Supreme Court provides useful considerations for challenge proceedings

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Facts

Decision

In a recently published decision, the Supreme Court rejected a challenge against a partial award for an alleged violation of the right to be heard and incompatibility with substantive public policy.\(^{(1)}\)

**Facts**

The case pertained to a contract under which an Austrian company was to supply railway machinery to a Russian company. Further to alleged delays in the delivery of the machinery, the Russian company terminated the contract and started arbitration proceedings under the arbitration rules of the United Nations Commission on International Trade Law against the Austrian company in Zurich. In a partial award, the arbitral tribunal:

- found the termination invalid;
- rejected the Russian company’s claims; and
- deferred its decisions on the Austrian company’s counterclaims.

The Russian company challenged this partial award before the Supreme Court based on an alleged violation of the right to be heard and incompatibility with substantive public policy.

**Decision**

The Supreme Court rejected the challenge on the grounds that the Russian company had not established the asserted violation and incompatibility. In its reasoning, the court made a number of considerations, which practitioners should bear in mind when challenging an arbitral award. These may be summarised as follows:

- A challenge can be brought only against arbitral awards, as opposed to procedural orders. Such awards can be final (ie, awards that end a dispute), partial (ie, awards that end part of a dispute) and preliminary or interim\(^{(2)}\) (ie, awards that deal with one or more preliminary questions, whether of procedural or substantive nature). Parts of an award that defer the arbitral tribunal’s decisions on counterclaims and on arbitration costs until a further decision cannot be challenged.\(^{(3)}\)
- The requirement to state grounds in the challenge is not met if a party merely refers the Supreme Court to the factual allegations and exhibits contained in the briefs served in the arbitration proceeding. Further, a party cannot use the reply brief in the challenge proceedings to raise new grounds or complete an insufficient motivation.\(^{(4)}\)
- A party relying on an alleged inadvertence of the arbitral tribunal must establish such inadvertence and also that the elements of fact, of proof or of law that it has regularly submitted but have been ignored by the arbitral tribunal were likely to have an impact on the outcome of the dispute.\(^{(5)}\)
- The arbitral tribunal has no duty *sua sponte* to identify in the file any relevant evidence of a step (a notice in the present case) that its purported author does not even allege to have carried out.\(^{(6)}\)
If the arbitral tribunal relies on various (alternative) grounds in support of its decision, the plaintiff must challenge all such grounds, failing which its challenge is inadmissible.  

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Endnotes

(1) Supreme Court, 4A_491/2017, 24 May 2018 (in French).

(2) Pursuant to Article 190(3) of the Private International Law Act, preliminary or interim awards are subject to an immediate challenge within 30 days from their notification on the grounds of irregular composition of the arbitral tribunal (Article 190(2)(a) of the Private International Law Act) and wrongful acceptance of jurisdiction (Article 190(2)(b) of the Private International Law Act).

(3) Ground 2 – the Supreme Court noted that in the present case the plaintiff had raised neither of the two grounds that allow an immediate challenge (ie, irregular composition of the arbitral tribunal and wrongful acceptance of jurisdiction) against the arbitral tribunal’s decisions regarding the counterclaims.

(4) Ground 3.

(5) Grounds 4.1.2 and 4.1.3.

(6) Ground 4.2.4.

(7) Ground 4.2.4.

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