

Supreme Court reconfirms requirements for appointment of independent tribunal expert

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Facts

Decision

Comment

In a recently published decision, the Supreme Court rejected a challenge on the basis that the arbitral tribunal's refusal to appoint a tribunal expert was not a violation of the applicant's right to be heard.⁽¹⁾

Facts

In connection with four tourism projects, the company X started International Chamber of Commerce (ICC) arbitration proceedings against the state Z in Geneva. The arbitral tribunal issued the following decisions:

- a preliminary award, in which it rejected a number of exceptions raised by Z, including on jurisdiction;
- a prejudicial award, in which it found that Z was liable for the non-performance of two out of the four tourism projects; and
- a final award, in which the president of the arbitral tribunal essentially rejected the parties' quantum claims based on Article 25(1) of the ICC Rules (the co-arbitrators issued dissenting opinions).

X challenged the final award before the Supreme Court, invoking a violation of its right to be heard.

Decision

According to X, the arbitral tribunal had violated its right to be heard by refusing to order an independent expert report to establish its loss of profit, which it assessed to be in excess of \$300 million.

The Supreme Court reconfirmed the parties' right to request an expert report in international arbitration proceedings and the conditions to obtain such an expert report,⁽²⁾ namely:

- an express request by a party;
- compliance with the agreed form and timeliness;
- advance of costs paid by the requesting party; and
- relevance of the facts for the award, as well as the suitability and necessity of the expert report to prove those facts, which will be the case only if, on the one hand, the facts are of a technical nature or need special knowledge and, on the other hand, the arbitrators do not have this knowledge.

Since the relevance of the facts to be established is a condition to the right to an expert report:

"the judge seized with a request for annulment for the denial of a request for an expert report, will thus have to look at whether the taking of this means of evidence could have led

AUTHORS

[Frank Spoorenberg](#)



[Daniela Franchini](#)



to a different award, thus deal with questions both of assessment and merits. However, since pursuant to Article 190(2)(e) of the Private International Law Act the state judge can only verify the assessment of evidence, the application of the law and the solution given to the dispute by the arbitral tribunal under the limited point of view of public policy, he will only be able, in most cases, to exercise a limited control regarding the violation of the right to adduce evidence, even if the law makes it a full ground for challenge."(3)

Further:

"the arbitral tribunal can refuse to take evidence without violating the right to be heard if the evidence is unfit to support a conviction, if the fact to be proved is already established, if it is objectively without pertinence, or also if the tribunal reaches the conclusion by way of an anticipated assessment of the evidence that its decision is already made, and that the result of the evidence submitted can no longer alter it."(4)

Applying these principles to the case at hand, the Supreme Court found that:

- while X had requested an expert report, on certain occasions it had also requested the arbitral tribunal to decide the case as it stood;
- it was insufficient for X to rely on the fact that the parties had jointly requested an expert report because other requirements must be met for an expert report to be ordered for reasons of procedural economy;
- X had not sufficiently established the relevance of the facts to be proven and explained what the object of the expert report would have been; and
- X could not establish that the purported "gross, wrong and arbitrary" advanced assessment of evidence was incompatible with public policy.(5)

In any event, according to the Supreme Court, the arbitral tribunal did not make an advanced assessment of evidence but simply found that X's request for an expert report had not been made in the appropriate form because it was not accompanied by the documentary evidence indispensable to the expert's mission. For these reasons, the Supreme Court rejected the challenge.(6)

Comment

The Supreme Court followed its well-established practice that the parties' right to be heard in adversarial proceedings includes the right to appoint an independent tribunal expert, subject, however, to rather strict requirements. This right is without prejudice to the arbitral tribunal's latitude to reject the request for such an appointment if an anticipated assessment of evidence shows that expert evidence is unnecessary. This decision also emphasises the importance of the formal requirements that an arbitral tribunal may expect from a request for an expert appointment, failing which, the request may be dismissed with no right to be heard issue (in this case, the requesting party had not produced the documentary evidence indispensable to the expert's mission together with its request).

With respect to the annulment proceedings and grounds for annulment, this decision seems to express limitations to the formal nature of the right to be heard in adversarial proceedings, at least in respect of the right to adduce evidence. Pursuant to this formal nature, a violation of the right to be heard is a ground for the annulment of the award regardless of whether the outcome of the case would have been different if the violation had not occurred. However, in this decision, the Supreme Court said that it would examine an alleged violation of such a right only if the requested an expert report would have had an impact on the arbitral tribunal's decision.

For further information on this topic please contact [Frank Spoorenberg](#) or [Daniela Franchini](#) at Tavernier Tschanz by telephone (+41 22 704 3700) or email (spoorenberg@taverniertschanz.com or franchini@taverniertschanz.com). The Tavernier Tschanz website can be accessed at www.taverniertschanz.com.

Endnotes

(1) Supreme Court, 4A_277/2017, August 28 2017 (in French).

(2) Ground 3.1.

(3) *Id.*, referring to Supreme Court, 4P.115/2003, October 16 2003, Ground 4.2.

(4) *Id.*, referring to ATF 142 III 360, Ground 4.1.1.

(5) Ground 3.3.

(6) *Id.*

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