Arbitral tribunal's reliance on contractual interpretation by previous tribunal not surprising (Swiss Supreme Court)

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In *Decision 4A_628/2019*, the Swiss Supreme Court rejected an application to set aside an award based on an alleged violation of a party's right to be heard. It held that an arbitral tribunal's adoption of a contractual interpretation made by a previous arbitral tribunal, which was deciding on the same contract between the same parties, was not surprising.

In a recently published judgment, the Swiss Supreme Court rejected an application to set aside an award based on an alleged violation of a party's right to be heard. It held that an arbitral tribunal's adoption of a contractual interpretation by a previous arbitral tribunal, which was deciding on the same contract between the same parties, was not surprising.

A dispute concerning a joint venture between two parties regarding the Turkish electricity market led to two consecutive but independent arbitrations. In both proceedings, the tribunals had to interpret a contractual compensation mechanism in a share purchase agreement. In the second arbitration, the tribunal relied on the first tribunal's interpretation.

Before the Supreme Court, the appellant argued, among other things, that the second tribunal's reliance on the first tribunal's interpretation was surprising, given that the contractual compensation mechanism was no longer disputed and that the tribunal overlooked material differences between the two arbitrations.

The Supreme Court rejected these arguments and pointed out that the second tribunal had invited the parties to comment on the first tribunal's interpretation of the disputed clause. According to the court, it was obvious and not at all surprising that the second tribunal would resort to the interpretation of the previous tribunal. Therefore, a violation of the appellant's right to be heard was ruled out. Additionally, the Supreme Court rejected all arguments on the grounds of a violation of the right to be heard that would have effectively led to a review of the merits of the case.

Based on the present decision, if the same issues are at stake during an arbitration as were discussed in previous proceedings, parties should actively address, in front of the arbitral tribunal, whether it should follow the findings of a previous tribunal. The decision also serves as a reminder of the strict application of formal rules in proceedings before the Supreme Court. Here, a submission that was submitted by email was not taken into account, since it was not signed with a qualified electronic signature, as required by Swiss law to be admissible.

Case: *Decision 4A 628/2018 (19 June 2019)* (Swiss Supreme Court).

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