Arbitrators' assessment of the evidence cannot be questioned under cover of alleged violation of right to be heard (Swiss Supreme Court)

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In *decision 4A_572/2015*, the Swiss Supreme Court examined whether an arbitral tribunal that relied on the claimant's expert evidence on quantum, and treated the respondent's criticisms of that expert evidence as mere allegations, violated the respondent's right to be heard.

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Speedread

In a French-language decision dated 6 January 2016, the Swiss Supreme Court rejected a petition to set aside an arbitral award based on an alleged violation of the right to be heard. In its award, the arbitral tribunal had awarded damages having relied on the claimant's expert evidence on quantum. In substance, the respondent criticised the arbitral tribunal for failing to take into account its criticisms of the expert evidence on the ground that they were mere allegations and, as such, insufficient to refute the other party's expert evidence. By doing so, the arbitral tribunal had allegedly put the respondent in the same situation as if it had not been given any opportunity at all to present its case. The Supreme Court dismissed this argument finding that, under cover of the right to be heard, the respondent was in fact engaging in an appeal on the merits and disputing the arbitrators' weighing of the evidence, which was not admissible. *(Decision 4A_572/2015.)*

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 equal treatment has been violated.

Facts

In 2013, a Spanish company (X) and a French company (Y) entered into an investment agreement, under which the parties were to create a joint company with an initial share capital of EUR 3 million, with each partner contributing half of this sum. The joint company was to purchase (and subsequently operate) a portfolio of parking spaces in Spain between 2013 and 2016, for a total amount of more than EUR 150 million. However, Y failed to contribute its share of the capital and the investment could not be carried out.

X started arbitration proceedings in Geneva, claiming around EUR 18 million for lost profits. X relied on an expert report for the damages calculation. Spanish law governed the merits of the dispute.

In the arbitration, Y did not deny that it had breached the investment agreement, but disputed the quantum of X's damage, arguing that it would be close to zero.

In an award rendered in September 2015, the arbitral tribunal ruled that Y had breached the investment agreement and had been grossly negligent. Consequently, the arbitrators ordered Y to pay X around EUR 18 million for lost profits, plus interest.

In their reasoning, the arbitrators noted that an arbitral tribunal cannot disregard expert evidence simply because the other party contends that the assessed lost profits are too optimistic. The tribunal stated that it needed solid grounds to conclude that the allegations and arguments made by one party shall prevail over the expert evidence of the opposite party. The arbitral tribunal considered that such grounds were missing in the present case for the following reasons:

- The expert evidence provided by X was persuasive and the answers given by the experts during their examination at the hearing were convincing.
- Y had chosen not to file any expert evidence to rebut the evidence given by X's experts.
- None of Y's arguments was sufficiently convincing to impugn X's expert evidence on the quantum of damages sought.
- Y's arguments were mere allegations and did not serve to refute X's quantum valuation insofar as this valuation was based on expert evidence.

The arbitral tribunal thus ordered Y to pay the amount of lost profits calculated by X's expert.

Y brought setting-aside proceedings before the Swiss Supreme Court, arguing that the tribunal had violated its right to be heard under Article 190(2)(d) PILA. More specifically, Y argued that the arbitral tribunal had ignored the arguments set forth in its written submissions on the sole ground that they were mere allegations and, as such, insufficient to refute expert evidence. By doing so, the arbitral tribunal had put Y in the same situation as if it had not been given the possibility of presenting its case (in Swiss legal parlance, Y was invoking a "formal denial of justice"). Y further argued that the experts themselves had admitted during the hearing that Y's arguments were admissible (in particular, that the assumptions used for the calculations could be 15% lower, in which case the future profits would be nil). Y further submitted that in any event, there was no need to rely on counter-expert evidence to show that a revenue projection over seven years is, by nature, uncertain and based on necessarily fragile assumptions. According to Y, the arbitral tribunal should therefore have adopted a more critical view of the conclusions given by X's expert.

Decision

The Supreme Court rejected the set-aside petition in a short judgment, which was rendered only two and a half months after the motion to set aside was filed and without requesting a rejoinder from X (as is the usual practice).

It considered that the admissibility of Y's challenge was questionable, given that Y was simply referring to parts of its written submissions in the arbitration proceedings, which was not a valid motivation.

In any event, the Supreme Court found the challenge to be devoid of any merit.

Under cover of an alleged violation of its right to be heard, Y was in fact trying to put into question the assessment of evidence made by the arbitral tribunal, which was not admissible.

Comment

While the Supreme Court decision is quite short, it reaffirms that setting aside proceedings before the Supreme Court are not an appeal on the merits. This decision provides confirmation of the Swiss Supreme Court's celerity and pragmatism:

- Celerity, because the decision was rendered less than three months after the date of the award. The Supreme Court's decision is final and not appealable, which means that in less than three months, the arbitral award is definitely final. This is indeed particularly rapid compared with other major arbitration seats.
- Pragmatism, because in light of the evident lack of merit of the challenge, the court decided to dismiss the challenge without the need of a rejoinder submission, thereby reducing the costs incurred by the party defending the award.

This decision also confirms that, although there is a recent trend in the decisions of the Supreme Court to look more closely at whether the arbitral tribunal has duly addressed the parties' relevant arguments, it does not mean that the Supreme Court will second-guess the arbitrators' weighing of the evidence. The Supreme Court will make a finding of "formal denial of justice" only where the award completely fails to address allegations of fact or legal submissions that were relevant for the resolution of the dispute and that were not implicitly rejected by the arbitrators. This approach ensures the effectiveness of the parties' right to be heard but does not allow a party to criticise, or the Supreme Court to review, the weighing of evidence by the arbitral tribunal.

Case

Decision 4A_572/2015 (Swiss Supreme Court).

Resource information

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