

No unconditional right to reply to written submissions in arbitration (Swiss Supreme Court)

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

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In *Decision 4A_277/2021*, the Swiss Supreme Court dismissed an application to set aside a Swiss Arbitration Centre (formerly SCAI) domestic arbitration award, submitted, among other things, on the ground that the arbitral tribunal had refused to grant leave to reply to the other party's post-hearing brief.

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In a recently published French-language decision, the Swiss Supreme Court rejected a motion to set aside a domestic Swiss Arbitration Centre award submitted, among other things, under article 393(d) of the Code of Civil Procedure, which allows parties to challenge awards that violate their right to be heard in adversarial proceedings. This provision mirrors article 190(2)(d) of the Swiss Private International Law Act applicable to international arbitration.

A dispute arose in relation to a construction contract and the contractor initiated Swiss Rules arbitration at the Swiss Arbitration Centre in Lausanne. The employer raised counterclaims. In the award, the sole arbitrator ordered that most of the claims and counterclaims be offset against each other and ordered the contractor to reimburse part of the employer's legal expenses and costs of the arbitration.

The contractor challenged the award arguing, among other things, that its right to be heard in adversarial proceedings had been violated when the sole arbitrator denied its request to file a reply to the employer's simultaneous post-hearing submission.

The contractor contended that the sole arbitrator's decision breached the contractor's "unconditional right to reply" pursuant to articles 6 ECHR and 29(2) of the Swiss Constitution. Recalling its case law (Decision 142 III 360, paras. 4.1.1 and 4.1.2 (26 April 2016) discussed in *Legal update, Enforcing parties' agreement to one round of written submissions does not violate right to be heard (Swiss Supreme Court)*), the court underlined that the right to be heard in adversarial proceedings, far from being unlimited, is subject to significant restrictions in arbitration proceedings, as opposed to court proceedings. In particular, the court emphasised that the parties have no absolute right to a second round of written submissions and to an unconditional right to reply. The court noted that simultaneous post-hearing submissions, without the possibility to file replies, do not run counter to the parties' right to be heard (Decision 4P.104/2004 para 5.3.1 (18 October 2004)). Therefore, the court rejected the contractor's argument.

Finally, the court noted that, in its post-hearing brief, the employer had not invoked any new elements that might have surprised the contractor and justified the possibility to file a reply.

This decision shows that while the unconditional right to reply applies without limitation in court proceedings regardless of the novelty and relevance of the arguments contained in a submission, that principle cannot be transposed into arbitration proceedings.

Case: *Decision 4A_277/2021 (Swiss Supreme Court) (21 December 2021)*.

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