



Arbitration Newsletter Switzerland

Receptum arbitri and the Race against the Clock – an incredible Story!

On March 14, 2014 the Federal Supreme Court (hereinafter "the Court") made available on its website its most recent decision dealing with a case in which a sole arbitrator failed to deliver the award within the time limit agreed upon with the parties¹. The facts are rather peculiar and the Court has indicated that its decision will be published in the compilation of its leading decisions.

Facts

On June 14, 2002 and May 8, 2003 a Swiss company (hereinafter the "Claimant") entered into two lease contracts with a French company (hereinafter the "Respondent"). Both contracts were subject to Swiss law and provided that a sole arbitrator should resolve any disputes amongst the Parties without delay. The seat of the arbitration was Geneva, Switzerland.

A dispute arose and the Parties appointed a Geneva-based attorney as sole arbitrator and he accepted his mandate in April 2010. The subsequent facts can be summarized as follows:

June 7, 2010: submission of the request for arbitration.

October 18, 2010: the sole arbitrator issued his first procedural order holding, inter alia, that the arbitral proceedings should be subject to the Civil Procedure Code of the Canton of Geneva, irrespective of the Federal Civil Procedure Code coming into effect on January 1, 2011. The provisional timetable attached thereto indicated that the sole arbitrator would deliver his award between April 15 and 20, 2011.

May 4, 2011: end of the hearing.

Mid June, 2012: upon request by counsel for Claimant the sole arbitrator responded that he would, in principle, render the award by the end of the month.

Mid June until beginning of October 2012: counsel for Claimant made a dozen requests of sole arbitrator to advise where he stood concerning issue of the award.

October 24, 2012: counsel for Claimant threatened to refer the case to the competent judicial authority to request justification for the delay in rendering the award.

January 18, 2013: counsel for Claimant re-iterated his threat but, despite the continuing non-delivery of the award, he did not refer the case to the competent judicial authority.

May 31, 2013: delivery date for the award as promised by the arbitrator.

June 3, 2013: Claimant's director and the sole arbitrator exchanged emails in which the former complained that the latter had not delivered the award as promised. The arbitrator's requested another 1-2 weeks and Claimant's director replied:

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

The sole arbitrator replied thereto:

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

¹ 4A_490/2013 of January 28, 2014, issued in French.



August 8, 2013: in a letter from counsel for Claimant, dated August 8, 2013 and countersigned by counsel for Respondent, he referred to the latest email exchange and, noting that the award had not yet been delivered, stated that the arbitrator's offer to resign would be accepted as at August 30, 2013 (a Friday) should no award have been delivered by then.

August 27, 2013: the above letter is sent, also by fax, only at that date to the arbitrator.

The arbitrator confirmed receipt on the same day. Claiming that he would have to spend the entire weekend finishing the award, he asked the parties if it would be acceptable if the award was delivered by Monday, September 2, 2013.

In a fax from counsel for Claimant, again countersigned by counsel for Respondent, he extended the deadline fixed in their letter dated August 8, 2013 until September 2, 2013 at 5pm. In addition he stated (unofficial translation):

"Apart therefrom, said letter [dated August 8, 2013] remains entirely valid, meaning that your resignation will be accepted and effective as per September 2, 2013 at 5pm in the event that no award has been rendered and delivered in the meantime."

August 28, 2013: the sole arbitrator confirmed receipt of the fax dated August 27, 2013 and declared his acceptance of its terms.

September 2, 2013 at 5pm: neither Party had received the award.

September 3, 2013: counsel for Respondent received the award in the late afternoon.

At 6.29pm counsel for Claimant sent the arbitrator a fax, this time not countersigned by counsel for Respondent, in which he requested that, having not received the award within the agreed time limit, the arbitrator confirm his resignation.

On the same day, at 6.42pm, the arbitrator informed counsel for Claimant that the award would be delivered within the next 30 minutes.

At 7.24pm, the sole arbitrator sent counsel for Claimant an email stating that since his office was

closed the two boxes with the award and the annexes would be delivered to him the next day.

September 4, 2013: the two boxes with the award and the annexes were delivered to counsel for Claimant in the afternoon.

On the delivery receipt counsel for Claimant noted (unofficial translation):

"Receipt of the boxes does not mean acceptance of a possible award which might be in the boxes nor does it mean acceptance of the validity of any documents included therein. Geneva, September 4, 2014 at 2.42pm."

Minutes before, at 2.37pm, counsel for Claimant had sent an email to the arbitrator stating, inter alia, not only that he expressly reserved his right to reject any delivery but also that any receipt was not to be construed as an acceptance of its content.

Later that day, after having consulted with his client, counsel for Claimant informed the arbitrator that his client refused acceptance of the award with the consequence that the award, in his view, was null and void since rendered after the arbitrator had been deemed to have resigned.

September 4, 2013: an attorney acting on behalf of the arbitrator sent counsel for Claimant a fax stating that the acceptance of the two boxes implied the acceptance of the award included therein.

September 6, 2013: the sole arbitrator sent both counsel a corrected version of the operative part of the award.

September 9, 2013: counsel for Claimant (i) declared that the sole arbitrator was not entitled to issue that corrected version and, at the same time, (ii) objected to the position taken by the arbitrator's attorney in the fax dated September 4, 2013.

October 4, 2013: Claimant filed an action for annulment with the Court. In so doing, Claimant argued that no valid award had been rendered during the arbitrator's term which has lapsed on September 2, 2013 at 5pm, relying primarily upon Art. 190(2) lit. b PILA (improper appointment).



Considerations

First, the Court recalled that it generally bases its decisions only on the facts introduced during the arbitral proceedings. In the case at hand, however, Claimant's factual allegations all fell obviously outside the arbitral proceedings, namely in a time period after the hearing was held. Yet, since Claimant's action for annulment can only relate on such facts, they had to be taken into account in order to render a decision.

Second, the Court described in detail its understanding as to the contract between the parties and the arbitral tribunal (*receptum arbitri*)² and held, in particular, that the parties had the right to limit the term of an arbitral tribunal.

The Court then continued by interpreting the parties' and the arbitrator's actions and statements. In so doing, it held that their tripartite agreement provided that the sole arbitrator's term would end should he not have rendered and delivered the award by September 2, 2013 at 5pm. Further, it concluded that neither the arbitrator nor Respondent could unilaterally change the tripartite agreement, e.g. by the latter's accepting the award. It finally held that the tripartite agreement would not even be amended had Claimant not made his reservation on the delivery receipt.

In an intermediate decision, the Court held that the award had been rendered after the sole arbitrator's term had ended on September 2, 2013 at 5pm.

Next, the Court considered in detail the different views of Swiss scholarly writers in respect of the question whether an award rendered after the lapse of the arbitral tribunal's term constituted an improper appointment (Art. 190(2) lit. a PILA, as interpreted by minority of those scholars) or lack of competence *ratione temporis* (Art. 190(2) lit. b PILA, the majority view). After weighing both interpretations against each other, it concluded that it preferred to qualify the present case as one of lack of competence *ratione temporis*.

In concluding, the Court upheld Claimant's action for annulment and quashed the award.

Conclusions

This was a rather peculiar decision, both on its facts and on the legal considerations!

The Court's decision is the logical consequence of the continuing inactivity of the arbitrator. Finally, he had himself set the alarm clock to September 2, 2013, 5pm - and the alarm went off! So, at that time the arbitrator became *functus officio*. Only he knows what actually prevented him doing what he should have done a long time ago.

The Court's conclusion is that there is a limit for everything, or as the Court puts it "*la patience a des limites*" and the sole arbitrator had now to face the consequences arising therefrom, which could be far-reaching. He had not fulfilled his mandate: he had not delivered an imperfect award - such as e.g. one violating the right to be heard of one party - he had actually delivered a non-award, something very different. Therefore, he should receive no compensation for having rendered a non-award.

The case is now in the hands of the parties, whether they want to start from scratch again; the losing party will most likely opt for this. Is the sole arbitrator also responsible for these new costs?

The Court's decision shows also the risks and perils of *ad hoc* arbitration. It is fair to assume that this case would probably have taken a different turn under institutional arbitration. The additional costs caused by the involvement of an arbitral institution are marginal compared to the benefit arising thereof, namely to have a safety net in case a party - or as in the present case an arbitrator - goes out of bounds.

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Exhibit: decision 4A_490/2013

² See our newsletter dated January 27, 2011.