

The Swiss Federal Supreme Court declares timeout for awards rendered after the agreed deadline (X v Z)

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Arbitration analysis: Catherine A. Kunz of LALIVE analyses the Swiss Federal Court's decision in X v Z in which the court annulled an arbitral award as a result of the arbitrator's failure to deliver the award on time.

X v Z

In 'X v Z' dated 28 January 2014 (4A_490/2013, which has been published as a leading decision under case reference 140 III 75), the Swiss Federal Supreme Court annulled an award which was rendered by a sole arbitrator shortly after the expiry of the last time limit agreed with the parties. This decision has caused quite a stir within the arbitration community because of the exceptional factual circumstances which gave rise to it.

Facts of the case

The case before the Supreme Court concerned an award rendered by a sole arbitrator in *ad hoc* arbitration proceedings with its seat in Geneva in relation to a dispute between a Swiss company (the Applicant in the proceedings before the Supreme Court) and a French company (the Defendant) arising out of an aircraft lease agreement.

In accordance with the arbitration clause in their agreement, the parties agreed on a sole arbitrator who was then confirmed by the first instance courts of Geneva. The proceedings began in June 2010 and were closed in May 2011 at the end of the evidentiary hearing.

The provisional timetable enclosed in the first procedural order issued in October 2010 indicated that the approximate dates for the communication of the award were 15-20 April 2011.

By mid-June 2012, however, the arbitrator had still not rendered his award. When the Applicant then enquired about the status of the arbitrator's work on the award, the arbitrator answered that the award would, in principle, be rendered at the end of the month (i.e. June 2012). Although the Applicant renewed its requests a dozen times, by the end of October 2012 the award had still not been rendered. The Applicant then threatened to refer the matter to the courts of Geneva on the ground of the arbitrator's unjustified delay; this threat was renewed in January 2013, but was ultimately never carried out.

The Applicant complained again in June 2013 that, despite the arbitrator's promises, it had still not received the award. When the arbitrator responded by requesting a further one or two weeks, the Applicant answered as follows:

'Oh - dear me - one more week is not critical - but based on the fact that we are into the second year waiting - I would appreciate your firm commitment to deliver within one week - or simply resign.'

To which the arbitrator answered in turn:

'Tough proposal! Subject to the approval of both parties' counsel, I shall resign if the award is not rendered by June 30, 2013.'

By letter dated 8 August 2013, but only dispatched on 27 August 2013, the parties informed the arbitrator that his proposal to resign was accepted for 30 August 2013 should the award not have been rendered and received by the parties by that date. Upon the arbitrator's request, the parties agreed to extend this deadline until 2 September 2013 at 5pm. The arbitrator acknowledged receipt and accepted the terms of this letter on 28 August 2013.

On 3 September 2013, the award was received by the Defendant in the late afternoon, but the Applicant had still not received it. On the same day at 6.29pm, the Applicant sent a fax to the arbitrator, in which the Applicant noted that the arbitrator had failed to deliver the award within the agreed time limit and, therefore, that the arbitrator's resignation had become effective. The arbitrator responded a few minutes later that the award would be delivered within the next half hour and wrote again at 7.24pm to say that the delivery had failed because the offices of the Applicant's counsel were closed.

The award was eventually delivered to the Applicant's counsel on the following day. Upon its delivery, the Applicant's counsel specified that the receipt of the boxes presumably containing the award could not be deemed to constitute an acceptance of the award or the recognition of its validity; the Applicant also expressly reserved the right of its client to challenge the award or its validity. On the same day, the Applicant informed the arbitrator that it refused to accept the award, which it considered invalid since it had been rendered after the arbitrator's resignation.

The Applicant then applied to the Swiss Federal Supreme Court for the setting aside of the award, the main ground invoked being the irregular composition of the tribunal (Article 190(2)(a) Swiss Private International Law Act (PIL Act)); the Applicant also applied for a stay of the enforcement of the award.

The Supreme Court's decision

The Supreme Court granted both the Applicant's request for a stay of enforcement and its request to set aside the award.

In its decision, the Supreme Court first examined the nature of the contract between the arbitrator and the parties (*receptum arbitrii*). It recalled that although such a contract was often characterised as a mandate *sui generis* (of its own kind) under Swiss law, the statutory provisions of Swiss law governing the mandate (Articles 394 *et seq.* of the Swiss Code of Obligations (CO)) were to a large extent not applicable. In particular, Article 404(1) CO, which provides for the right of either party to terminate the mandate at any time even without a good cause, did not apply to such a contract, which typically terminates at the same time as the arbitration, *i.e.* once the award has been rendered.

The Supreme Court then examined the scenarios where the termination of the contract between the arbitrator and the parties exceptionally occurs during the proceedings. These include:

- o the removal of the arbitrator by joint agreement of the parties
- o the removal of the arbitrator through the courts or an arbitral institution
- o the resignation of the arbitrator and
- o the agreement of the parties to limit the duration of the arbitrator's mandate.

The Supreme Court recalled that the arbitrator could only resign before the end of the arbitration for good cause or if all parties to the arbitration agreed and that the arbitrator's resignation or removal could be subject to a condition, such as the failure of the arbitrator to perform his contractual obligations within a given time limit.

In this case, the Supreme Court held that it was not clear whether the conduct of the parties should be qualified as a removal of the arbitrator by the parties, rather than as a resignation of the arbitrator or as the limitation of the duration of his mandate by the parties. The Supreme Court found that it was nonetheless clear that there had been a tripartite agreement between the parties and the arbitrator that the contract between the arbitrator and the parties would automatically terminate on 2 September 2013 at 5pm if one of the parties had not received the award by then.

The Supreme Court found that such a situation where a tribunal issues its award after the end of its mandate is not a case of an irregular composition of the tribunal within the meaning of Article 190(2)(a) PIL Act, as argued by the Applicant, but is instead similar to the case of a tribunal that is validly appointed but simply disregards the time limit set to its jurisdiction, which falls within the scope of the ground for challenge set out in Article 190(2)(b) PIL Act. The Supreme Court however acknowledged that this distinction had not been clearly made before, such that the Applicant should not be penalised for having relied on the wrong ground for challenge.

The Supreme Court rejected the Defendant's argument that the Applicant had challenged the validity of the award merely to obtain the annulment of an unsatisfactory decision and that such conduct constituted an abuse of rights. It considered that the Applicant was entitled to draw the consequences that flowed from the ultimatum set to the arbitrator, had reacted without delay by confirming the arbitrator's resignation on the day following the expiry of the deadline and did not subsequently adopt a conduct that was in contradiction with this first reaction and, in particular, had immediately notified its refusal to accept the validity of the award upon its receipt.

The Supreme Court therefore annulled the award. It rejected however the Applicant's request for the referral of the matter to the first instance court of Geneva for the designation of a new arbitrator, considering that it was up to the parties to take the procedural measures required as a consequence of the annulment of the award.

Consequences of the Supreme Court's decision

The Supreme Court's decision in this case is of interest not only because setting aside applications rarely succeed in Switzerland, but because it has lifted the uncertainty about the consequences of an award rendered after the end of the arbitrator's mission

First, this decision confirms that when the parties agree that the arbitrator's mission will terminate if he fails to issue the award by the expiry of a given time limit and the arbitrator accepts such terms, this has the effect of modifying both the arbitration agreement between the parties as well as the agreement between the parties and the arbitrator. Such a tripartite agreement is binding on the parties and the arbitrator, with the consequence that the failure of the arbitrator to abide with the agreed time limit automatically terminates his mission.

Second, this decision clarifies that an award rendered after the arbitrator's mission has terminated is not an issue of irregular composition (Article 190(2)(a) PIL Act), but can be annulled on the ground of lack of jurisdiction *ratione temporis* pursuant to Article 190(2)(b) PIL Act.

This decision also shows that the parties to *ad hoc* proceedings have various tools to ensure that their proceedings are handled efficiently and avoid any procrastination on behalf of the arbitrators. Indeed, in this case, instead of entering into a tripartite agreement with the arbitrator, the parties could have applied for relief before the courts in view of his unjustified delay (which the parties threatened to do) or have jointly agreed to remove him. The drawback in either scenario is that the parties then have to start new proceedings from scratch as well as possibly assert damages claims against the arbitrator who failed to meet his/her obligations with the required diligence

The facts addressed in this decision remain exceptional. Luckily for the reputation of arbitration as an institution, arbitrators are usually much more diligent and sensitive to the need for speedy and efficient proceedings. This decision nonetheless constitutes a significant development in that it is now clear that an arbitrator who accepts that his mandate will end if he does not render his award within a given time limit must then issue the award within the agreed time limit if he does not want to see the award annulled and face damages claims by the parties. In view of this decision, arbitrators are well advised to heed the classic admonition '*defer no time, delays have dangerous ends*'.