

# The right to a tribunal appointed expert

## Kluwer Arbitration Blog

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[Georg von Segesser \(von Segesser Law Offices\)](#)

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In a decision dated 14 June 2011 and published on 7 July 2011, the Swiss Federal Supreme Court dismissed an appeal to set aside an arbitral award holding that the right to the appointment of an expert by the tribunal is not violated where the respective request was not made in a timely manner and in proper form (4A\_617/2010).

### **Decision**

X (a Turkish company) and Y (a Polish company) were in dispute over the question of which party was responsible for the delays in the execution of the contractual work. The dispute was brought before an ICC tribunal seated in Zurich. With respect to the disputed question, each party submitted to the arbitral tribunal a technical expert report.

In an award of 30 September 2010, the arbitral tribunal dismissed X's claim. It partially granted Y's counterclaim and ordered X to pay to Y EUR 6,587,442.70. In the award, the arbitral tribunal dealt with the submitted expert reports and found the expert report submitted by Y more persuasive than X's expert report. It held X responsible for the delays in the execution of the contractual work.

X appealed against the award to the Swiss Federal Supreme Court. It argued that the arbitral tribunal, in its award, only dealt with the expert opinion submitted by Y thereby "completely suppressing" the expert opinion submitted by X. Moreover,

according to X, the arbitral tribunal should have appointed an expert to receive the technical expertise necessary for the assessment of the decision-relevant questions. By not doing so, the arbitral tribunal violated X's right to equal treatment and its right to be heard (Article 190(2)(d) PILA) as well as the public policy (Article 190(2)(e) PILA)\*.

The Supreme Court dismissed the appeal. It found X's complaint that the tribunal only dealt with the expert opinion submitted by Y and thereby "completely suppressed" the expert opinion submitted by X unfounded because, before the Supreme Court, X admitted that the arbitral tribunal on pages 96-114 of its award explained in detail why it did not follow the expert opinion submitted by X but gave preference to the opinion submitted by Y.

Also, in the arbitration, X submitted its comments on the expert report filed by Y without at the same time submitting a request that the tribunal appoint an expert to receive the technical expertise necessary for the assessment of the decision-relevant questions. Confirming its constant practice, the Supreme Court held that, if X, at that time, considered that its right to be heard or its right to equal treatment had been violated, it should have communicated its objection promptly.

## **Comment**

This decision touches on an interesting issue, namely, when is an arbitral tribunal obliged to appoint an expert. In the present case, the tribunal did not have to decide this question (the appeal was rejected because the appellant had not pursued this request in a timely manner during the arbitration).

However, it is worthwhile recalling that the position of the Supreme Court on this point is clear. The parties have a right to the appointment of an expert by the tribunal (such right being a part of their right to submit evidence and be heard) if the following preconditions are met: (i) the party who intends to rely on this right must have expressly requested the appointment of an expert; (ii) the request must be made in proper form and in a timely manner; (iii) if required by the tribunal, the requesting party must advance the costs of such expertise; (iv) the expert evidence must relate to facts relevant for rendering of the award; and (v) the expert evidence must be necessary and proper for proving such relevant facts.

This last precondition is met where the facts concern technical issues or matters which in some other way require special knowledge and cannot be proven

otherwise, and where the arbitrators do not have such special knowledge (decision 4P.320/1994 of 6 September 1996).

Where these preconditions are met, and unless its members possess the necessary technical or other special knowledge, an arbitral tribunal violates the right of the parties to be heard if it rejects a request for the appointment of a tribunal-appointed expert (decision 102 Ia 493, unpublished note 8; decision 4P.23/1991 of 25 May 1992 note 5b).

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\* Article 190(2) of the Swiss Federal Statute on Private International Law (PILA) permits a final award to be set aside for a limited number of reasons. Under Article 190(2)(d) PILA, an award can be set aside if the parties' right to equal treatment or their right to be heard was violated and, under Article 190(2)(e) PILA, an award can be set aside if it violates public policy.

Georg von Segesser / Petra Rihar