

Kluwer Arbitration Blog

Swiss Federal Court Annuls Arbitration Award due to Violation of the Right to be Heard

Susan Field (Herbert Smith Freehills LLP) · Monday, October 7th, 2013 · Herbert Smith Freehills

In a recent decision of the Swiss First Civil Law Court (X._____ v. Y._____, 4A_669/2012), an arbitral award was annulled on the basis that the arbitrator had violated the appellant's right to be heard.

Although the decision applies Swiss Federal law, the decision is relevant to practitioners in other jurisdictions which allow for annulment of an arbitral award where a party's right to be heard is violated. For example, section 68 of the English Arbitration Act 1996 allows for challenge to an award on the basis of serious irregularity, which includes a failure by the tribunal to comply with its general duty to act fairly and impartially as between the parties or to deal with all the issues that were put to it. Similarly, an award may be set aside under article 34(2)(a)(iv) of the UNCITRAL Model Law if it is not in accordance with article 18, which provides that "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".

The Federal Tribunal decision confirms the procedural nature of the right to be heard. The court limited its investigation to whether the appellant's arguments had been duly considered by the arbitrator and was clear that there was no need to review the arbitrator's reasoning or decisions.

The decision also emphasises the importance of pleading arguments with sufficient specificity, particularly where fault is alleged in an Award. The Federal Tribunal rejected two of the appellant's arguments on the basis that they were not clear, and because the appellant had not identified where in the arbitral proceedings it had made the argument which the Tribunal was said to have overlooked.

Background

X entered into an agreement with V for the sale of nickel products, in the form of an Initial Letter. X and V then entered into a Framework Agreement with Y which transferred all V's rights under the Initial Letter to Y. The effective result was that the agreement for sale of X's nickel products was between X and Y.

The agreements anticipated that 2,400 metric tons of nickel product were to be delivered to England by X. Y was to pay the purchase price to X and to take and re-sell the product.

The Framework Agreement was governed by English law and provided for arbitration by a sole arbitrator seated in Zurich.

The arbitration proceedings

Y commenced arbitration proceedings against X for payment of damages. The claim was primarily for lost profits as a result of X's failure to supply the nickel product.

Y calculated its lost profits on the basis of the 2,400 metric tons of product anticipated in the Framework Agreement and the purchase price payable to X anticipated in the Initial Letter. It submitted that the Initial Letter set this purchase price at USD 30 per metric ton (pmt). Y set the unit price at which it would have resold the goods as USD 1,050 pmt. It also deducted assumed financial costs and a credit insurance premium, producing a claim for lost profits totalling USD 2,288,162.54.

X argued that Y had grossly overstated this amount, for a number of reasons.

The sole arbitrator made an award in favour of Y and ordered X to pay Y the sum of USD 1,800,000. He calculated the lost profits on a basis distinct from that proposed by Y. The arbitrator assumed a lower resale price of USD 750 pmt but accepted the purchase price of USD 30 pmt.

X appealed to the Swiss First Civil Law Court under the Federal Statute on International Private Law ("PILA"), requesting that the Federal Tribunal annul the Award on the basis that its right to be heard had been violated. X argued that in calculating the damages payable, the arbitrator did not address four of the main arguments submitted by X.

The right to be heard

Article 190(2)(d) of the PILA states that an award may be annulled "if the principle of equal treatment of the parties or the right of the parties to be heard was violated".

The Federal Tribunal observed that the right to be heard under PILA imposes upon the arbitrators a minimum duty to examine and address the pertinent issues.

The duty will be violated when "inadvertently or by misunderstanding, the arbitral tribunal does not take into account some statements of facts, arguments, evidence and offers of evidence submitted by one of the parties and important to the decision to be issued". However, the duty does not require the arbitrator to discuss all of the arguments advanced by the parties, to the extent that some arguments may not be dispositive. The duty will therefore only be violated where a potentially determinative issue has been ignored.

The right to be heard is a formal right – it is not for the court to assess the decisions taken by the arbitral tribunal, or to decide whether the tribunal should have upheld or rejected an argument if it had dealt with it. The court must not replace the arbitral tribunal's substantive reasoning with its own – if it determines that the applicant's right to be heard has been violated it must simply annul the award.

The decision of the Federal Tribunal

The Federal Tribunal found that the arbitrator had indeed violated X's right to be heard, but only in respect of one of X's four arguments. Nonetheless, this was sufficient to annul the whole award.

1. The price Y should have paid to X for the nickel products

The Federal Tribunal found that the arbitrator had overlooked significant submissions and expert evidence on the price which Y would have paid to X for the nickel products. The arbitrator had accepted Y's submission that the unit price payable to X under the Initial Letter was USD 30 pmt. In doing so, he had overlooked, without explanation, X's response that the Initial Letter only provided a base price, to which cutting, transportation and financial costs would necessarily have been added. This would have resulted in an actual price of USD 525 pmt.

Although Y proposed a possible mathematical basis on which the arbitrator might have made its decision, this could not account fully for the award ultimately made by the arbitrator.

The arbitrator had failed to address the issue and had not given any explanation for having overlooked it. Accordingly, the Federal Tribunal found that the arbitrator had indeed violated X's right to be heard under the PILA.

The Federal Tribunal went on to consider the remaining three arguments which had allegedly been overlooked. It found that the arbitrator's treatment of these arguments had not violated X's right to be heard.

2. The volume of sales Y could have made

X had argued that while the sales anticipated in the Initial Letter and Framework Agreement were based upon global supply and demand, production problems in Finland would have prevented delivery to that country. This would have reduced the volume of sales.

However, the Federal Tribunal found the grievance to be unfounded. This was because X had failed to sufficiently make out the argument and was also not specific as to the impact it would have had. Nor had X indicated with sufficient precision where and how it had submitted its argument to the arbitrator in the arbitration proceedings.

3. The unavailability of bank financing

X submitted that in the arbitral proceedings it had argued that Y could not have obtained bank financing until several months after the Framework Agreement came into force. The amount of sales, and profits, lost by Y should have been adjusted accordingly, yet the arbitrator did not examine the issue.

The Federal Tribunal held that, on the contrary, the arbitrator had dealt with the issue and had expressly acknowledged Y's response that alternative financing had been available. The arbitrator did take X's argument into account so there was no violation of X's right to be heard.

4. The commission payable under the participation agreement

Finally, X submitted that the arbitrator had not addressed its argument that, under a separate partnership agreement with A, Y was required to pay to a 38% commission on resale of the nickel products in England.

The Federal Tribunal was not persuaded that X's right to be heard had been violated in this respect. This was primarily because X had failed to explain the legal basis of the argument and did not indicate where or when it submitted the argument to the arbitrator. The Federal Tribunal also noted that the Award contained only an oblique reference to a 37% (not 38%) share of profit reserved to

A and X had not invited the arbitrator to clarify the issue.

The Federal Tribunal therefore granted X's appeal only in relation to its first argument. The Federal Tribunal recognised the possibility of annulling the Award in part where the issue successfully appealed is independent from those which have been rejected. As the appeal involved only a single claim, the Federal Tribunal annulled it in its entirety, though it noted that in any new award to be issued the only issue for re-examination would be X's first argument, as only in relation to this issue had its right to be heard been violated.

The decision confirms that the right to be heard is a procedural right, which is limited to ensuring that the parties' arguments have been duly considered. It also underlines the importance of pleading an alleged breach of this right, or any other fault in an Award, in clear terms.

By Craig Tevendale, Partner, Herbert Smith Freehills LLP and Susan Field, Associate, Herbert Smith Freehills LLP


To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).


Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



 Wolters Kluwer

This entry was posted on Monday, October 7th, 2013 at 10:00 am and is filed under [Due process](#), [Right to be heard](#), [Set aside an arbitral award](#), [Switzerland](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can skip to the end and leave a response. Pinging is currently not allowed.