

Swiss Supreme Court reiterates its limited scope of review of tribunal's factual findings

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In *Decision 4A_74/2019*, the Swiss Supreme Court rejected an application to set aside an international award for violation of the right to be heard or the principle of equal treatment. Among other issues the petitioners put forward, the tribunal had ordered a witness to testify who had not submitted a written witness statement, while refusing to call a witness who the petitioners wanted to question.

In a recently published German-language decision, the Swiss Supreme Court rejected an application to set aside an international award, holding that the petitioners could not establish a violation of their right to be heard, or the principle of equal treatment (*Article 190(2) PILA*).

The petitioners had applied to the Supreme Court to set aside the award on those grounds due to, among other things, the tribunal's decision to call the counterparty's witness (G), who had not submitted a written witness statement, while failing to call another witness (F), who had submitted a letter and whom the petitioners wished to cross-examine.

The Supreme Court first reiterated that it may only review the factual findings of a contested award if admissible objections within the meaning of Article 190(2) of the PILA are raised.

Applying these standards, the Supreme Court held, among other things, that the petitioners' right to be heard and the principle of equal treatment had not been infringed by the tribunal's decision to call G but not F since, based on paragraph 35 of Procedural Order No. 1, the tribunal "may order a witness to give testimony at the hearing if such testimony is relevant to the case and material to its outcome". By contesting the tribunal's decision to call G, the petitioners were, in fact, contesting the tribunal's application of this procedural rule, which is not a ground for setting aside an award.

As to the petitioners' further complaint that they could not have sufficiently prepared themselves for the cross-examination of G, due to the lack of a written statement, the Supreme Court noted, first, that the petitioners had not raised such an objection during the hearing itself and, second, that it was sufficient that both parties were given a short break during the hearing to prepare for cross-examinations.

This decision shows that it is important for a tribunal to establish procedural rules in advance of the hearing, providing for the possibility to call witnesses of its own accord (if this is not already provided for in the applicable institutional rules). Also, it deals with the issue of how much time must be granted to a party to prepare for cross-examination. In this particular case, even a very short time did not violate due process.

Case: *Decision 4A_74/2019 (31 July 2019)* (Swiss Supreme Court).

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