Swiss Supreme Court sets aside arbitral award on allocation of arbitration costs for violation of right to be heard

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In *decision* ***4A_570/2016***, the Swiss Supreme Court considered a petition based on a violation of the right to be heard to set aside an award on costs.

In a German language decision dated 7 March 2017, which was published on 17 March 2017, the Swiss Supreme Court set aside an arbitral tribunal's decision on the allocation of costs.

In a domestic arbitration concerning a construction dispute, an arbitral tribunal invited the claimant to either pay the respondent's share of the advance on costs (given that the latter had refused to do so), or to withdraw from the proceedings. Upon considering the claimant's (seemingly unsolicited) submissions on the allocation of costs and following the claimant's withdrawal, the arbitral tribunal closed the proceedings and ordered the parties to share the costs of the arbitration in equal parts. The petitioner appealed this decision before the Supreme Court, arguing a violation of its right to be heard on the basis that the arbitral tribunal never gave it the opportunity to comment on the allocation of the arbitration costs. The Supreme Court held that the arbitral tribunal had violated the petitioner's right to be heard by not granting it the opportunity also to comment on costs. Even though the finding concerns a domestic arbitral award, it is nonetheless relevant to international arbitration proceedings, as the right to be heard applies equally to domestic and international arbitration.

The decision is in line with its previous case law regarding the parties' right to comment on the allocation of arbitration costs (*see Legal update, Swiss Supreme Court confirms allocation of arbitration costs contained in closing order constitutes final award subject to appeal*). Nonetheless, the decision is noteworthy because, in its reasoning, the Supreme Court referred to cases pertaining to domestic civil procedure, which is unusual. For example, it discussed exceptions to the right to be heard on the allocation of costs based on domestic court cases, even though in arbitration there should not be any such exceptions as an arbitral tribunal has more discretion than a court to allocate costs.

Case: *Decision* ***4A_570/2016*** (Swiss Supreme Court).

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