

Right to Have Witnesses Heard

Held: (1) The right to be heard (due process) is not violated by arbitrators who refuse to draw inferences from a party's refusal to produce evidence. (2) Procedural objections are waived if not raised and pursued immediately.

Background: A party to an ICC arbitration in Switzerland named as witnesses two executives of the other party in the arbitration. These executives were not produced, and the arbitral tribunal issued the award without hearing these witnesses. The party having named the witnesses filed an appeal to set aside the award asserting a violation of its right to be heard. That party argued that the two executives had made statements that were crucial to the case, and pointed out that the 1983 IBA rules on the presentation of evidence (now superseded by the 1999 version) provide that the arbitrator shall draw inferences from a party's refusal to produce evidence (art. 4.6 of the rules). The Supreme Court dismissed the appeal.

Discussion: Because the challenge was about drawing inferences from a party's failure to produce the two executives as witnesses, the Swiss Supreme Court considered that the appeal was criticizing the evaluation of the evidence by the arbitral tribunal. The improper evaluation of the evidence is not a ground to set aside an award.

Moreover, the challenging party had failed to object immediately. That party had noted the non-appearance of the two witnesses and asked the tribunal to draw inferences from it. That party had not, however, objected, nor asked for a new hearing to be scheduled for these witnesses, nor applied to the arbitrators to request the assistance of the court in aid of arbitration. Objecting only after an unfavorable award is issued is not consistent with good faith, since the criticized violation of the right to be heard was not committed in the award.

ASA Bulletin 2000, 96-104 (Swiss Supreme Court, 25 July 1997).