Delivering expert knowledge to global counsel

International Law Office®

Arbitration - Switzerland

May and Must Arbitrators Supply their Own Legal Grounds?

November 08 2001

Author

Pierre-Yves Tschanz

The Swiss Supreme Court, which directly hears challenges against arbitral awards, has confirmed that arbitrators may and must supply their own legal grounds when making awards.(1)

Facts

A bank refused to pay on a guarantee it had issued. The beneficiary of the guarantee sought an order against the bank to pay on the guarantee. The bank's ground for refusing to pay was found to be valid, so the bank could not be ordered to pay. However, the tribunal found that the bank had a contractual duty to advise the beneficiary of its ground to refuse payment (the bank was presented only with a copy of the guarantee instead of the contractually required original). As the bank did not so advise the beneficiary, the bank was liable to pay damages, which were then reduced on account of the beneficiary's contributory negligence. Thus, the award ordered the bank to pay damages for breach of the guarantee, even though the beneficiary had not claimed damages.

Decision

Ultra petita
First, the court considered whether the award was *ultra petita* (ie, whether the tribunal answered on more than the petitioners had asked it to). Awards can be set aside "where the arbitral tribunal has ruled beyond the claims submitted to it, or failed to decide one of the claims" (Private International Law Act, Article 190(2)(c)). The court held that an award is not *ultra petita* when it awards no more money than is sought, albeit on legal grounds not asserted by the parties, unless the parties have agreed to limit the arbitrator's authority to considering only specific legal grounds.

Right to be heard
The court also considered whether the award violated the right to be heard. Awards can be set aside "where the principle of equal treatment of the parties or their right to be heard in an adversary procedure has not been observed" (Private International Law Act, Article 190(2)(d)). The bank asserted that it had been deprived of the opportunity to discuss its liability in damages.

The court held that right to be heard does not extend to the legal evaluation of properly established facts, unless the arbitrator wishes to decide on a legal ground that the parties neither asserted nor should reasonably have contemplated to be relevant. It reasoned that the issue which must be considered is whether the application of the law took the parties by surprise. The Swiss Supreme Court exercises restraint in evaluating surprise in arbitration. In this case the beneficiary of the guarantee had alleged that the bank should have advised the beneficiary of the technical reason preventing payment of the guarantee. Since such duty is discussed in legal writings, together with the resulting liability in case of breach, the bank should reasonably have reckoned that the arbitral tribunal would also review an entitlement to damages. Therefore, the finding of liability should not have come as a surprise; and the bank could have addressed it in its last brief or during oral argument.

For further information on this topic please contact Pierre-Yves Tschanz at Tavernier

Tschanz by telephone (+41 22 347 77 07) or by fax (+41 22 347 9789) or by email (tschanz@ttv.ch).

Endnotes

(1) *St Petersburg v ATA Insaat Sanayi ve Ticaret Ltd*, March 2 2001, 4P 260/2000/rnd, Bull ASA 3/2001, 531-538 (in German); also available from the Swiss Confederation website at www.admin.ch (select "Federal Supreme Court", then "*Rechtsprechung*").

The materials contained on this website are for general information purposes only and are subject to the disclaimer.

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at **www.iloinfo.com**.

Official Online Media Partner to the International Bar Association
An International Online Media Partner to the Association of Corporate Counsel
European Online Media Partner to the European Company Lawyers Association

© Copyright 1997-2009 Globe Business Publishing Ltd