

# Ex post short extension to file statement of claim is no ground for challenge

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## Facts

## Decision

## Comment

The Supreme Court recently rejected a challenge based on the alleged belated filing of the statement of claim. [\(1\)](#)

## Facts

In an arbitration proceeding under the Swiss Chambers' Arbitration Institution between B and A, the latter requested the sole arbitrator to terminate the proceeding on the claim because B had filed its statement of claim one day after the deadline originally set for this filing. The sole arbitrator refused to do so because she had extended the deadline by one day on her own motion. More particularly, on the day after the deadline, she had written to B asking whether it had already filed its submission, failing which it should do so on the same day (thereby granting a one-day extension to file such submission). B complied with the extended deadline. The final award ordered payment from A to B. A challenged this award before the Supreme Court.

## Decision

A argued that the sole arbitrator had violated the parties' right to equal treatment and their right to be heard (Article 190(2)(d) of the Private International Law Act) by admitting B's claim, despite the belated submission of the statement of claim and by continuing the proceeding on the claim. A also argued that this course was incompatible with public policy (Article 190(2)(e) of the Private International Law Act).

After recalling its practice in relation to these grounds for challenge, [\(2\)](#) the Supreme Court rejected A's arguments and its challenge on the following grounds:

- A had not established an inequality of treatment, particularly considering that A did not contend that it had missed a deadline and was denied an extension. [\(3\)](#)
- A did not contend that it was denied the opportunity to take position on B's belated submission, thereby suffering a violation of its right to be heard. [\(4\)](#)
- Insofar as A had argued that the Swiss Rules of International Arbitration mandatorily required the sole arbitrator to terminate the proceedings on the claim (Article 28), it had misapplied the applicable rules. According to the Supreme Court:

*"[t]he mere fact that a procedural rule contained in the arbitration rules is chosen by the parties and is binding on the arbitral tribunal does not render this rule a mandatory procedural principle within the meaning of Article 190(2)(d) of the Private International Law Act."*

Therefore, there was no violation of A's right to be heard or an inequality of treatment in B being invited to proceed with the filing of the statement of claim. [\(5\)](#)

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- A wrong or abusive application of procedural rules is insufficient to constitute a violation of procedural public policy. The sole arbitrator's indulgence towards B did not breach fundamental and generally recognised procedural principles.<sup>(6)</sup>

## **Comment**

The Supreme Court refused to interfere with the sole arbitrator's decision to extend the timeframe to file the statement of claim. The question may arise again at the enforcement stage in the context of Article V(1)(d) of the New York Convention, which provides that recognition and enforcement of an award may be refused, among other things, if "the arbitral procedure was not in accordance with the agreement of the parties". The enforcement court may thus have to decide whether, in the circumstances of this particular case, the parties' agreement on the tribunal's procedural powers included the spontaneous extension of a timeframe after that timeframe had elapsed.

*For further information on this topic please contact [Frank Spoorenberg](#) or [Daniela Franchini](#) at Tavernier Tschanz by telephone (+41 22 704 3700) or email ([spoorenberg@taverniertszchanz.com](mailto:spoorenberg@taverniertszchanz.com) or [franchini@taverniertszchanz.com](mailto:franchini@taverniertszchanz.com)). The Tavernier Tschanz website can be accessed at [www.taverniertszchanz.com](http://www.taverniertszchanz.com).*

## **Endnotes**

(1) Supreme Court, 4A\_405/2016, March 2 2017 (in German).

(2) Ground 3.2.

(3) Ground 3.3.

(4) *Id.*

(5) *Id.*

(6) *Id.*

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