

An Arbitrator's Lack of Cooperation Need Not Hold Up Award

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The Swiss Supreme Court refused to set aside an award on the ground that a co-arbitrator had failed to attend the deliberation.

The co-arbitrator failed to attend without giving prior notice, but argued that the deliberation could not be held because the ICC was due to decide on the challenge of the chairman. The ICC subsequently rejected the challenge. Having received a new version of the draft award, reflecting the discussions at the deliberation meeting held without the recalcitrant co-arbitrator, the latter refused to comment on the draft and stated that he would not participate in a second deliberation meeting if the new draft was not withdrawn. The chairman refused to withdraw the new draft and the co-arbitrator did not participate in the meeting. The latter also failed to respond to an invitation to comment on the changes made to the draft award at that meeting. The final award was signed by the chairman and the other co-arbitrator.

The Court considered that the reasons advanced by the recalcitrant co-arbitrator were not sufficient, as it is generally recognised that a challenge against an arbitrator does not have automatically the effect of staying the proceedings.

According to the Swiss Supreme Court, this situation can be distinguished from the case where the arbitrator has been dismissed, and where the Court held that the proceedings could not be continued, without the parties' agreement, until a new arbitrator was appointed.

Just like the parties' right to be heard is satisfied when each party has been given the opportunity to present its case, an arbitrator's right to participate in the deliberation is satisfied when the arbitrator has been given the possibility to present his point of view.

This solution is aimed at preventing one arbitrator from blocking the process of making the award. Similar solutions have been adopted by several institutions. See, e.g., Article 12(1) of the Arbitration Rules of the London Court of International Arbitration and Article 35(a) of the Arbitration Rules of the World Intellectual Property Organization.

Source : X. Ltd v. Y. BV, 4P.226/2001, 1 February 2002, not yet published; available from the website of the Swiss Supreme Court, <http://www.bger.ch> (using the French language version, select "jurisprudence", then "arrêts dès 2000").