

Swiss Supreme Court confirms it cannot review tribunal's factual findings

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

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In *Decision 4A_324/2020*, the Swiss Supreme Court dismissed an application to set aside an arbitral award for an alleged violation of substantive public policy. The Supreme Court found that it was bound by the factual findings of the tribunal as to the intention of the parties to enter into a simulated contract and that the applicant had acted in bad faith by raising a new argument not relied on in the arbitration.

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In a recently published French-language decision, the Swiss Supreme Court dismissed an application to set aside an award based on an alleged violation of substantive public policy. The court found that it was bound by the factual findings of the arbitral tribunal and that the applicant had acted in bad faith, which precluded it from relying on public policy grounds in the setting-aside proceedings.

The dispute arose in connection with an agreement for the sale of B's shares in company C to A (SPA). At an unknown point in time, A and B concluded a declaration of trust (Fiduciary Contract), according to which B was still the owner of the shares and A was to hold the shares only as B's nominee. Subsequently, B demanded the return of the shares, but A refused, prompting B to initiate arbitration proceedings against A. The tribunal rendered an award in which it declared the SPA null and void, and the Fiduciary Contract valid and ordered A to return the shares to B.

A filed an application to set aside the award before the Swiss Supreme Court alleging a violation of substantive public policy (*article 190(2)(e), Swiss Private International Law Act*), arguing that the Fiduciary Contract was illicit as it had purportedly been used as a simulated contract to conceal the shares' ownership and was therefore null and void.

The court first recalled that it cannot review the factual findings of the arbitral tribunal, namely in this case that it was the parties' actual intention to simulate the SPA and to conceal the Fiduciary Contract.

The court further considered that, because A had not alleged in the arbitration that the Fiduciary Contract was null and void, it was acting in bad faith by raising this new argument in the set-aside proceedings and was precluded from invoking a violation of substantive public policy on that basis.

This decision serves as a further confirmation that the Supreme Court cannot review findings of an arbitral tribunal as to the common intention of the parties, as they are factual findings, and highlights the importance that the court attaches to the principle of (procedural) good faith.

Case: *Decision 4A_324/2020 (18 September 2020)*.

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