

Swiss Supreme Court dismisses set aside application confirming restrictive approach to doctrine of "surprise effect"

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

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In *Decision 4A_374/2021*, the Swiss Supreme Court dismissed an application to set aside an award, confirming its case law and restrictive approach to the doctrine of "surprise effect" under the plea of the right to be heard, and the scope of the prohibition of deciding *ultra petita* as grounds for annulment of an award.

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In a recent French-language decision, the Swiss Supreme Court dismissed an application to set aside an award based on alleged violations of the right to be heard and the prohibition to rule *ultra petita* (beyond the matters submitted to the tribunal).

The underlying dispute concerned payments made to the general manager of a Swiss company under an agreement between the Swiss company, one of its shareholders and one of its subsidiaries (claimants), on the one hand, and the general manager (respondent) on the other. After the respondent was found to have granted himself personal financial advantages to the detriment of the company, the claimants initiated arbitration proceedings requesting the payment of over EUR11 million, an amount corresponding to the fees paid to the respondent under the agreement.

The arbitral tribunal considered that, despite the respondent's contractual violations, his right to remuneration subsisted, but should be reduced. Therefore, the respondent was ordered to reimburse the claimants almost EUR3 million, equalling 25% of the fees he received under the agreement. The respondent challenged the award.

Alleging a breach of due process (*Article 190 (2)(d), PILA*), the respondent complained that the tribunal based its decision on "surprising" (meaning unforeseeable) grounds, by favouring a criterion that the parties had not focused on in the arbitration in order to determine the reduction of the fees. The court dismissed the respondent's argument, stating that the reduction of fees had been at the heart of the dispute and that it was not "surprising" that the tribunal attached importance to all of the elements that were relevant in order to determine the amount of the reduction.

As a second ground, the respondent alleged a violation of the *ultra petita* principle (*Article 190 (2)(c), PILA*), saying that the tribunal had ordered a partial reduction of the fees, whereas the claimants had requested a full reimbursement. The court held that the tribunal had not gone beyond the framework set in the claimants' prayers for relief by awarding them 25% of the sum they had claimed. Therefore, the tribunal had not ruled "beyond" what the claimants had requested.

This decision confirms the restrictive approach of the Supreme Court when it comes to the so-called "surprise effect" doctrine, underlining that a tribunal basing the award on another legal argument than the one the parties focused on does not justify setting the award aside.

Case: *Decision 4A_374/2021 (Swiss Supreme Court) (23 November 2021)*.

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