

Arbitration - Switzerland

Delay in Challenging Biased Expert

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In an arbitration between a Turkish steel manufacturer (claimant) and a German buyer (defendant), an arbitral tribunal rejected an application by the claimant to disqualify a tribunal-appointed expert on the ground that he was prejudiced. The claimant then challenged the award on that ground, asserting a violation of procedural public policy under Article 190(2)(e) of the Federal Act on Private International Law. The Swiss Supreme Court dismissed the challenge because the claimant had waived the objection. This case illustrates the court's general attitude as regards waivers of grounds to set aside awards.

The arbitral tribunal appointed the expert in October 1997. In February 1998 the expert contacted a representative of the claimant and solicited an offer for the supply of steel to a subsidiary company of the expert's employer. The claimant did not disclose this fact at the time. Between March and June 1998 the expert carried out his duties for the arbitral tribunal. By mid-July 1998 the negotiations between the claimant and the subsidiary of the expert's employer failed. In late July 1998 the expert delivered a final report to the arbitral tribunal. The final report did not substantially vary from a draft report filed before the negotiations had failed.

In October 1998 the claimant challenged the expert for prejudice on the grounds that the latter had discussed business opportunities with the claimant's representative between February 1998 and July 1998. The arbitral tribunal rejected the challenge on the ground that it was late. In December 1999 the arbitral tribunal dismissed the claimant's claim and granted the defendant's counterclaim. The claimant challenged the award before the Swiss Supreme Court, asserting in particular that the expert was prejudiced.

With regard to challenging an expert for prejudice, the court confirmed the rule that such a challenge must be raised as soon as the challenging party learns of the grounds. If these grounds are not raised immediately, the party is barred from relying on them at a later stage. In this case, contact between the expert and the claimant's representative began in February 1998 and stopped in July 1998. However, the claimant only raised the issue of the existence of this contact in late October 1998, in order to challenge the expert. The court decided that the claimant was barred from relying on this issue since it had not raised it in February 1998 when contact began or, at the latest, in July 1998 when it stopped. The court added, however, that the requirement of an immediate objection does not apply to mandatory grounds for challenging an expert. Such a mandatory ground exists if an expert has a direct personal interest in the outcome of the dispute or has been previously involved in the dispute.

For further information on this topic please contact Pierre-Yves Tschanz or Sébastien Roy at Tavernier Tschanz by telephone (+41 22 347 77 07) or by fax (+41 22 347 9789) or by e-mail (tschanz@ttv.ch or roy@ttv.ch).

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Authors

Sébastien Roy

**Pierre-Yves
Tschanz**





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