

May and Must Arbitrators Supply their Own Legal Grounds?

The Swiss Supreme Court -- which directly hears challenges against awards -- answered in the affirmative in *Bank Saint Petersburg PLC, St. Petersburg v. ATA Insaat Sanayi ve Ticaret Ltd., Besiktas Istanbul*, 2 mar. 2001, 4P.260/2000/rnd, *Bull. ASA* 3/2001, 531-538 (in German); also available from the website of the Swiss Confederation at www.admin.ch (select Federal Supreme Court, then *Rechtsprechung*).

Factual background: A bank refused to pay on a guarantee it had issued. The beneficiary of the guarantee sought an order against the bank to pay on the guarantee. The bank's ground for refusing to pay was found to be valid, so that the bank could not be ordered to pay. The tribunal found, however, that the bank had a contractual duty to advise the beneficiary of its ground to refuse payment (here, the bank was presented only with a copy of the guarantee instead of the contractually required original). As the bank did not so advise the beneficiary, the bank was liable to pay damages, which were then reduced on account of the beneficiary's contributory negligence. Thus, the award ordered the bank to pay damages for breach of the guarantee, even though the beneficiary had not claimed damages.

Was the award *ultra petita*? Awards can be set aside "where the arbitral tribunal has ruled beyond the claims submitted to it, or failed to decide one of the claims" (PIL Act, Art. 190(2) lit. c).

Holding: An award is not *ultra petita* when it awards no more money than is sought, albeit on legal grounds not asserted by the parties, unless the parties have agreed to limit the arbitrator's authority to considering only specific legal grounds.

Did the award violate the right to be heard. Awards can be set aside "where the principle of equal treatment of the parties or their right to be heard in an adversary procedure has not been observed" (PIL Act, Art. 190(2) lit. d). The bank asserted that it was deprived of the opportunity to discuss its liability in damages.

Holding: The right to be heard does not extend to the legal evaluation of properly established facts, unless the arbitrator wishes to decide on a legal ground that the parties neither asserted nor should reasonably have contemplated to be relevant.

The Court's reasoning: The issue is whether the application of the law took the parties by surprise. The Swiss Supreme Court exercises restraint in evaluating surprise in arbitration. Here, the beneficiary of the guarantee had alleged that the bank should have advised the beneficiary of the technical reason preventing payment of the guarantee. Since such duty is discussed in legal writings, together with the resulting liability in case of breach, the bank should reasonably have reckoned that the arbitral tribunal would also review an entitlement to damages. Therefore, the finding of liability should not have come as a surprise; and the bank could have addressed it in its last brief or during oral argument.