

## Arbitration - Switzerland

### Failure to Hear Evidence

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#### Background Discussion

The Supreme Court recently held that the right to be heard (ie, to due process) is not violated by arbitrators who refuse to draw inferences from a party's refusal to produce evidence. The court also stated that procedural objections are waived if not raised and pursued immediately.

#### Background

A party to an International Chamber of Commerce arbitration in Switzerland named as witnesses two executives of the other party in the arbitration. These executives were not produced so the arbitral tribunal issued the award without hearing their testimony.

The party who named the witnesses filed an appeal to set aside the award asserting a violation of its right to be heard. The party argued that the two executives had made statements that were crucial to the case, and pointed out that the 1983 International Bar Association rules on the presentation of evidence (now superseded by the 1999 version) provided that the arbitrator shall draw inferences from a party's refusal to produce evidence (Article 4.6). The Supreme Court dismissed the appeal.

#### Discussion

Because the challenge concerned drawing inferences from the other party's failure to produce the two executives as witnesses, the Swiss Supreme Court considered that the appeal criticized the arbitral tribunal's evaluation of the evidence. The improper evaluation of evidence is not a ground to set aside an award.

Moreover, the challenging party had failed to object immediately. That party had noted the non-appearance of the two witnesses and asked the tribunal to draw inferences from it. However, that party did not object or asked for a new hearing to be scheduled for these witnesses, nor did the party apply to the arbitrators to request the assistance of the court in aid of arbitration. Objecting only after an unfavourable award is issued is not consistent with good faith, since the criticized violation of the right to be heard was not committed in the award.

Source: ASA Bulletin 2000, 96-104 (Swiss Supreme Court, July 25 1997).

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