

Arbitration & ADR - Switzerland

Bribery and incompatibility with public policy

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In a recent decision the Supreme Court confirmed that bribery may constitute a ground for annulment of arbitral awards, to the extent that bribery is established and the arbitral tribunal has refused to consider it in the challenged award.⁽¹⁾

Facts

The dispute arose out of two consultancy agreements in relation to the construction of an underground railway and a power plant. The agreements contained identical arbitration clauses in favour of an International Chamber of Commerce arbitral tribunal in Geneva.

Based on these clauses, the claimant started arbitration proceedings seeking payment of the commissions under the two consultancy agreements. The respondents requested a stay of arbitration proceedings pending the outcome of criminal bribery investigations involving the claimant in England.

The arbitral tribunal rejected the respondents' request and issued two awards granting the claim. The respondents challenged these awards before the Supreme Court, invoking the awards' incompatibility with substantive public policy according to Article 190(2)(e) of the Private International Law Act.

Decision

The Supreme Court refused to consider four documents produced by the plaintiffs along with their submissions on the grounds that the documents were subsequent to the date on which the challenged awards had been issued.⁽²⁾

The Supreme Court then examined the plaintiffs' argument that the payment orders would expose them to criminal penalties under the UK Bribery Act 2010. Referring to a previous decision,⁽³⁾ the Supreme Court recalled that in order for bribery to constitute a ground for annulment, it must be established that bribery was involved and that the arbitral tribunal had refused to consider this circumstance in the award.⁽⁴⁾

Applying these requirements, the Supreme Court noted that the arbitral tribunal had analysed the evidence adduced by the plaintiffs and found the bribery allegations to be unproven. Such a finding, which is based on an assessment of evidence that the Supreme Court cannot review, excluded any incompatibility with public policy from the outset.⁽⁵⁾

The Supreme Court also considered that, instead of deploring the bribery itself, the plaintiffs actually deplored the risk of being exposed to criminal penalties if they performed the challenged awards. The arbitral tribunal found that proof of objectionable conduct on the claimant's part had not been submitted and recalled that the principle that criminal law has precedence over civil law (*le pénal tient le civil en l'état*) is not part of procedural public policy according to Article 190(2)(e) of the Private International Law Act.⁽⁶⁾ According to the Supreme Court, the plaintiffs' challenges were limited to an inadmissible criticism of the arbitral tribunal's assessment of evidence, and were therefore rejected.⁽⁷⁾

Comment

This decision confirms the Supreme Court's practice in relation to bribery allegations in the context of challenges based on public policy. If the criminal proceedings in England reveal that the underlying contracts were illegal, it may be possible to seek revision of the awards (eg, Supreme Court, 4A_596/2008, October 6 2009).

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Endnotes

- (1) Supreme Court, 4A_532/2014 and 4A_534/2014, January 29 2015 (in French).
- (2) Ground 4.2.
- (3) Ground 5, referring to Supreme Court, 4A_231/2014, September 23 2014.
- (4) Ground 5.1, referring to Supreme Court, 4A_538/2012, January 17 2013, Ground 2.d; Supreme Court, 4P.208/2004, December 14 2004, Ground 6.1; Supreme Court, 4P.115/1994, December 30 1994, Ground 2.d.; Kaufmann-Kohler/Rigozzi, *Arbitrage international*, 2nd ed, 2010, p 536 N 666.
- (5) Ground 5.1.
- (6) Ground 5.2, referring to ATF 119 II 386, Ground 1c; Supreme Court, 4A_604/2010, April 11 2011, Ground 2.2.2.
- (7) Ground 5.2.

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