

Kluwer Arbitration Blog

Iura novit curia – the right to be heard (decision of the Swiss Federal Supreme Court as of 9 June 2009 – 4A_108/2009)

Georg von Segesser (von Segesser Law Offices) · Thursday, August 27th, 2009

In this case, the Swiss Federal Supreme Court decided that the right to be heard (art. 182 para. 3 of the Swiss Federal Act on International Private Law, “PILA”) does not encompass a right of the parties to be specifically heard with regard to the legal qualification of the facts they had introduced into the proceedings. However, an exception to this rule applies if the Arbitral tribunal intends to base its decision on legal grounds which the parties neither have invoked nor could reasonably anticipate as being relevant. In the case at hand, a Hungarian company had entered into a construction contract with a Swiss company for the modernization of an electro steel plant with a COSS-charging system. The first attempt to put the new system into operation failed and was followed by two further attempts. The Hungarian company declared avoidance of the contract, asked for repayment of the paid instalments and the removal of the charging system. The Swiss company refused to do so and subsequently introduced ICC arbitration proceedings against the Hungarian Company for payment of the outstanding purchase price of EUR 3’590’000.

By final award, the Arbitral Tribunal ordered the Hungarian Company to pay EUR 1’900’000 as well as the outstanding instalments of the purchase price because the Hungarian company was not entitled to avoid the contract according to the contractual terms. The Hungarian company challenged the award before the Swiss Federal Supreme Court on the grounds that the Arbitral Tribunal had wrongly relied on contractual terms and legal provisions that were not pleaded and whose application came as a surprise to the parties and consequently violated the parties’ right to be heard.

The Swiss Federal Supreme Court dismissed the action for annulment. In line with its longstanding jurisprudence regarding the application of the right to be heard, it held that this right does not encompass a right of the parties to be specifically heard with regard to the legal qualification of the facts if the facts were introduced by the parties into the proceedings. Only if the court intends to base its decision on legal grounds which the parties have not invoked and which they could reasonably not anticipate as being relevant, the Arbitral Tribunal shall give the parties an opportunity to express their views in that respect. On the merits, the Swiss Federal Supreme Court held that, under the contractual terms, the Hungarian company was barred from avoiding the construction contract since the Swiss company had been deprived of conducting performance tests. Avoidance as a remedy was only available after the tests of the new system had been completed. The Swiss Federal Supreme Court denied any surprise effect of the application of the contractual terms as the Swiss company had referred to the respective provisions several times, albeit indirectly by referring to the consequences of their application without mentioning explicitly the

contractual provisions themselves. Therefore, the Hungarian company would have had ample opportunity to respond to these arguments. In addition, the Swiss Federal Supreme Court stated that the Hungarian company, represented by experienced business lawyers, should have anticipated the application of contractual terms addressing the termination of the construction contract.

Beatrice Grob / Georg von Segesser


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The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with one figure in the center being magnified by a magnifying glass. The background is accented with horizontal lines in blue and green.

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