

Arbitration - Switzerland

Awards Based on Grounds not Submitted by the Parties

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Awards made in Switzerland may be challenged directly before the Supreme Court if the arbitrators have violated the parties' "right to be heard in adversarial proceedings", guaranteed by Articles 182(3) and 190(2)(d) of the Swiss Private International Law Act.

The right to be heard applies in connection with both factual and legal issues. However, as regards legal issues, the right to be heard does not prevent the arbitrators from deciding the case on arguments or rules that have not been submitted. Nor are the parties entitled to an opportunity to supplement their legal submissions before the arbitrators decide on such different grounds. This has been confirmed in several cases.

However, a recent case⁽¹⁾ has created an exception to this rule. The ruling holds that if the arbitrators wish to decide the dispute on legal grounds that were unforeseen and unforeseeable by the parties, they must give the parties an opportunity to supplement their submissions on that legal issue.

The case concerned the validity of a termination based on a governmental decree rendering some contractual clauses illegal. The terminating party had based its termination on a clause dealing with *force majeure* and further relied on theories of illegality and changed circumstances. These were the grounds asserted and discussed during the arbitration. Further, both parties argued about the assumption that the contract had made no specific provision for the situation at hand. However, the tribunal found that the effects of the decree were to be treated as the lack of a governmental licence and were consequently addressed in the contractual provision dealing with the absence of a licence.

The exception created by this ruling may come as a surprise, in view of previous case law. The Supreme Court's previous decisions have consistently confirmed the arbitrators' complete freedom to go beyond the parties' legal submissions. However, the decision probably does not signal a change in the law. The case appears to have been an extreme one. Not only could the parties not have foreseen the arbitrators' reasoning, but it appears that given the opportunity, the parties could easily have put the arbitrators right by providing evidence as to what the contract actually meant.

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Endnotes

(1) Decision of September 30 2003 of the Swiss Supreme Court in *A v B Limited*, award of March 11 2003, ATF 130 III 35, available from the website of the Swiss Supreme Court, <http://www.bger.ch>.

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