

Arbitration & ADR - Switzerland

Challenge against decision to discontinue or stay arbitration proceedings?

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The Supreme Court recently held that procedural orders on the discontinuation or stay of arbitration proceedings cannot be challenged, unless they contain an implicit decision on jurisdiction.⁽¹⁾

Facts

The dispute arose out of a contract for the construction of a Turkish hammam in a Swiss chalet. The contract contained an arbitration clause in favour of a sole arbitrator to be appointed under the Swiss Chambers' Arbitration Institution. The place of arbitration was Geneva.

Following suspension of the works, the construction company started arbitration seeking payment of the balance of the contract price and reimbursement of the costs incurred in connection with this suspension.

Before the sole arbitrator was appointed, one of the construction company's three managers (X) argued that the other managers (Y and Z) had started arbitration on the company's behalf without X's consent and thus the arbitration had to be annulled. One of the defendants (A) requested a stay of the arbitration proceedings pending a decision on the powers of the managers. During the first procedural meeting with the sole arbitrator, A reiterated this request and alternatively requested bifurcation of the proceedings. For its part, the construction company objected to the requests on the grounds that the decision to start arbitration had been validly taken by the majority of its managers, and that X had been relieved of his duties. A disputed the construction company's position and restated its request that the proceedings be discontinued, or at least stayed and bifurcated.

The sole arbitrator first rejected A's request to bifurcate the proceedings. Then, by way of a procedural order, he rejected A's request to discontinue or stay the proceedings. After finding that he had no jurisdiction to decide on the internal dispute between the construction company's managers,⁽²⁾ he held that the extraordinary circumstances required to order a discontinuation or stay were missing in this case, and that on a preliminary view Y and Z had the power to start arbitration on the construction company's behalf.

A challenged this procedural order before the Supreme Court, invoking the sole arbitrator's lack of jurisdiction to decide the construction company's claims.

Decision

The Supreme Court first emphasised that a challenge can be brought against arbitral awards only (whether final, partial or preliminary), to the exclusion of procedural orders that can be modified or added to in the course of the proceedings and decisions on interim measures.⁽³⁾ However, the Supreme Court confirmed that procedural orders on the stay of arbitration proceedings:

"may nevertheless be referred to the Supreme Court if the arbitral tribunal, issuing them, has implicitly ruled on its jurisdiction..., in other words if, in doing so, it has issued, with them, a preliminary decision regarding its jurisdiction (or the regularity of its composition, if it was disputed) within the meaning of art. 190 par. 3 of the Private International Law Act."⁽⁴⁾

Therefore, it is the content of the challenged decision that is decisive, not its title.⁽⁵⁾

The Supreme Court agreed with the plaintiff that the question of whether Y and Z had the power to start arbitration on behalf of the construction company related to jurisdiction *ratione personae* in the broad sense.⁽⁶⁾ The Supreme Court also made clear that the only issue to be resolved in terms of the admissibility of the challenge was whether the sole arbitrator's determinations on jurisdiction were final. In the affirmative, the Supreme Court would have to assess whether the arbitrator's findings on jurisdiction were correct.⁽⁷⁾

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Based on these considerations, the Supreme Court found that the sole arbitrator had made no final determination on jurisdiction.⁽⁸⁾ It first observed that the title of the challenged procedural order (although this was not decisive) referred to a stay of the proceedings "until the dispute with respect to the construction company's management is resolved". According to the Supreme Court, this title revealed that the sole arbitrator's intent was limited to deciding whether the proceedings should be stayed until the legal situation regarding the construction company's management had been clarified. Moreover, according to the Supreme Court, the reference in the challenged procedural order to the exceptional nature of a stay and the use of terms such as '*prima facie*' and 'based on the documents currently before him' indicated that this decision was not final and could be modified if required.⁽⁹⁾ Finally, the Supreme Court relied on the context in which the challenged procedural order had been issued. Shortly before issue of the order, the sole arbitrator had rejected the plaintiff's request for bifurcation, which was based on objections to the arbitrator's jurisdiction over the other defendants, and thus had refused to decide on his jurisdiction over these defendants. Under these circumstances, the Supreme Court considered it unlikely that the sole arbitrator had changed his mind and that he intended to make a determination on jurisdiction in the challenged procedural order.⁽¹⁰⁾

Comment

When drafting procedural orders on the discontinuation or stay of arbitration proceedings, arbitrators should indicate clearly whether they intend to make any final determination as to jurisdiction, in order for the parties to have no doubt as to the challenge being available.

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Endnotes

(1) Supreme Court, 4A_446/2014, November 4 2014 (in French).

(2) The relationship between the construction company's managers was governed by an agreement under the laws of New York and providing for arbitration under the rules of the American Arbitration Association.

(3) Ground 3.1, referring to ATF 130 III 755 Ground 1.2.1 and ATF 136 III 200 Ground 2.3.

(4) Ground 3.1, referring to ATF 136 III 597 Ground 4.2; Supreme Court, 4A_596/2012, April 15 2013, Ground 3.3; Supreme Court, 4A_428/2011, February 13 2012, Ground 5.1.1; Supreme Court, 4A_614/2010, April 6 2011, Ground 2.1; and Supreme Court, 4A_210/2008, October 29 2008, Ground 2.1.

(5) Ground 3.2.

(6) Ground 3.3.2.

(7) *Ibid.*

(8) Ground 3.3.3.

(9) Ground 3.3.2.

(10) Ground 3.3.2.

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