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Awarding Beyond the Claims of The Parties: The Swiss Perspective

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Arbitral awards can be annulled on exhaustive grounds prescribed in the *lex arbitri*. Under UNCITRAL Model Law Art. 34/2/a/iii an award can be challenged, if arbitrators award differently than the submissions of the parties (*ultra* or *extra petita*). In a recent judgment, the Swiss Federal Supreme Court (hereafter "**SFSC**") partially annulled an ICC-award on *extra petita* (4A_294/2019), as the sole arbitrator awarded compensation despite the party's request for a declaratory judgment. Moreover, it has ruled a payment order, which was not claimed.[1)]

The Dispute and Award

The dispute arose out of a contract on the design, production, and delivery of armored vehicles between an Israeli company (herafter "**A**" or "**Claimant**") and two Turkish companies (hereafter "**B and C**" or "**Respondents**"). After several conflicts, A partially rescinded from the contract, initiated an ICC arbitration against B and C with a seat in Zurich. In its pleadings, A requested from the tribunal to declare that Respondents should compensate its damages stemming from their contractual breach. On the other hand, Respondents objected to the validity of A's rescission, filed claims for the compensation of their damages amounted to 8,5 Million USD, and for the restitution of the already paid contractual consideration amounted to 8,7 Million USD.

The tribunal rendered its award on 6 May 2019, in which it ruled *inter alia* that (1) Respondents shall compensate the Claimant in the amount of 1,6 Million USD due to contractual breach, (2) Respondents shall reimburse to the Claimant 1,2 Million USD (*Repayment of the surplus amount of Claimant's bank guarantee, from which Respondents' awarded damages are drawn down*), (3) Claimant shall repay Respondents the contractual consideration amounted to 6,5 Million USD. In sum, the tribunal awarded Respondents 3,7 Million USD.

The Decision of the Swiss Federal Supreme Court on Annulment

Following the issuance of the award, both Parties applied for its annulment. Upon Claimant's application, Respondents argued that Claimant lacks the legitimate interest to file a challenge –*which is a pre-condition for an appeal*-, as it was granted damages and therefore benefits from the

award. The SFSC found that A, who is seeking declaratory judgment, has a legitimate interest in applying for the annulment, as in case that the award for compensation takes *res judicata effect*, A will not be able to demand a higher amount by commencing future proceedings. Conversely, the Claimant could ask for higher compensation, if the arbitrator had ordered a declaratory ruling, as requested.

In the merits of their application, both parties contended that the award is *extra petita*, as it grants compensation despite the claim for a declaratory judgment. Respondents further argued that by setting off Respondents' damages from Claimant's bank guarantee and ordering Respondents to reimburse the remaining amount –*which is not demanded*-, the sole arbitrator decided *extra petita*. Subsequently, the SFSC accepted both objections and partially annulled the award.

The Background of the Legal Concept & Previous Judgments of the Swiss Federal Supreme Court

Under the Swiss Law, an arbitral award can be annulled, if one of the grounds counted within the Article 190/2 of the Swiss Private International Law Act (hereafter "SPILA") is met. The subparagraph C of the article lays down that an arbitral award can be set aside if the arbitrators decide beyond parties' submissions:

> "*The award may only be annulled:*
>
> *(….) c)* ***if the arbitral tribunal's decision went beyond the claims submitted to it*** *(…)"*
>
> However, if the award orders something beyond the arbitration agreement, the subparagraph B of the article will be applied, instead of the former:
>
> "*The award may only be annulled:*
>
> *(….) b) if the arbitral tribunal wrongly accepted or declined jurisdiction (…)*"

The restriction under Article 190/2/c SPILA –*which is referred to as the principle of ne ultra petita*– is an extension of parties' right to be heard. It aims to protect a party from an unexpected award beyond the submissions, to which it did not have the opportunity to respond and defend itself. The principle further intends to save a party from being awarded more than it has claimed, herewith respecting the party's right to dispose of its assets.

The rationale behind *ne ultra petita* is that arbitrators' jurisdiction is placed on parties' consent. Hence, they may only decide on matters, which are presented to them, *i.e.* their decision-making is limited to the latest version of parties' prayers (4A_464/2009) (*and not to the issues listed in the Terms of Reference*.[2)] Therefore, arbitrators are bound with and restrained from excessing, correcting parties' claims in the final version of their prayers.

The prohibition of excessing the claims of parties may come up when either (*i*) an award grants a party more than claimed *i.e. ultra petita* (*e.g.* "awarding interest although it was not claimed" (as in

4A_440/2010)) or (*ii*) arbitrators order another legal relief than requested *i.e. extra petita* (*e.g.* "refusing the claim for compensation and ordering specific performance").[3)]

Ne Ultra Petita and Jura Novit Curia

Nonetheless, *ne ultra petita* does not restrict arbitrators with parties' implementation of the law. The principle of *jura novit curia* ("*the judge/arbitrator knows the law*") compels arbitrators to determine the legal provisions applicable to the dispute, without being bound with parties' legal interpretation. Thus, considering both *principles*, arbitrators are independent when determining the relevant provisions of law, notwithstanding that they should remain within parties' prayer for relief. For instance, the award is not *extra petita* when despite the party's request for the annulment of the contract, arbitrators find that it is void.[4)] Further, arbitrators may order compensation despite the party's request for a pecuniary performance claim (4P. 260/2000), whereas *vice versa* would constitute *extra petita*. Likewise, in case that a party submits multiple claims, arbitrators may decide for some claims more than demanded, provided that the total awarded amount may not be higher than the one that the party has claimed (4P. 54/2006). Lastly, an award should be described as *extra petita*, if a party requests negative declaratory relief that the debt does not exist, but arbitrators not only declare that the debt exists, and they also order that party to pay it, although it was not claimed (4P.20/1991).

In line with these judgments, the SFSC summarizes that if arbitrators implement a different legal qualification, but order the same as or less than the party's claim, the award would not be *extra petita* (4A_404/2017). To put it differently, *as long as arbitrators' re-shaping of parties' claims falls within the ambit of their original prayers, ne ultra petita would not be violated* (4P. 260/2000).

Set-off or Counterclaim?

To avoid a further *extra-petita* ground, a distinction should be made between the defense of set-off and the counterclaim. A counterclaim should be respected as a separate legal action from a claimant's request. The thing that the latter is declined does not bar an arbitrator to decide on a counterclaim. On the contrary, a respondent's defense for set-off can only be accepted and can be drawn down from a claimant's request (or receivable), as long as the latter is accepted (or acknowledged). For this reason, if a respondent files a set-off and an arbitrator not only declines the request of a claimant, but it also awards respondent the amount designated in the set-off defense, the award will be *extra-petita*. An award would come to the same result when an arbitrator sets off a claim from a party's receivable and orders the party declaring the set-off to pay the remaining amount, although the payment of that receivable is not requested (as in the case at hand).

Conclusion

To prevent the annulment of an award under the Article 190/2/c SPILA, parties' counsel should diligently draft their prayers for relief and clearly express their claims, whereas arbitrators should

carefully analyze parties' pleadings and ask the parties for clarification in case of doubts on the meaning of their prayers. If the claims remain unclear, arbitrators should interpret them with good faith, by considering all relevant circumstances.

However, in cases where the party's prayers are clear, arbitrators should not convert a claim in a way that makes sense to them, which may contradict the party's real intention. *In casu,* the sole arbitrator probably found the Claimant's demand for the declaratory ruling insufficient and awarded compensation. In the same vein, the arbitrator set off Respondents' damages from the Claimant's bank guarantee and ordered Respondents to pay the excess amount, although the Claimant did not demand any payment. Consequently, the SFSC set the *extra-petita* award aside, which conforms with its previous case-law. For this reason, the tribunal should have respected the Claimant's demand and should have awarded a mere declaratory ruling, even the requested remedy did not make sense in its eyes. It should also have ended its analysis with only setting off Respondents' damages, rather than deciding on a payment order.

References

?1 You may also see: Nathalie Voser / Katherine Bell: Swiss Supreme Court Partially Sets Aside ICC Award on Grounds of Extra Petita, Thomson Reuters Practical Law UK.

?2 Elliott Geisinger and Alexandre Mazuranic, International Arbitration in Switzerland: A Handbook for Practitioners (Second Edition), Kluwer Law International, 2013, p. 243.

?3 Manuel Arroyo, Arbitration in Switzerland: The Practitioner's Guide, Kluwer Law International, 2013, p. 219.

?4 Christian P. Alberti, Iura Novit Curia in International Commercial Arbitration: How Much Justice Do You Want?, International Arbitration and International Commercial Law: Synergy, Convergence, and Evolution, Kluwer Law International, 2011, p. 18.

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