Notification of incomplete award may still trigger time limit to appeal award (Swiss Supreme Court)

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In *Decision 4A_264/2019*, the Swiss Supreme Court declared an application to set aside an allegedly incomplete and unsigned International Chamber of Commerce (ICC) award inadmissible because it failed to meet the statutory time limit to appeal. It did so on the constitutional principle of good faith.

Speedread

In a recently published German-language decision, the Swiss Supreme Court declared an application to set aside an allegedly incomplete and unsigned International Chamber of Commerce (ICC) award inadmissible, as the statutory 30-day time limit to challenge the award had elapsed. The court rejected the appellant's allegation that the notification of an incomplete and unsigned award does not trigger the statutory time-limit to challenge the award before the Supreme Court.

The underlying dispute arose in connection with a contract for the construction of a production plant. On 22 October 2018, the ICC sent a courtesy digital copy of the award to the parties. One day later, the appellant received the hardcopy of the award, which had been served by courier, in accordance with the ICC Rules. However, according to the appellant, the hardcopy was incomplete, with several pages missing, including dispositive parts of the decision and the signature page.

On 29 May 2019, the appellant challenged the award before the Supreme Court on the grounds that it had not been served in accordance with Article 100(1) of the Swiss Supreme Court Act (SCA). In its view, the notification of an incomplete and unsigned award is null and void, and therefore, the time limit to file the setting aside application should not be triggered until a new award has been properly served.

The Supreme Court declared the appellant's request inadmissible. It held that the principle of good faith in Article 5(3) of the Swiss Federal Constitution, which is applicable to arbitration, obliges a party to report any procedural error to any public authority with no delay. Due to the fact that the appellant failed to notify the ICC about the incompleteness of the award immediately on receipt of the copy, it forfeited its right to a new notification in the sense of Article 100(1) of the SCA. Therefore, while a timely request for additional notification of the award might have been considered the triggering event for the statutory 30-day time-limit, the fact that the appellant failed to request additional notification in a timely manner meant that the time-limit to challenge the award had elapsed.

Interestingly, the Supreme Court relied on Article 5(3), which applies to the relationship between an individual and a public administration, to conclude that the appellant had failed to comply with the

good faith principle in its relationship with the ICC, a private entity. (*Decision 4A_264/2019 (16 October 2019).*)

Background

Article 100(1) of the Swiss Supreme Court Act (SCA) determines that "[a]n appeal against a decision must be filed with the Federal Supreme Court within 30 days of the notification of a complete copy [of the decision]".

According to Article 77(2) of the SCA, Article 100(1) SCA also applies to the setting aside application against an award rendered in Switzerland.

In *Decision 4A_40/2018* dated 26 September 2018, the Supreme Court held that that the 30-day time limit under Article 100 of the SCA to challenge an award commences with the notification of the signed original arbitral award and not with the advance courtesy electronic copy sent by the ICC (see *Legal update, 30-day time limit to challenge ICC award commences with notification of signed original award (Swiss Supreme Court)*).

Good faith is considered an overarching principle of Swiss substantive and procedural law. Article 5(3) of the Swiss Federal Constitution sets out that "[S]tate institutions and private persons shall act in good faith". The Swiss Supreme Court has ruled that this article binds private persons in their dealings with public authorities (*Behörden*). More specifically, the court's case law requires procedural objections to be raised as early as possible; asserting such defects only at a later stage of the relevant proceedings will be contrary to good faith (*Swiss Supreme Court DFT 143 V 66, at 43, page 69*).

In its previous case law, the Supreme Court also decided that the principle of good faith applies to international arbitration seated in Switzerland and that any procedural objection has to be raised as soon as possible (*Swiss Supreme Court, DFT 130 III 66, at 4.3, page 75*).

Facts

On 29 May 2012, a company incorporated in Azerbaijan (appellant) entered into a contract with a company incorporated in the People's Republic of China (B Ltd), for the construction of a clinker-brick production plant.

On 10 May 2016, B Ltd filed for arbitration with the International Chamber of Commerce (ICC), claiming outstanding payment obligations allegedly owed by the appellant. On a joint nomination by the parties, the ICC Court confirmed the appointment of the sole arbitrator. The arbitrator rendered the final award on 17 October 2018, ordering the appellant to pay B Ltd over USD1.6 million, plus interest.

Pursuant to Article 34(1) of *the ICC Rules 2012*, the ICC served the award by courier, which the appellant received on 23 October 2018. One day before, on 22 October 2018, the ICC had sent the parties a courtesy digital copy of the award by email. The appellant filed a request for interpretation of the award in accordance with Article 35 of the ICC Rule 2012, which was rejected by the tribunal on 21 March 2019. On 29 May 2019, the appellant lodged the application to set aside the award with the Swiss Supreme Court.

The appellant alleged that at some point in time it realised that the hardcopy award served by the ICC by courier was incomplete, with several pages missing, including dispositive parts of the award and the signature page. However, it was not until 8 April 2019, that the appellant notified the ICC of the purportedly missing pages and requested

a complete new copy of the award. The appellant explained that its lack of immediate reaction was due to the fact that its counsel had reviewed and studied the electronic courtesy copy of the award when it prepared the request for interpretation that was filed with the arbitral tribunal.

The appellant requested that the Supreme Court declare the award null and void and remit the award to the ICC and the sole arbitrator for revision so that it could issue a new award. According to the appellant, the fact that it had not been served with a complete award resulted in it being null and void. In consequence, the time limit for filing the appeal had not yet been triggered.

Decision

The Supreme Court declared the appellant's request inadmissible. Based on the constitutional principle of good faith, which is set out in Article 5(3) of the Swiss Federal Constitution, it held that parties to arbitration have a duty to immediately report any procedural error and, if they fail to do so, they forfeit any right to complain against such error at a later stage. The Supreme Court further stated that a party may not expect protection in relation to an error of a public authority, for example, lack of legal notice, where the party could have identified such error by paying due attention to it.

In the case at hand, the Supreme Court held that the appellant was not only in a position, but also obliged, to report the alleged lack of completeness to the ICC immediately on receipt of the incomplete award and to request a complete copy thereof. The Supreme Court held that the appellant was aware that an award had been rendered and knew about the ICC's intention to notify it to the parties. In addition, the appellant was familiar with the content of the award by way of the courtesy copy and should have realised, by simply paying due attention to the hardcopy sent by courier, that some of the pages were missing. By failing to immediately notify the ICC about its error, the appellant forfeited its right to a new and proper notification within the meaning of Article 100(1) of the SCA. Accordingly, the time period to lodge the application to set aside had elapsed. While a timely request for additional notification of the award might have been considered the triggering event for the 30-day notification period, the fact the appellant had failed to request additional notification in a timely manner meant that the time-limit to challenge the award had elapsed.

Comment

Interestingly, the Supreme Court relied on Article 5(3) of the Swiss Federal Constitution, which applies to the relationship between an individual and the public administration, to conclude that the appellant had failed to comply with the good faith principle in its relationship with the ICC, which is a private entity. The Supreme Court has previously applied this article in cases where private parties were involved, but always in their dealings with a public authority (*Behörde*). Against this background, in this case the Supreme Court seems to consider the ICC as a public authority, which is rather surprising.

What seems equally surprising is that the Supreme Court did not address the appellant's main allegation, which was that the notification of an incomplete award renders the award null and void (and not subject to appeal) and therefore, the time-limit to appeal could not be triggered. So far, the Supreme Court has decided in one case that an award was not subject to appeal in such a case, but, in fact, null and void. Although this was a very singular and particular case, one might have expected that the Supreme Court would at least address this question, although it is unlikely that it would have changed the outcome (see joint *Decisions 4A_618/2015 and 4A_634/2015* dated 9 March 2016, discussed in *Legal update, Swiss Supreme Court declares two domestic "awards" null and void*).

Furthermore, the Supreme Court established an obligation on the notified party to take positive actions against a flawed notification. This raises some questions. When does this obligation arise? What is the scope of this obligation?

How far does the (soon-to-be) notified party have to go in order not to see its right to appeal vanish? In the case at hand it appears straightforward. But what if the respondent in the arbitration has not been served at all, but was informed by the tribunal that it was about to render an award? When should the respondent start enquiring whether a notification has already been sent out? It appears that in a different factual setting, the rule applied by the Supreme Court might prove difficult to follow.

On the other hand, it appears reasonable that the losing party cannot wait endlessly before filing an application for setting aside, when it knows that an award has been rendered, especially, as in this case, when it is already familiar with the content of the decision.

Finally, the Supreme Court confirmed its previous case-law that the courtesy electronic copy commonly shared with the parties before formal notification of the award has no bearing in terms of triggering the time period to appeal.

Case

Decision 4A_264/2019 (16 October 2019) (Swiss Supreme Court).

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