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Printed on acid-free paper
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Good manners never hurt anyone – or do they?
Remarks on the Swiss Federal Tribunal’s Decision
no 4A_407/2012 of 20 February 2013

Johannes Landbrecht

During an arbitration, counsel politely states that his party’s “right to be heard and to be treated equally is really at stake here”. This would not be the only time he voices this objection during the arbitration proceedings. Yet, the Federal Tribunal finds that the respective party has not done enough to safeguard its rights, has not objected sufficiently forcefully, and has thus forfeited its right to challenge the award.

Does the Federal Tribunal punish politeness? It is submitted that this is not the case. The Federal Tribunal insists on clear objections, but the exact wording is irrelevant. Manners never hurt. Not even in Switzerland.

The following remarks focus on the Federal Tribunal’s discussion of the right to be heard and the right to be treated equally, article 190(2)(b) PILA.

I. General observations: Swiss awards difficult to annul

The drafters of Swiss arbitration law intended to limit the possibilities to challenge awards. The Federal Tribunal therefore exercises self-restraint with regard to annulling awards. It is in fact difficult to have arbitral awards annulled in Switzerland.

In the present decision, consistent with earlier case law, the Federal Tribunal insists that parties object as soon as possible to alleged violations of their right to be heard and to be treated equally, i.e. in general already during the arbitration proceedings. Raising objections during annulment proceedings for the first time would violate the parties’ duty to act in good faith. The Federal Tribunal emphasises that annulment proceedings are of a subsidiary

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1 ASA Bull. 3/2013, p. 659.
2 Rechtsanwalt, Dr. iur., LL. B., LALIVE, Geneva.
3 For a brief summary of the case in English see ASA Bull. 3/2013, p. 605.
5 Basler Kommentar/BERT/SCHNYDER, IPRG, 2nd ed. 2007, art. 190, n. 18.
6 For a statistical analysis see DASSER, International Arbitration and Setting Aside Proceedings in Switzerland, ASA Bull. 1/2010, p. 82.
7 Similar wording recently in DFT no 4A_244/2012 of 17 January 2013, E 3, ASA Bull. 3/2013, p. 608.
nature insofar as the arbitral tribunal must have been given the opportunity to remedy the problem. 8

II. Right to be heard: no wait and see

The respondent 9 complained that a certain witness had not been heard. 10 The witness in question was a government official and not allowed to testify without the prior consent of his employer, the Austrian ministry of economy. The ministry was approached but officially refused to allow testimony by its employee in the arbitration proceedings. This witness was therefore not available to the arbitral tribunal. During the hearing, the respondent then asked the arbitral tribunal whether it was “the view of the Tribunal that the Tribunal should make any more efforts to hear” this government official.

The Federal Tribunal did not accept this question as a formal objection with regard to a possible violation of the respondent’s right to be heard. And for good reason.

The right to be heard is not a passive right (wait and see whether you like the outcome of the arbitration…) since the respective party is obliged to make reasonable efforts to draw the tribunal’s attention to its arguments. 11 Furthermore, the appellant in annulment proceedings has to show how it was hindered in establishing its case with regard to a relevant issue for the outcome of the proceedings. 12 It is a party’s responsibility to determine whether certain issues are relevant to its case. 13

III. Right to be treated equally: objections have to be substantiated

The respondent also complained that the parties had not been granted equal time to examine witnesses. 14 Counsel stated that the respondent’s “right to be heard and to be treated equally [was] really at stake here”. He further alleged that the respondent was “stopped [from] asking questions on several

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8 DFT no 4A_407/2012 of 20 February 2013, E 3.1 with further references.
9 The respondent in the arbitration was the appellant in the annulment proceedings before the Federal Tribunal.
10 DFT no 4A_407/2012 of 20 February 2013, E 3.2.
11 Commentaire Romand/Bücher, LDIP, 2011, art. 182, n. 40.
12 Commentaire Romand/Bücher, LDIP, 2011, art. 190, n. 87.
13 Commentaire Romand/Bücher, LDIP, 2011, art. 182, n. 43.
14 DFT no 4A_407/2012 of 20 February 2013, E 3.4.
occasions”, that there was an “imbalance of time”, and that the respondent felt to be “at a disadvantage”.

The Federal Tribunal does not accept those quotes as sufficiently clear objections (“hinreichend deutliche Rüge”) with regard to a violation of the procedural requirements in article 190(2)(d) PILA. At first glance, this may be surprising. Depending on one’s cultural background, those statements might seem quite forceful. However, merely focussing on the exact wording of the quoted complaints would be beside the point.

As already explained above, objections under article 190(2)(d) PILA have to be raised in a timely fashion. The objective is to allow the arbitral tribunal to remedy the situation. This includes that the complaining party points to the issues it wishes to have remedied.

In the present case, the respondent apparently did not point out how the alleged “disadvantage” or “imbalance” of time affected its case, what else, e.g., it would have asked the witnesses. Furthermore, the respondent seems to have objected merely in general to being “stopped [from] asking questions”. Reading the Federal Tribunal’s account of those objections, it seems more likely that the respondent invoked its right to be treated equally only formally, for the sake of having an objection on record upon which to base annulment proceedings.

The Federal Tribunal expressly points out that the respondent, had it been serious about its complaints, should and could have requested a repetition or amendment of the witness testimony. The right to equal treatment is not an absolute and independent right. Rather, it is closely linked to the right to be heard and therefore subject to the obligation to be raised in a timely fashion and to be substantiated.

IV. Conclusion: the precise wording of objections is irrelevant

Therefore, the precise wording of objections is irrelevant. The Swiss courts tend to take into account the true intentions of the parties and avoid sticking slavishly to the words used. To quote another example from the arbitration case law, regarding the possibility of avoiding annulment actions altogether (article 192 PILA), the Federal Tribunal held that the parties have

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15 Basler Kommentar/BERTI/SCHNYDER, IPRG, 2nd ed. 2007, art. 190, n. 62.
16 Commentaire Romand/BUCHER, LDIP, 2011, art. 182, n. 51.
17 This principle is spelt out expressly with regard to the interpretation of contracts in art. 18(1) of the Swiss Code of Obligations.
to expressly exclude such remedy,\textsuperscript{18} but there is no need to use specific wording.\textsuperscript{19}

Coming back to the initial question: does the Federal Tribunal punish polite behaviour? The answer is clearly no. The Federal Tribunal merely repeated the purpose of procedural objections, \textit{i.e.} giving the arbitral tribunal the opportunity to remedy procedural shortcomings.

\textsuperscript{18} A general statement in arbitration rules of arbitral institutions is never enough, see DFT 133 III 235, 241, E 4.3.1.

\textsuperscript{19} See the discussion in Basler Kommentar/PATOCCHI/GERMINI, IPRG, 2\textsuperscript{nd} ed. 2007, art. 192, n. 14; BERGER & KELLERHALS (n 4) n. 1678 \textit{et seq}. In particular, a precise reference to the remedy of annulment (article 190 PILA) is not required, DFT 131 III 173, 177, E 4.2.3.1.
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