

Arbitration - Switzerland

Violation of right to be heard and partial annulment

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July 25 2013

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On April 17 2013 the Supreme Court annulled an arbitral award on the grounds that the arbitrator had failed to explain why, in the damage computation, it had not taken into account the deductions submitted by a financial expert and respondent (violation of the right to be heard). The decision also confirmed that an award may be annulled in total or in part.⁽¹⁾

Facts

The dispute referred to arbitration pertained to a tripartite framework agreement, the purpose of which was to transfer to the claimant all the rights that the respondent had previously conceded to a third party for the sale of nickel products. The framework agreement was governed by English law and contained an arbitration clause, according to which any dispute had to be submitted to a sole arbitrator in Zurich.

The framework agreement was never executed.

In the arbitration, the claimant sought compensation for the lost profits arising out of the non-delivery of the nickel products. The respondent argued that the framework agreement had to be considered as a letter of intent with no binding effect on the parties. In the final award the sole arbitrator held that the framework agreement was binding on the parties, and therefore ordered the respondent to compensate for the claimant's lost profits.

The respondent challenged this award before the Supreme Court on the grounds that the sole arbitrator had breached its right to be heard.

Decision

The Supreme Court partially admitted the respondent's challenge and annulled the final award.

The respondent argued that the sole arbitrator had failed to address four arguments that the respondent had submitted in its briefs, which resulted in an incorrect damage calculation (violation of the right to be heard).⁽²⁾

The Supreme Court reiterated the well-established principles to be applied when examining an asserted violation of the right to be heard. The arbitrators' minimum duty to examine and address the pertinent issues is breached if, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into account some statements, arguments, evidence and offers of evidence adduced by the parties that are important for the decision to be issued (for further details please see "[Four recent Supreme Court arbitration decisions provide legal guidance](#)").⁽³⁾ The Supreme Court further held that if an award omits entirely such pertinent issues it is upon the arbitrators or the respondent to justify this omission in the annulment proceedings.⁽⁴⁾

Applying these principles, the Supreme Court found that in the final award the sole arbitrator mentioned the deductions to the nickel sale price that were submitted by a financial expert and the respondent, but then omitted to take these deductions into account in the damage calculation, giving no explanation in this respect.⁽⁵⁾

The Supreme Court therefore partially admitted the challenge. It recalled that the partial annulment of an arbitral award is possible if the issue appealed is independent from the others, but annulled the final award in its entirety since there was only one disputed

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claim in the present case.⁽⁶⁾

Comment

In the case at hand, the Supreme Court reiterated the well-established principles regarding the test for arbitral awards to comply with the parties' right to be heard. It also stated that, in specific circumstances, an award may be annulled partially.

At the end of the decision, the Supreme Court provided its own calculation of the lost profit.⁽⁷⁾ However, as a rule, the Supreme Court only annuls the challenged award and remands the case to the arbitral tribunal for a new decision (the cassatory nature of the challenge).⁽⁸⁾ It may thus be questioned whether the Supreme Court went beyond this cassatory nature by providing its own damage calculation.

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Endnotes

(1) Supreme Court Decision 4A_669/2012. Available at www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.html (in French).

(2) Ground 3.2.

(3) Ground 3.1.

(4) Ground 3.1.

(5) Ground 3.2.1.

(6) Ground 3.3.

(7) Ground 5.

(8) The Supreme Court allows an exception to such a cassatory nature only in relation to the plea of incorrect decision on jurisdiction (ATF 128 III 50, Ground 1b; ATF 127 III 279, Ground 1b; ATF 117 II 94, Ground 4).

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