

## **Delay in Challenging Biased Expert**

In an arbitration between a Turkish steel manufacturer (claimant) and a German buyer (defendant), an arbitral tribunal rejected an application by claimant to disqualify a tribunal-appointed expert on the ground that he was prejudiced. Claimant then challenged the award on that ground, asserting a violation of procedural public policy under PIL Act Article 190(2) lit. *e*. The Swiss Supreme Court dismissed the challenge because claimant had waived the objection. This case illustrates the Court's general attitude as to waivers of grounds to set aside awards.

The arbitral tribunal appointed the expert in October 1997. In February 1998, the expert contacted a representative of claimant and solicited an offer for the supply of steel to a subsidiary company of the expert's employer. Claimant did not disclose this fact at the time. Between March and June 1998, the expert carried out his mission for the arbitral tribunal. By mid July 1998, the negotiations between claimant and the subsidiary of the expert's employer failed. In late July 1998, the expert rendered a final report to the arbitral tribunal. The final report did not substantially vary from a draft report filed before the said negotiations had failed. In October 1998, claimant challenged the expert for prejudice on the grounds that the latter had discussed business opportunities with claimant's representative between February 1998 and July 1998. The arbitral tribunal rejected the challenge on the ground that it was late. In December 1999, the arbitral tribunal dismissed claimant's claim and granted defendant's counterclaim. Claimant challenged the award before the Swiss Supreme Court asserting in particular that the expert was prejudiced.

As regards challenging an expert for prejudice, the Court confirmed the rule that such a challenge must be raised as soon as the challenging party learns of the grounds. If these grounds are not raised immediately, the party is barred from relying on them at a later stage. Here, the contacts between the expert and claimant's representative started in February 1998 and stopped in July 1998. Claimant, however, only raised the existence of these contacts in late October 1998, in order to challenge the expert. The Court decided that claimant was barred from relying on these contacts because it had not raised them in February 1998 when they started or, at the latest, in July 1998 when they stopped. The Court added, however, that the requirement of an immediate objection does not apply to mandatory grounds for challenging an expert. Such a mandatory ground exists if an expert has a direct personal interest in the outcome of the dispute or has been previously involved in the dispute.

Tavernier Tschanz