

# Denial of justice cannot serve as disguised appeal

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**Facts**  
**Decision**  
**Comment**

The right to be heard cannot be used to twist the setting aside proceeding into an appeal of an award (confirmation of well-established practice).<sup>(1)</sup>

## Facts

The dispute arose out of a share purchase agreement whereby B sold the entirety of its shareholding in X to Bank A for €1, subject to a €3 billion recapitalisation of X by B. The share purchase agreement contained a clause providing for an adjustment mechanism in favour of B if, at a specific date, Bank Y set the ratio between X's own capital and its risk-weighted assets below 10%.

At the relevant date, Bank Y set the ratio at 9%, following which B began arbitration proceedings to obtain payment from Bank A based on the abovementioned clause. According to Bank A, an adjustment in favour of B was provided for only if Bank Y reduced X's own capital requirements, which it did not. Subsidiarily, Bank A relied on the asserted nullity of the adjustment clause.

A three-member International Chamber of Commerce arbitral tribunal in Geneva admitted B's request. Bank A challenged the award before the Supreme Court for violation of its right to be heard.

## Decision

The plaintiff contended that the Supreme Court's practice in relation to the motivation of arbitral awards, the arbitrators' duty to examine and address the pertinent issues and the formal nature of the right to be heard had been relaxed.<sup>(2)</sup> In response, the Supreme Court made clear that this practice has not changed since the issuance of the *Cañas* decision in 2007.<sup>(3)</sup> For the Supreme Court, there is no reason to broaden the scope of the formal denial of justice in relation to the arbitrators' duty to examine and address an argument in the arbitral award.<sup>(4)</sup> According to the Supreme Court, there is even less of a reason to do so considering the increased number of plaintiffs that rely on an asserted violation of the right to be heard in an attempt to obtain indirectly a review of the merits of the challenged award, and considering the Supreme Court's limited power of review.<sup>(5)</sup>

On the merits of the challenge, the Supreme Court found that the arbitrators had not bypassed the question of the incidence, if any, of a breach of mandatory norms on the validity of the disputed clause in the share purchase agreement, but that they had considered this question to be irrelevant.<sup>(6)</sup> The Supreme Court found that the arbitrators had sufficiently explained in the award why they did not have to answer this question, and that it was not for the Supreme Court to determine whether the arbitrators' reasoning had any merits because doing so would broaden the scope of the Supreme Court's power of review.<sup>(7)</sup> According to the Supreme Court, in order to obtain the annulment of the award, the plaintiff could argue only that the reason to avoid examining its argument had been retained by the arbitrators in breach of one of the grievances listed in Article 190(2) of the Private International Law Act, which the plaintiff did not.<sup>(8)</sup> Therefore, the Supreme Court rejected the challenge.

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## Comment

This decision confirms that the Supreme Court continues relying on its well-established practice regarding the parties' right to be heard, although this practice may be perceived to be quite strict for the party that must accept the arbitral tribunal's (sometimes unjustified) refusal to examine the arguments submitted to it, as the Supreme Court itself pointed out at the end of the decision.

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## Endnotes

- (1) Supreme Court, 4A\_520/2015, December 16 2015 (in French).
- (2) Ground 3.3.1. For further details please see "[Violation of right to be heard and partial annulment](#)" and "[Standard form insufficient to exclude violation of right to be heard](#)".
- (3) ATF 133 III 235.
- (4) Ground 3.3.1.
- (5) Ground 3.3.1.
- (6) Ground 3.3.2.
- (7) Ground 3.3.2.
- (8) Ground 3.3.2.

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