Kluwer Arbitration Blog

Arbitration in Switzerland: Non-Swiss Parties Should Be Aware of the Arbitrator's Powers under the Swiss Principle of Jura Novit Curia

Georg von Segesser (von Segesser Law Offices) · Tuesday, September 15th, 2015

and Katherine Bell, Schellenberg Wittmer

In decision 4A_554/2014 dated 15 April 2015, the Swiss Federal Supreme Court considered an application to set aside an award on the ground of violation of the right to be heard where the sole arbitrator had based her award on a legal concept that had not been explicitly pleaded by the parties.

The case involved a dispute between French company A and US consulting firm B. The parties had entered into a contract according to which B was to provide general as well as project-based assistance to support A in obtaining large scale construction projects. The parties agreed to a contract term of one year. However, for the project-based assistance, a longer period could be agreed for each project. In such a case, the contract would be extended only for the assistance relating to that particular project.

At the end of the fixed one year term, A informed B that it did not intend to renew the contract but preferred to use B's services on an *ad hoc* basis. The parties continued their cooperation with regard to a certain project, for which A subsequently won the bid. A dispute arose when B requested payment of its fees (i.e. a certain percentage of the project). A refused to pay the fees, arguing that the contract had already expired and that B had not made a significant contribution to the project. Subsequently, B initiated ICC arbitration proceedings with seat in Geneva and French law as the applicable law.

The main legal issue of the proceedings was whether due to the parties' ongoing professional relationship, the contractual provisions regarding the project-based assistance remained applicable despite the expiry of the contract's initial term. In the award, the sole arbitrator relied on the French concept of "tacit renewal", which had not been invoked in the proceedings. The arbitrator observed that the parties' ongoing contact after the end of the contract term clearly demonstrated a common intent to continue the professional relationship, at least with regard to the project-based assistance. Therefore, the parties had agreed to enter into a new contract similar to the one that just ended. Consequently, the arbitrator found that B was entitled to the amount claimed.

Relying on Article 190(2)(d) PILA, A challenged the award before the Swiss Supreme Court, arguing that the arbitrator violated its right to be heard due to her "surprise" reliance on the concept

of “tacit renewal”. The petitioner’s French background may explain why it challenged the award. In France, the principle of due process known as *principe du contradictoire* implies that arbitrators cannot introduce any new factual or legal issues without inviting the parties to comment thereon. As a consequence, an award can be set aside when the arbitrator applied legal provisions ex officio without first submitting them to the parties.

However, under Swiss law, the determination of the law is the arbitrator’s duty and escapes the parties’ right to be heard. Consequently, the Swiss Supreme Court rejected A’s appeal and confirmed its longstanding case law, according to which the parties’ right to be heard primarily relates to the facts and not the law. This stems from the principle of *jura novit curia* (“the court knows the law”), according to which an arbitral tribunal seated in Switzerland can determine the legal provisions (even under foreign law) applicable to the dispute and can thus rely on other legal provisions than those submitted by the parties. This has important practical implications as a party cannot, in the course of the proceedings, rely on the right to be heard to comment on new legal theories introduced by one party as it could do with regard to new facts.

The only exception exists when the arbitrator’s application of the law comes as a surprise to the parties, i.e. when the parties could not have reasonably expected such application of the law. In such case, the arbitrator must give the parties the opportunity to comment, failing which the right to be heard is violated. However, the Supreme Court applies this exception very restrictively and annulments are scarce. Also in the present case, the Supreme Court found no surprise application of the law. It held that the parties could have reasonably expected the arbitrator to apply the concept of “tacit renewal”, given that (i) the only legal issue was whether the contractual provisions related to project-based assistance were applicable after the term of the contract, and under French law, there were only a few possible reasonings to answer this question, one of which was “tacit renewal”; (ii) as an international company which regularly enters into international contracts, A should have been familiar with legal questions pertaining to the termination of contracts; and (iii) tacit renewal had implicitly been addressed by B.

Regarding the relevant legal framework, A contended that as per the terms of reference, the arbitrator was obliged to comply with the exceptions *d’ordre public* under French law. The terms of reference contained the following provision: “The arbitral tribunal will apply the ICC Rules 2012 to the dispute while at the same time respecting the exceptions of public order provided under French law.” In A’s view, this constituted a procedural rule prohibiting any ex officio application of the law by the arbitrator. However, the Supreme Court clarified that when the arbitration is seated in Switzerland, the correct legal framework to assess the right to be heard is limited to Article 190(2)(d) PILA and the Supreme Court’s jurisprudence on the “surprise application of law”.

A further argued that when the parties agreed in the terms of reference to submit all legal material they relied upon, they in fact intended to limit the arbitrator’s review only to the legal rules invoked by the parties. As outlined by the Supreme Court, “parties have no right to be heard on the effect of the law to the extent that the arbitral agreement does not limit the tribunal’s mandate”. Applying this principle to the terms of reference, the Supreme Court found that it was not sufficiently clear from the wording that the parties had intended to limit the Swiss principle of *jura novit curia*.

Had it been clearer, the ground for challenge in this case would in any event have been either jurisdiction (Article 190(2)(b) PILA) or *ultra petita* (Article 190(2)(c) PILA), and not the right to

be heard.

It should be pointed out that the principle of *jura novit curia* is understood as a duty imposed on the arbitrator, not a mere option. If the arbitral tribunal is not convinced by the legal arguments introduced by the parties, it must use its own legal knowledge or carry out the appropriate research in order to apply the correct rule of law. However, failure to meet that obligation does not prompt any particular sanction as the incorrect application of the law is not a ground to set aside an award.

Finally, the decision is noteworthy because the Supreme Court expressly states that the parties may agree on the extent of the arbitral tribunal's power to raise legal issues *ex officio* and may limit its mandate to legal arguments submitted by the parties. This appears to answer in the negative the question previously left open by the Swiss Supreme Court, namely whether the principle of *jura novit curia* is part of Swiss procedural *ordre public* and as such mandatory for arbitral tribunals sitting in Switzerland. If the parties can waive the principle, it is obviously not mandatory and thus not part of public policy.

This entry was posted on Tuesday, September 15th, 2015 at 6:56 am and is filed under Applicable Law, Jura Novit Curia, 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.