Swiss Supreme Court remains cautious on corruption and "surprise effect" of application of Swiss law principles on non-Swiss counsel

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In *decision 4A_136/2016*, the Swiss Supreme Court considered whether to set aside an International Chamber of Commerce (ICC) arbitral award.

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Speedread

In a French-language decision of 3 November 2016 which was published on 23 November 2016, the Swiss Supreme Court refused to set aside an arbitral award rendered under Swiss law by an International Chamber of Commerce (ICC) tribunal seated in Geneva.

In the arbitral proceedings, the claimant requested outstanding commission payments under consultancy agreements entered into with the defendants who justified their refusal to pay on the basis of:

- On-going criminal investigations by US and UK authorities and the risk of serious criminal sanctions in case of payment.
- The claimant's alleged involvement in corrupt practices.
- The claimant's breach of contractual obligations and internal compliance rules.

The arbitral tribunal dismissed these objections and ordered the defendants to pay approximately EUR1.5 million.

The defendants initiated set aside proceedings arguing a violation of public policy and of their right to be heard.

The Supreme Court held that allegations of corrupt practices must be supported by concrete evidence by the party making such claims. A mere violation of internal compliance rules does not *per se* constitute a public policy violation, as otherwise the content of public policy would effectively be determined by private parties.

Further, under Swiss law, it is permissible for the tribunal to consider the parties' conduct subsequent to conclusion of the contract in order to determine the parties' intentions. The tribunal's interpretive approach did not constitute a "surprise decision", and thus did not violate the parties' right to be heard. The defendants' had failed to retain Swiss counsel at their own risk.

This decision is in line with previous decisions. It reflects the Supreme Court's twofold concern that, while corruption does present significant challenges to the arbitral process and must be appropriately addressed, allegations of corruption may also be used in bad faith by recalcitrant parties aiming to derail arbitral proceedings. (*Decision 4A_136/2016.*)

Background

Article 190(2)(d) of the Swiss Private International Law Act (PILA) permits the initiation of set aside proceedings where the right of the parties to be heard is not observed.

Article 190(2)(e) of the PILA permits the initiation of set aside proceedings where the award is incompatible with public policy.

Facts

In 2004 (Agreements 1 and 2) and 2009 (Agreement 3), the claimant and the defendants entered into three separate consultancy agreements according to which the claimant was to assist the defendants in the preparation of tender offers for public infrastructure projects. Agreements 1 and 2 provided, amongst other things, that payments were to be made only upon proof of services furnished by the claimant. All three agreements included an arbitration clause providing for the resolution of conflicts by a three-member International Chamber of Commerce (ICC) tribunal seated in Geneva.

From 2006 to 2008, the defendants made various payments to the claimant under Agreements 1 and 2, but subsequently ceased to make further payments under these agreements and also refrained from making any payments under Agreement 3.

In 2013, the claimant initiated arbitral proceedings against the defendants, claiming outstanding commission payments under the consultancy agreements. The defendants argued that they were unable to pay due to on-going corruption-related criminal investigations by the United States Department of Justice (DoJ) and the United Kingdom's Serious Fraud Office. According to the defendants, they could

face serious criminal sanctions in the event of payment, in particular as recent discoveries suggested that the consultancy agreements formed part of a corruption scheme and were in violation of the defendants' internal compliance rules. Moreover, the defendants objected that the claimant had, in violation of the terms of the agreements, failed to provide sufficient proof of its services and therefore was not entitled to further remuneration.

In a final award dated 29 January 2016, the arbitral tribunal ordered the defendants to pay a total of approximately EUR1.5 million to the claimant. In its decision, the tribunal initially clarified that the burden of proof for allegations of corruption remained with the party making such allegations, in this case with the defendants. The tribunal then examined the evidence provided by the defendants and concluded that it did not support the defendants' claims that the consultancy agreements were entered into for illegal purposes.

Subsequently, the tribunal analysed the defendants' argument that the claimant had failed to provide sufficient proof of its services. While the tribunal initially acknowledged that Agreements 1 and 2 each required the claimant to provide "proof of service", it focused its attention on the conduct of the parties following the conclusion of the relevant agreements. In doing so, the tribunal concluded that the parties had not interpreted the proof of services requirement literally. Rather, the defendants, for several years, had accepted the documents submitted by the claimant despite the fact that they were not in compliance with the contractual requirements. The tribunal opined that the parties had thereby tacitly altered the terms of the contract, precluding any objections by the defendants. By contrast, the tribunal ruled that these considerations did not apply to Agreement 3 which included stricter and more detailed payment terms and, as no payments had been made, had also not been altered by the parties' subsequent conduct.

The defendants subsequently applied to the Swiss Supreme Court to vacate the award.

Decision

The Swiss Supreme Court refused to set aside the award.

The Supreme Court confirmed its long-standing case law that it was bound by the facts established by the arbitral tribunal. Having clarified its scope of investigation, the Supreme Court held that, while corrupt practices or the existence of a corruption scheme generally violate Swiss public policy, such facts must be supported by concrete evidence by the party making such claims. Specifically, the Supreme Court, citing previous decisions to this effect, reiterated that a public policy violation required:

- The establishment of corrupt practices.
- The refusal of the arbitral tribunal to take these findings into account in its decision.

In the present case, the Supreme Court notably criticised the defendants for ignoring the detailed observations of the tribunal regarding the allegations of corruption in the award and the fact that it had limited itself to commenting on the documents in the arbitral case file.

Moreover, the Supreme Court clarified that a mere violation of internal compliance rules does not *per se* constitute a public policy violation, as otherwise the content of public policy could effectively be determined by private parties. The defendants had argued that their internal compliance rules constituted a concretisation of internationally recognised anti-corruption principles and therefore formed part of public policy in the sense of Article 190(2)(e) of the PILA. The Supreme Court dismissed this argument and emphasised that the notion of public policy embodied the fundamental principles and beliefs of a society. Therefore, it could not be unilaterally determined by private parties, let alone, as in this case, by foreign-seated private parties.

The Supreme Court further commented on the defendants' objection that the arbitral tribunal had improperly altered the parties' agreement by relying on the subsequent conduct of the parties with regard to the proof of services which thereby violated the defendants' right to be heard. The Supreme Court noted that under Swiss law, contractual agreements may principally be altered by subsequent party conduct and that consequently Swiss courts (but also arbitral tribunals applying Swiss law) may take the conduct of the parties into consideration when determining the true and mutual intent of the parties with regard to the content of a contractual obligation ('subjective interpretation'). Specifically, the Supreme Court held that the subsequent conduct of the parties could, depending on the circumstances of the individual case, justify a restrictive interpretation of a contract clause or even constitute a tacit modification of the latter.

On this basis, the Supreme Court also dismissed the defendants' argument that the arbitral tribunal had issued a surprise decision, noting that the interpretive approach taken by the tribunal was in line with principles of contract interpretation under Swiss law. If the defendants and their non-Swiss counsel were, as the defendants had claimed, not familiar with the law governing the contract (Swiss law), this was their own risk. Consequently, the Supreme Court upheld the arbitral tribunal's decision regarding the applicable standards for proof of services which were stipulated in the contract.

Comment

Corruption is a global phenomenon with many dimensions, not least in international arbitration. In the past years, an abundance of legal literature and an increasing number of arbitral awards and court judgments have dealt with various aspects of this issue, including the abuse of arbitral proceedings for the implementation of corruption schemes, the proper conduct of arbitrators faced with indications of corruption, public policy considerations and recognition and enforcement issues with regard to corruption-tainted awards.

The Swiss Supreme Court's stance on corruption in international arbitration, as demonstrated in this judgment, is in line with previous decisions. It reflects its twofold concern that while corruption does present significant challenges to the arbitral process and must be appropriately addressed, allegations of corruption may also be used in bad faith by parties aiming to escape liability or to frustrate arbitral proceedings or the enforcement of an award. Consequently, the Supreme Court acknowledges that the occurrence of corruption may, in principle, justify the setting aside of an arbitral award for violation of public policy, but requires that the party making such allegations submit concrete and robust evidence to support its claims. In addition, public policy is only violated if the arbitral tribunal has refused to consider such evidence in its award. It is hard to see why an arbitral tribunal would not take into account established evidence of corruption (a finding which itself cannot be reviewed by the Supreme Court). As such, it is likely to be very difficult to apply this ground of a violation of public policy in practice.

When it comes to contract interpretation under Swiss law, a subjective interpretation based on the true and mutual intent of the parties is not "surprising" in the sense of a violation of the right to be heard. A party may therefore not, as was attempted in this case, successfully plead its own or its non-Swiss lawyers' ignorance regarding the interpretive approach taken by the arbitral tribunal. If a party deliberately chooses to do without Swiss counsel, it may of course do so, but, as has now been made clear, at its own risk.

Case

Decision 4A_136/2016 (www.practicallaw.com/w-005-1002) (Swiss Supreme Court).

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