Arbitration - Switzerland

Confidentiality of Swiss Supreme Court Review of Arbitral Awards

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Arbitration practitioners are ever-conscious that the best-laid plans to protect the privacy and confidentiality of an arbitration may be thwarted if a question in relation to the arbitration lands before a state court, the rules of which will often require publication of aspects of the arbitration such as its existence, the identity of the parties and the facts underlying the matter in dispute.

In a recent decision on an action for annulment of an arbitration award regarding valuable manufacturing know-how, the Swiss Supreme Court refused an application for certain confidentiality protection and invited the applicant to re-apply for certain other confidentiality protection.(1) The court took the opportunity to review a number of aspects of the law on confidentiality of judgments, in particular where the Swiss Supreme Court deals with arbitration awards. In doing so, it provided important guidance on what confidentiality protections the parties before it may expect and how to argue an application for confidentiality.

Supreme Court Practice on Publication of Judgments Involving Arbitration

The procedure to apply for the annulment of a Swiss arbitration award is effected in writing alone, save in exceptional circumstances. There are five means through which the Supreme Court judgment in such cases is publicized. The Supreme Court confined its review to the most important of these, as follows:

- A record of proceedings before judgment ('*l'intitulé*') and the order part of the judgment ('*le dispositif*') can be

consulted by any member of the public for a period of 30 days following the handing down of the judgment. For that same 30-day period, upon application, third parties may also view the entire judgment.

- The reasoning in the most important judgments is published in the Supreme Court's official law reports.
- Since 2000, the complete text of about two-thirds of Supreme Court judgments has been posted on the Internet, generally with the parties' names excised.

General Legal Considerations in Dealing with Confidentiality Applications

Swiss law recognizes not just the parties' right, under the European Convention on Human Rights and the Swiss Constitution, to public proceedings, but also the right of the general public to know how justice is administered. Therefore, the parties cannot simply waive such right; rather, they must demonstrate that their interest in confidentiality outweighs this public interest.

Case

The Supreme Court observed that Article 6(1) of the European Convention on Human Rights tolerates no exception to the principle of publicity of judgments, but neither the convention nor municipal Swiss law prescribes the form that such publicity must take. It held that the existing measures on publicity represent a fair balance of interests in the abstract. In relation more specifically to arbitration, the Supreme Court expressly recognized that there is often a heightened need for discretion on the basis of which the parties' names may be removed, provided good cause is demonstrated in the individual case.

In the case at hand, one party sought confidentiality protection and the other party and the arbitral tribunal supported this request. The case for confidentiality was that "highly confidential technology, business and manufacturing secrets" were at issue in the arbitration and in the proceedings before the Supreme Court.

In brief, the Supreme Court found that this was not relevant with regards to the suppression of the parties' names from publication, but that it could serve as material grounds for the non-disclosure of details of the technology.

On this basis, the Supreme Court rejected the request that the parties' names be removed from the record of proceedings and from the order part of the judgment made available for public consultation at the court's building outside Lausanne.

Regarding the possibility for third parties, upon request, to view the entirety of a Supreme Court judgment involving arbitration, the Supreme Court declared that it would never be proportionate, given the public interest in the publicity of judgments, to suppress access to the text of a judgment altogether. Rather, the proper course of action, where a party demonstrates a well-founded interest in confidentiality, is to remove the parties' names and any passages describing facts worthy of confidentiality or from which the identities of the parties might be inferred. The Supreme Court held that in this case no such interest was present, at least as regards a text from which the parties' names had been removed.

The Supreme Court then went on to identify the public interest behind the publication of judgments on the Internet and in law reports as relating principally to the "development or consistency of case law". This interest is present where a judgment deals with a legal question of general significance. In such case, in principle, the judgment must be published, but almost invariably the parties' names will be removed from it. The court held that the judgment at issue contained considerations of general interest and featured no passages from which the parties' names could be inferred nor facts worthy of confidentiality.

The court then declared itself willing to accept a revised application from the parties requesting that their names be removed from the versions of the judgment made available for consultation at the Supreme Court's premises.

Implications

It is clear from this decision that if the parties do not apply for the suppression of their names and confidential information, it is possible for third parties to learn these facts. Nonetheless, the Supreme Court is generally disposed to grant applications for the removal of parties' names in relation to arbitration cases - it accepts in principle that the parties have an interest in discretion in such cases, and there will usually be no countervailing public interest in knowing those names. Moreover, the Supreme Court will grant applications for the removal of passages of its judgments which relate to confidential information, such as descriptions of know-how, provided that this does not excessively interfere with the understanding of the judgment

and its legal significance. By contrast, the Supreme Court will never accede to an application for absolute non-publication of a judgment.

For further information on this topic please contact Pierre-Yves Tschanz at Tavernier Tschanz by telephone (+41 22 347 77 07) or by fax (+41 22 347 9789) or by email (tschanz@ttv.ch).

Endnotes

(1) Swiss Supreme Court decision of June 19 2006, 4P.74/2006/ast, currently available in German on the Swiss Supreme Court website at www.bger.ch.

Comment or question for author

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