

Arbitration - Switzerland

Contesting Arbitrators' Fees

November 13 2003

[Facts](#)
[Decision](#)
[Comment](#)

Facts

An arbitral tribunal requested several advances towards its fees and expenses. The claimant paid the requested advances, but complained that they were excessive and requested an accounting. The tribunal eventually disclosed its hourly rate and the number of hours worked. The claimant argued that the hourly rate was excessive and eventually referred the issue to the arbitration institution. The arbitration institution indicated a lower rate as a maximum, which meant a substantial refund from the tribunal. The claimant then challenged the three arbitrators before the arbitration institution for lack of independence. Two weeks later, the tribunal issued its final award. As the award had been issued in the meantime, the arbitration institution declined to decide on the challenge. The claimant then challenged the award before the Swiss Supreme Court. The main basis was a lack of independence of the arbitrators, essentially for two reasons. First, having referred the question of fees to the arbitration institution, the claimant feared that the arbitrators' conflict of interest would bias them against the claimant; second, before issuing its award, the tribunal cancelled two provisional hearing dates.

Decision

The arbitrators' independence is not affected by a disagreement about their fees.⁽¹⁾ The fact that the tribunal had to reduce its fees as a result of the claimant's intervention did not mean the arbitrators had lost their impartiality. A challenge against the arbitrators does not stay the arbitration; therefore, the arbitrators may render their award while the challenge is pending. The hearings that were cancelled were only provisional.

In addition, the objection to the arbitrators' independence should have been raised immediately upon the event - that is, when the arbitrators disclosed their hourly rate or when the arbitration institution set a lower maximum allowable rate.

Comment

For cases started after January 2004 before any of the Swiss chambers of commerce active in arbitration (ie, Basel, Berne, Geneva, Lausanne, Lugano and Zurich), new uniform rules will apply. The new Swiss rules are modelled on the United Nations Commission on International Trade Law rules and will be the subject of a conference hosted by the Swiss Arbitration Association on January 23 2004 (www.arbitration-ch.org). The new rules provide for a schedule of fees instead of hourly rates.

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Endnotes

⁽¹⁾ 4P.263/2002, *A Ltd v B SA*, Swiss Supreme Court, June 10 2003 (decision in French), as yet unpublished; available from the website of the Swiss Supreme Court at www.bger.ch (using the French language version, select "Jurisprudence", then "Arrêts dès 2000").

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