



Arbitration Newsletter Switzerland

Arbitration, Confidentiality and the Swiss Supreme Court

The Swiss Federal Supreme Court ("Supreme Court") has in its recent decision (4P.74/2006) dealt with the application of article 190 (2) (d) PILA, an alleged violation of the right to be heard.

An ICC panel in Zurich (Robert S. Rifkind, Jochen Pagenberg und Laurent Levy, chair) had to decide a dispute which was arising under a number of licence agreements. Claimant maintained that Defendants were using the licensed know-how beyond the terms provided for in the agreements. The arbitral tribunal supported Claimant's position and rendered an award prohibiting Defendants, amongst other, from further using certain elements of the licensed know-how.

In its action for annulment before the Supreme Court Defendants argued that the arbitral tribunal had violated the right to be heard by overlooking a witness statement and appreciating at its own discretion a further witness statement. The decision of the Supreme Court was clear and it comes as no surprise that the action for annulment was dismissed. In doing so the Supreme Court confirmed its position, namely that the right to be heard is not violated by the mere fact that an arbitral tribunal may not have properly recognized certain evidence, such as witness statements. From this perspective the above decision does not call for further comments since the decision just confirms the rather rigid approach of the Supreme Court to that issue.

Since the reasoning of the challenged award and, in particular, also its operative part contains significant information about the licensed know-how both parties motioned to the Supreme Court that its decision should not be made available to the public. The parties' motions gave the Supreme Court an opportunity to further develop and demonstrate its approach to that issue. The Supreme Court states the following:

Proceedings for constitutional complaints are in general public (Art. 17 (1) of the Federal Statute of the Organisation at the Federal Judiciary, "OG"); this also applies to actions for annulment of arbitral awards based on article 85 e OG and 190 et seq. PILA.

Art. 30 (3) of the Swiss Constitution and Art. 6 (1) of the Human Rights Convention clearly establish the principle of public control of the courts. However, the parties involved may waive such public control. As far as there is no public hearing at the Supreme Court (which is mostly the case in actions for annulment of arbitral awards), publicity is established by making the headings (name of the parties) and the resolutions taken ("operative part"), but not the reasoning, available to the public for thirty days after the decision has been rendered by the Supreme Court at its secretariat. Exceptions to that rule are granted only in very particular cases such as matters of aid on victims of criminal acts, international legal assistance and tax matters but not, in general, arbitration.

In addition, since 2000, about two thirds of all decisions of the Supreme Court are made available to the public in anonymised form on the website of the Supreme Court (www.bger.ch). For that purpose the Supreme Court publishes every day a list of its decisions added to its website. Decisions of particular importance are added, thereafter, to the printed annual addition of selected decisions of the Supreme Court.

If particularly requested exemptions as to the publicity may be obtained. With regard to arbitration the Supreme Court explicitly recognizes that confidentiality is generally one of the reasons why parties submit their dispute to this private dispute resolution process. Consequently, the Supreme Court does acknowledge that the parties to an arbitration may not want that the fact that an arbitration is taking place become public because the names of the



parties are published for thirty days at the secretariat of the Supreme Court. However, the Supreme Court holds that the parties applying for privacy have to convincingly demonstrate strict confidentiality of the pending matter.

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In the above case the Supreme Court recognizes that while the challenged award of the arbitral tribunal contained significant business and manufacturing secret the reasoning of the Supreme Court had not to deal with such information since the issue was about the right to be heard but not about the licensed know-how itself. The parties to the arbitral proceedings had also failed to establish why the fact that there was actually a dispute between the parties should not be disclosed for thirty days in the secretariat of the Supreme Court. Consequently, the joint request of the two parties not to make this decision public was turned down.

In the light of the above two conclusions can be drawn based on the above decision:

The Supreme Court recognizes that confidentiality is one of the key elements of arbitration and, in very particular cases and upon specific motion, is willing to consider that the existence of this arbitration should not be made available to the public by disclosing the identity of the parties and the decision (operative part only) of the Supreme Court at its secretariat for thirty days.

In the vast majority of the cases for actions of annulment at the Supreme Court the nature of the dispute may not justify a waiver of publicity. But even in such cases it will be difficult to trace the identity of the parties since the thirty days period during which the identity of the parties is made available at the secretariat of the Supreme Court may have already lapsed by the time the anonymised decision is made public on the website of the Supreme Court.

Therefore, even if access to the Supreme Court has to be sought for an action of annulment of an arbitral award in Switzerland there remains adequate protection to maintain confidentiality in international arbitration in Switzerland

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