relevant:

- Article 186(2) provides that an objection based on lack of jurisdiction must be raised prior to any defence on the merits.
- Article 190(2)(b) permits the setting aside of an award where the tribunal has wrongly accepted or declined jurisdiction.
- Article 190(2)(d) provides that an award may be set aside if the right of the parties to be heard is not observed.

Facts

The parties were seated in Hong Kong (claimant) and the British Virgin Islands (respondent). One of the contracts underlying the dispute concerned the sale of kerosene.

The claimant had obtained a freezing order from a court in Geneva against the respondent's assets in Switzerland and had initiated debt enforcement proceedings. When the respondent filed an objection to the debt enforcement proceedings, the claimant commenced arbitration proceedings to have its claim confirmed (a necessary prerequisite to uphold the freezing order). In its prayers for relief, the claimant included a request to have the freezing order validated.

The arbitral tribunal found for the claimant and included the following wording in the operative part of the award: "*The freezing order dated 14 January 2014, reference ..., minutes ..., rendered by the Tribunal of first instance of Geneva has been validly validated*".

Petitioner's arguments before the Swiss Supreme Court

Competence of the tribunal

Before the Swiss Supreme Court, the petitioner argued that the arbitral tribunal wrongly accepted jurisdiction and, more broadly, that issues relating to debt enforcement proceedings are inarbitrable.

Right to be heard

As a second ground for challenge, the petitioner contended, among other issues, that its right to be heard was violated because the modalities of the procedure prevented it from examining a key witness. The petitioner argued that the

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arbitral tribunal's procedural rule requiring a written statement of a witness prior to examination prevented it from cross-examining a key witness because the opposing party had not submitted a written witness statement for this individual.

Decision

The Swiss Supreme Court rejected the request to set aside the award.

Competence of the tribunal

The court, confirming its longstanding case law and in line with almost unanimous scholarly opinion, held that the petition to confirm a claim required by Article 279 of the DEBA to uphold (that is, validate) a freezing order may be brought before an arbitral tribunal. In contrast, whether the freezing order has been validated by such proceedings is for the competent debt enforcement authority to decide, not for an arbitral tribunal (or even a state court).

The court cited previous case law according to which, the objection of inarbitrability is subject to the same rules as the objection of lack of jurisdiction, in that it is precluded unless it is raised before any arguments on the merits are made. However, the court also referred to previous jurisprudence where the application of Article 186(2) of the PILA was limited to arbitrable matters. The court noted that the question of whether an arbitral tribunal is to decide *ex officio* (of its own motion) on the arbitrability of the subject matter submitted to it, is discussed controversially in legal literature. Formally leaving the question open in the present decision, the court nonetheless stated that since inarbitrability results from a statutory restriction on the parties' autonomy, common sense dictates that the parties, having argued the merits of the case before the tribunal, may not prevent a tribunal from examining arbitrability *ex officio* nor by the same token, prevent a party from raising an objection on such a basis before the Supreme Court.

Even so, the court held that the petitioner did not have an interest worthy of protection (a prerequisite for any appeal against an award) in having the award set aside based on the arbitral tribunal's validation of the freezing order. The court held that the arbitral tribunal's finding did not harm the petitioner since the petitioner could nevertheless apply to the competent debt enforcement authority at any time to request the unfreezing of its assets, arguing that the freezing order lapsed for lack of validation. Further, the court held that there is no interest worthy of protection in setting aside an award solely because the operative part contains a superfluous finding with no individual significance, thus rejecting the petitioner's line of argumentation.

Right to be heard

The court held that the petitioner was precluded from raising this objection at this stage, as the petitioner had not demonstrated that it had made any effort during the arbitration proceedings to have the witness heard, for example by applying to the arbitral tribunal to have the witness examined anyway or by seeking assistance in the taking of evidence from the competent state court judge.

Comment

This decision affirms that the court will resolutely apply the principle that an interest worthy of protection is a prerequisite for any appeal. In the present case, this lead to the safeguarding of an award even though the court found that the petitioner was correct in that the arbitral tribunal wrongly asserted its competence regarding the validation of the freezing order. The prerequisite of an interest worthy of protection seemingly serves as the "last line of defence"

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where an award is objectively faulty but a setting aside would, in light of all circumstances, be unreasonable and/or unnecessary.

The decision is further noteworthy in that it suggests that an all too rigid approach by an arbitral tribunal to allow witness testimony (such as precluding oral testimony unless a written witness statement is submitted) may be considered a violation of the right to be heard. Therefore, arbitral tribunals may be well served to allow sufficient flexibility on this point.

Case

Decision 4A_12/2017 (Swiss Supreme Court).

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