

Independence of arbitrators in large international law firms

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Decision

Comment

In a recent decision, the Supreme Court had to deal with the independence of an arbitrator who was a lawyer in a large international law firm. It found that there was no indication of a conflict of interest and left undecided the question of whether a revision of an international arbitral award could be sought based on the subsequent discovery of grounds to challenge an arbitrator.⁽¹⁾

Facts

The dispute arose out of a contract for the construction and installation of a boat lift in Italy between the Dutch affiliate (Y) of a German group and an Italian company (X). After the final tests on the lift had been carried out, the lift cables broke and the platform crashed. X filed a request for arbitration before the International Chamber of Commerce (ICC), seeking damages from Y. The ICC appointed a Swiss lawyer from the Swiss office of the law firm A as a sole arbitrator. The final award found in favour of Y.

X sought the revision of the award before the Supreme Court because, after the time limit to challenge the award had expired, it discovered that the German office of the law firm A had advised a company belonging to the same group as Y. According to X, the connection between the law firm A and a company belonging to the same group as Y would have constituted a ground to challenge the arbitrator or the award had it been known during the proceedings or before expiration of the time limit to challenge the award, and thus justified the request for revision. Y disputed X's allegations and submitted that the alleged lack of impartiality or independence of an arbitrator did not as such constitute a ground for revision but only for challenge of the award. For his part, the arbitrator submitted that A was not an integrated law firm, the members of which would share the fees, but a mere network of independent law firms. The Supreme Court rejected the request for revision.

Decision

The Supreme Court first recalled that there are no provisions on the revision of arbitral awards in the International Private Law Act, and that Article 123 of the Federal Tribunal Statute applies by analogy.⁽²⁾ Since X relied on Article 121(a) of the Federal Tribunal Statute, which provides that the revision of a Supreme Court decision can be sought if the provisions on the composition of the tribunal or recusal have not been complied with, the Supreme Court had to deal with the question of whether that provision also applied by analogy to arbitral awards. After stating that the possibility for a party to raise the arbitrator's lack of impartiality and independence after the issuance of the award in challenge and *exequatur* proceedings did not appear to be a sufficient remedy, the Supreme Court held⁽³⁾ that the revision of the award seemed to be the only effective remedy in certain circumstances:

"the preceding analysis would demonstrate the necessity to admit that the discovery, after the expiration of the time limit to challenge an international arbitral award, of a ground that would have required the recusal of a sole arbitrator or of one of the members of the

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arbitral tribunal can lead towards the filing, before the Supreme Court, of a request for revision of that award, provided that the applicant could not have discovered the ground for recusal during the arbitration proceeding by using the degree of care required by the circumstances".(4)

However, the Supreme Court refrained from rendering a final decision on this issue because X's request for revision had to be denied for other reasons. The Supreme Court indicated that this point would best be dealt with by the legislature in the context of the envisaged revision of Chapter 12 of the International Private Law Act.(5)

On the merits of the request, X argued that the fact that "the sole arbitrator's law firm" had advised an affiliate of Y and obtained substantial revenues in relation thereto should have led to the sole arbitrator's recusal pursuant to the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration.(6) The Supreme Court rejected this argument because it was not established that "the different lawyers working with A had to be considered members of one and the same law firm". According to the Supreme Court, A was a network of independent law firms which did not share their fees, so that the guidelines relied on by X had no relevance in this case.(7) Further, according to the Supreme Court, the circumstances of the case were not of such gravity as to render the award "incompatible with the sense of justice and equity" because there was no indication of any bias against X during the proceedings (subjective impartiality) and the connection between the arbitrator and Y's affiliate was very tenuous (objective impartiality).(8) Regarding the objective impartiality, the Supreme Court emphasised that the member firms of the network were independent legal entities with no financial integration. It further noted that the party to the arbitration and the affiliate had no specific relationship and were members of a group composed of more than 300 legal entities.(9)

Comment

The decision is interesting on two accounts: first, the issue of whether a ground of challenge of an arbitrator is a ground of revision of an award, and second, the interaction between an arbitrator's independence and arbitrator's membership in a multinational and multi-office law firm.

Regarding the issue of independence and revision, the Supreme Court refrained from deciding whether the subsequent discovery of grounds to challenge an arbitrator constitutes a ground for revision of the arbitral award. While it considered that the issue should be decided in the context of the ongoing revision of the Swiss arbitration code (Private International Private Law Act, Chapter XII), the Supreme Court strongly suggested that lawmakers consider that such subsequent delivery be a ground for revision.

Regarding the second issue, the Supreme Court recalled its line of decisions according to which the IBA Rules on Conflict of Interest have no statutory effects but may be compared to the rules of ethics that construe and clarify the professional rules.(10) As a consequence, the finding in a particular case that the IBA rules tests are complied with is only an indication that may be taken into consideration in the assessment of arbitrator's independence in a specific case. It is not the end of such assessment. The latter more broadly requires analysing, in the specific circumstances of the case, whether the arbitrator in question fulfilled the requirements of subjective impartiality (no bias) and objective impartiality (independence).

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Endnotes

(1) Supreme Court, 4A_386/2015, September 7 2016 (in French).

(2) Ground 2.1.

(3) Ground 2.3.4.

(4) Ground 2.3.5.

(5) Ground 2.3.5.

(6) Ground 3.2.1.

(7) Ground 3.3.1.

(8) Ground 3.3.3.

(9) Ground 3.3.3.

(10) Ground 3.1.2.

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