May and Must Arbitrators Supply their Own Legal Grounds?

November 08 2001

Facts

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.\(^1\)

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
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(1) St Petersburg v ATA Insaat Sanayi ve Ticaret Ltd, March 2 2001, 4P 260/2000/rmd, 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").

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Endnotes

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