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EUROPE

Switzerland

Supreme Court Upholds Arbitral Tribunal's Refusal to Postpone Hearing

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On 15 June 2021, the Swiss Supreme Court dismissed a challenge of an award rendered under the LCIA Arbitration Rules by an arbitral tribunal seated in Geneva, finding that the arbitral tribunal's refusal to postpone a hearing and decision to proceed with a remote hearing despite the objections of one of the parties did not amount to a violation of the right to be heard or the principle of equal treatment of the parties.

1. Introduction

Two years into the COVID-19 pandemic and the legal systems of most countries are still grappling with its effects on dispute resolution – in particular, whether a party can be forced to accept a remote hearing, or whether the hearing should be postponed until such time as it can be held in person. Postponing in such a case might however play into the hands of parties who have an interest in delaying the outcome of the arbitration, using the pandemic as a dilatory tactic.

Against this background, the Swiss Supreme Court (the 'Supreme Court' or 'Court') ruled on 15 June 2021[1] against a party challenging an award in a case where the arbitral tribunal had refused to postpone the hearing and proceeded with a remote hearing, despite that party's objections.

2. Supreme Court Decision

a) Factual background

In 2011, the private equity business Actis LLP acquired 40% of the holding company of the Super-Max group — a leading razor blade manufacturer founded by members of Mr Rakesh Malhotra's family — through a special purpose vehicle, Actis Consumer Grooming Products Ltd ('ACGP'). Mr Malhotra and his family held the remaining 60% through the company Super-Max Mauritius. ACGP, Super-Max Mauritius, Mr Malhotra and the holding company were bound by the terms of a shareholder agreement governed by English law.

When a shareholder dispute broke out, ACGP launched an LCIA arbitration against Mr Malhotra and Super-Max Mauritius (together 'Super-Max') in late 2016, based on the arbitration clause in the shareholders' agreement. The seat of the arbitration was Geneva, Switzerland.[2]

b) The arbitral tribunal's refusal to postpone the hearing

A disagreement arose between the parties regarding the procedural timetable and, more specifically, the hearing dates. Super-Max objected to ACGP's proposal to hold the hearing in March 2020, invoking logistical difficulties due to a parallel multi-party arbitration, and suggested September 2020 instead. The arbitral tribunal considered this was too far away and scheduled the hearing for June 2020.

The outbreak of the COVID-19 pandemic in March 2020 prompted the arbitral tribunal to ask the parties whether the hearing could take place remotely. ACGP agreed. However, Super-Max, which by then was no longer represented by counsel, objected to the procedural timetable, including the hearing, and requested that the proceedings be closed, claiming they were unable to hire new counsel due to the pandemic.

The arbitral tribunal rejected Super-Max's objections and request on the basis that Super-Max had failed to establish the alleged impossibility of securing new counsel. It proposed that the hearing be held via videoconference on 7 May 2020. This was then changed to 21 May 2020, following a request from ACGP. Super-Max did not react to this or to subsequent

1 Swiss Supreme Court, Decision 4A_530/2020, 15 June 2021.

2 LCIA Case No.163535, *Actis v. Rakesh Malhotra (I)* available at: https://jusmundi.com/en/document/decision/fr-company-z-ltd-v-respondent-a-and-company-b-arret-du-tribunal-federal-suisse-4a-530-2020-tuesday-15th-june-2021.

communications regarding the hearing. They also did not participate in the test run of the videoconferencing tool and, despite several requests from the arbitral tribunal, did not indicate whether they would be taking part in the hearing.

On the eve of the hearing itself, Super-Max's former counsel informed the arbitral tribunal that he was again acting for them and requested that the hearing be held in person. He also asked that it be postponed to August 2020, once again invoking difficulties arising from the pandemic.

The arbitral tribunal refused and the hearing took place remotely, as planned, on 21 May 2020. At the start of the hearing, Super-Max's counsel renewed the request for a postponement, this time until July 2020, arguing that he had only just been engaged and had not received any instructions.

The arbitral tribunal, again, refused.

The arbitral tribunal justified its decision by referring to its duty to conduct the proceedings efficiently and expeditiously, as well as to the parties' duty to collaborate. It noted that Super-Max had not raised any issue with the procedural timetable up until the day before the hearing and had not substantiated the alleged impossibility of engaging counsel to represent them, when they had in fact been represented by counsel in parallel proceedings before the High Court of England and Wales earlier that year. It considered that Super-Max had had numerous opportunities to participate in the proceedings and communicate their inability to attend the hearing, but had chosen to do so only on the eve of the hearing.

Further to this decision, Super-Max refused to participate in the hearing.

On 15 September 2020, the arbitral tribunal rendered its final award.[3]

3 The award was corrected (on 2 Oct. 2020) pursuant to Art. 27 of the applicable LCIA Arbitration Rules.

c) The challenge to the award

Super-Max challenged the award before the Supreme Court and claimed that the arbitral tribunal had violated their right to be heard by refusing to postpone the hearing of 21 May 2020. According to Super-Max, this robbed them of the possibility to defend themselves. As a postponement request had previously been granted to ACGP, Super-Max also claimed that the arbitral tribunal failed to treat the parties equally.[4] The Supreme Court rejected the challenge.[5]

i) Alleged violation of the right to be heard

The Supreme Court noted that Super-Max invoked the pandemic to justify the requested postponement, when they had in fact already attempted to delay the final decision prior to its outbreak. The Court based this finding on the alleged logistical difficulties linked to the parallel arbitration; the unavailability of the legal representative who was only recently designated due to other unrelated mandates; and Super-Max's request that the proceedings be closed.

It also took into account Super-Max's failure to react to communications between the end of February and beginning of April 2020; to respond to the arbitral tribunal's criticism that they had not established the alleged impossibility of finding new counsel; to participate in the hearing preparations; and the fact that they manifested themselves only the day before the start of the hearing through their former counsel.[6]

The Court also found Super-Max's insistence on an in-person hearing in the midst of the pandemic to be incongruous. It considered their argument about the alleged impossibility of finding a legal representative to be specious, in particular since their counsel – who participated on and off in the arbitral proceedings – was representing them in parallel proceedings before the High Court over the same period.

The only argument the Court seems to have given some weight to is Super-Max's alleged difficulty in gathering evidence from factual and expert witnesses during the pandemic. The Court noted that had this argument been formulated in a less vague and imprecise manner, and not only been raised for the first

4 Art. 190(2)(d) of the Swiss Private International Law Act. Super-Max also invoked a further ground, namely an alleged public policy violation arising from the fact that the arbitral tribunal incorporated by reference in the award judgments of the High Court. Super-Max argued that by doing so the arbitral tribunal had ignored that only the operative part of those judgments were *res judicata* under Swiss law. This ground was also dismissed by the Supreme Court.

5 Swiss Supreme Court, Decision 4A_530/2020, 15 June 2021, para. 6.

6 *Id.*, para. 5.5.

time before the Supreme Court, it might have stood a chance of succeeding. However, the Court found that, as it was presented, the argument lacked credibility. The Court noted that Super-Max:

- had failed to specify which witnesses they would have called and the issues on which these witnesses would have testified;
- did not establish having been prevented from responding or filing witness statements or explaining any difficulties in that regard to the arbitral tribunal; and
- had failed to establish what evidence or arguments they would have presented had their request for a hearing postponement been granted.

The Court recalled that, when relying on a violation of the right to be heard, the party concerned must outline the impact of the violation on the proceedings unless it is self-evident. Super-Max's failure to do so only reinforced the Supreme Court's view that the alleged difficulties were a mere pretext. Under such circumstances, the arbitral tribunal's refusal to postpone the hearing was justified.[7]

ii) Alleged unequal treatment

The Supreme Court found that the arbitral tribunal had not treated two similar situations in a different manner, as the situations were clearly dissimilar. In reaching this finding, it took into account the fact that:

- ACGP had collaborated actively with the arbitral tribunal to progress the arbitration and requested a postponement of the hearing after the arbitral tribunal had changed its date and format; and
- Super-Max had not reacted (until the eve of the hearing), despite having been expressly invited to advise of any issues with the new date.[8]

3. Takeaways

Although the Supreme Court does not expressly say so, this decision confirms that there is no absolute right to an in-person hearing, particularly where this is difficult to organise for reasons unrelated to the parties (e.g., the pandemic).

An arbitral tribunal's refusal to postpone a hearing is not in itself tantamount to a violation of the parties' right to be heard. It might, however, constitute a violation of the right to be heard in certain circumstances – for instance where a party is prevented from presenting witness evidence because of the refusal to postpone the hearing.

The Supreme Court helpfully outlined the test for applicants to succeed with a challenge on that basis. Applicants must:

1. Specify the evidence, including witnesses, and arguments the applicants would have relied on had they been given the opportunity to properly present their case,
2. Establish why they were unable to submit the said evidence and/or arguments, and
3. Demonstrate the impact of the alleged violation of the right to be heard on the proceedings (and in particular, that it could not be subsequently remedied).
4. In addition, the applicants must raise the alleged violation immediately, directly before the arbitral tribunal. They cannot wait and raise the violation for the first time in the challenge proceedings if they had an opportunity to do so before the arbitral tribunal itself.

This decision is a reminder that the Supreme Court will look at a party's conduct as a whole when examining an alleged violation of its right to be heard or the principle of equal treatment. Where the grounds for challenge appear inconsistent with a party's prior conduct, additional effort should be put into developing a coherent and persuasive explanation.

It also shows that the Supreme Court will not protect a party who merely invokes the pandemic as a delaying tactic. In other words, the pandemic cannot serve as a blanket pretext to set aside an award in Switzerland.

7 *Id.*, para. 5.5.

8 *Id.*, para. 5.6.