Kluwer Arbitration Blog

Calling a witness (too) late in the proceedings

Matthias Scherer (Editor in Chief, ASA Bulletin; LALIVE) · Thursday, September 15th, 2011

In its decision 4A_162/2011 of 20 July 2011, which was published on 2 September 2011, the Swiss Federal Supreme Court elaborated on the content of – and limits to – the right of parties to call witnesses.
The arbitration which gave rise to the decision was between the Jamaica Football Federation and its former coach, Bora Milutinovich (the published judgment is redacted, but the names of the parties have become public in the press). In 2006, the Federation had hired the coach for four years. In the wake of a change at the helm of the Federation, the coach's employment contract was terminated in 2007. Milutinovich brought a successful claim against the Federation for premature termination before the FIFA Player's Status Committee. The Committee found that there was no documentary proof for the Federation's position that the coach had breached his obligations under the contract and that such breach entitled the Federation to terminate the contract early.

The Federation appealed the award before the Court of Arbitration for Sport (CAS/TAS). In the TAS proceedings, the Federation asserted that the coach, among other alleged violations of the contract, had failed to fulfil his obligation to present a plan for the development of local football to the Federation's board of directors within six months of signing the contract.

On 30 June 2010, the arbitral tribunal invited the parties to identify all witnesses whose testimony they wished to adduce, and a witness hearing took place on 22 November 2010. The day after the hearing, the tribunal requested that the Federation produce minutes of the meetings of its board, and to take a position regarding certain newspaper reports. The Federation produced the minutes, its comments on the reports, as well as a number of witness statements. The coach was then invited to file comments. He did so on 14 December, and, in addition, asked that a second hearing be convened for a new witness, the former chairman of the Federation, to be heard. The arbitral tribunal did not accept the request for a second witness hearing. It ruled that under Rule R55 and R56 of the TAS Code, the new witness had been called too late, as he was not included in the list of witnesses filed be the coach on 30 June 2010. Moreover, under R56, after the request for appeal and the answer have been filed, parties can only adduce new evidence and factual arguments in exceptional circumstances. According to the arbitral tribunal, the coach had not demonstrated that such circumstances existed.

On 2 February 2011, the tribunal issued an award in the Federation's favour. The coach sought to set aside the award before the Swiss Federal Supreme Court pursuant to Art. 190(2)(d) of the Swiss Private International Law Act. He argued that the arbitral tribunal had violated its obligation of equal treatment of the parties by affording the Federation an opportunity to file new evidence

regarding the alleged breach of the employment contract while refusing to grant him the opportunity to file further evidence on the same topic by means of witness testimony.

The Supreme Court recalled its standing case law that the right to adduce evidence must be exercised in a timely manner and in the form required by the applicable procedural rules. It found that the coach's application to hear a new witness was made late under the applicable TAS Code, and therefore the arbitral tribunal was entitled to reject the application based on Rules 55 and 56 of the TAS Code. The rule of equal treatment does not provide a right to a second hearing for the purpose of adducing new witness evidence. The Court noted that the Federation had not been given carte blanche to introduce new evidence, but had only been requested to submit and comment on select documents. In turn, the coach had been authorized to submit his own comments and had availed himself of this opportunity. The arbitral tribunal was not obliged to accept any new evidence offered by the coach, let alone convene a hearing to hear a new witness.

Two points seemed to have been of particular importance to the Court. The first was the fact that the coach had not identified the witness by the deadline of 30 June 2010 imposed by the arbitral tribunal. The second was that the coach had not argued in his comments of 14 December 2010 that there were extraordinary circumstances as per Rule 56 TAS Code that justified the exceptional admission of new evidence through a new hearing. Consequently, the Court found no violation of the right to be heard, and refused to set the award aside.

The Court's reasoning is not entirely convincing. If an arbitral tribunal invites a party to produce documents, and hence evidence that it considers relevant and decisive, why should the other party be limited in its choice of rebuttal evidence? Why should a new hearing be excluded (it is also noteworthy that the Federation had itself apparently produced a series of witness statements with the new documents)? And why should a party be sanctioned for having failed to call a witness to rebut documents that were not yet part of the proceedings? The TAS Code does require that parties file all their evidence upfront and that after the submission of the appeal brief and the answer no new evidence is to be admitted "unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances". However, this provision, on its face, does not seem to have been drafted with the hypothesis of tribunal-ordered document production in mind, but rather with the aim to establish discipline in the parties' submissions. Even assuming that Rule 56 is applicable to such a situation, would a request for new evidence by the tribunal itself not constitute an exceptional circumstance?

The circumstances of the case may have been more complex than what was depicted by the published Supreme Court decision. While it is not apparent from the Court's decision, it is in particular possible that the documents which the tribunal requested to be produced addressed points that were already in contention when the parties were invited to identify their witnesses, and the coach could therefore have called the new witness already at that stage. It is also possible that the arbitrators anticipated that the witness' testimony would not be relevant. In any event, practitioners (counsel and arbitrators alike) would have welcomed a more elaborate discussion of the factual matrix of this case by the Supreme Court.

Many arbitral tribunals feel the urge at some stage in the proceedings, oftentimes during or right after a hearing, to call for documents that neither of the parties had produced (for example because the tribunal suspects that such documents might reveal illicit business practices). Such a request may not be problematic in itself, however the arbitral tribunal will have to carefully consider how the parties' right to be heard can be preserved, and how the award should address the new

documents. The same holds true if the tribunal allows a party to produce further evidence at a late stage in the proceeding.

This was illustrated by the recent annulment of an ICSID award as a result of a serious departure from a fundamental rule of procedure within the meaning of Art. 52(1)(d) of the ICSID Convention (Fraport AG v Republic of the Philippines, ICSID Case or ARB/03/25 (annulment proceedings), Decision of 23 December 2010). At a very late stage in the proceedings, the Philippines had filed a number of documents. After a few communications by the parties, the arbitral tribunal requested that the parties refrain from further submissions. In its award it relied on the new documents. The ad hoc Committee found that a party's right to be heard – consisting of the opportunity to adduce evidence and argument on its claim and in rebuttal of those of its opponents – constituted a fundamental rule of procedure. Accordingly, the arbitral tribunal must afford both parties the opportunity to make submissions if new evidence is received and considered by the tribunal to be relevant. In the Fraport v Philippines case, the arbitral tribunal had (in the ad hoc Committee's view) not afforded Fraport a sufficient opportunity to address the new documents.

Arbitral tribunals are not obliged to admit evidence that they consider irrelevant for the outcome of the arbitration. However, if the tribunal admits new evidence or submissions, whether solicited or unsolicited, it may be necessary to allow the opposing party to produce additional witness testimony in order to preserve its right to be heard. Indeed, depending on the situation, such witness testimony may be the only way – or the most effective way – for a party to respond to new evidence or submissions being considered by the tribunal. Therefore, while new witness testimony at a late stage in the proceedings will unavoidably slow down the proceedings, as a new hearing would likely be necessary, tribunals must carefully consider the ramifications for a party's right to be heard before refusing to admit such evidence. It should also be noted that the parties' right to equal treatment and their right to be heard are part of procedural public policy. Procedural rules contained in the rules of an arbitral institution or otherwise agreed by the parties cannot oust these fundamental rights.

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