

Arbitration - Switzerland

Court clarifies position on additional awards and prayers for relief

Contributed by [Tavernier Tschanz](#)

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In a recent decision the Supreme Court confirmed that that it is possible to bring set-aside proceedings against additional awards, including refusals to issue additional awards.⁽¹⁾ The court also confirmed that a request for an additional award has no impact on other available post-award mechanisms and provided clarification on the issue of prayers for relief.

Facts

In a recent World Intellectual Property Organisation arbitration based in Geneva, a sole arbitrator awarded interest on damages to a party despite the fact that the relevant prayer for relief did not expressly refer to interest. The sole arbitrator thereafter rejected a request for an additional award. Both the award on interest and the refusal to issue an additional award were challenged before the Supreme Court.

Supreme Court decision

The Supreme Court provided clarification on several procedural issues which are worth emphasising.

First, the court declined to resolve the recurring controversy regarding the applicability, to international arbitrations, of the Sfr30,000 minimum dispute value threshold, which normally applies to challenge proceedings in civil matters before the Supreme Court (Article 74(1) of the Swiss Supreme Court Act).⁽²⁾

Second, the court confirmed that set-aside proceedings are available against additional awards⁽³⁾ and clarified, for the first time, that such proceedings are also available against decisions by which arbitral tribunals refuse to issue additional awards. The court saw no reason to differentiate such a refusal from a refusal to issue a corrected award, which, according to Supreme Court case law, may be challenged by way of set-aside proceedings.⁽⁴⁾ With respect to the impact of a request for an additional award on other post-award mechanisms, the court confirmed its longstanding position that:

- the submission of a request for an additional award does not suspend the time period for challenging the initial award;
- the right to challenge the initial award is not subject to the prior filing of a request for an additional award; and
- if the initial award may be challenged because the arbitral tribunal did not rule on all prayers for relief (Article 190(2)(c) of the Private International Law Act), this right to challenge does not prevent the relevant party from seeking an additional award on the omitted prayers – in such cases the court should stay the challenge proceedings until the arbitral tribunal has issued its final decision on the request for an additional award.

Third, the arbitral tribunal must apply the law, without being limited to the parties' submissions. Therefore, an arbitral tribunal may rely on legal arguments that were not submitted by the parties. In doing so, the arbitral tribunal gives a different legal characterisation of the factual background of the case, but does not rule on a new claim or an amended claim. That said, the arbitral tribunal remains at all times bound by the subject matter and amount of the prayer for relief – in particular by the limitations or specific legal characterisation in the parties' prayer for relief.

In the case at hand the Supreme Court found that awarding interest where such interest

Author

[Frank Spoorenberg](#)



was not expressly included in the prayer for relief section of the brief was not *ultra petita* (ie, did not exceed the claimant's prayer for relief), since:

- the claimant's prayer for relief sought payment of "the 2009 minimum royalty, to be established definitely once the 2009 turnover is submitted – that is, at least €1,397,883.62";⁽⁵⁾
- the claimant clearly stated in its brief that the royalties were subject to 4% interest; and
- there was no indication of the claimant's intent to stop the interest from accruing at the date of the brief or at the date of the award.

Therefore, the court found that the abovementioned prayer for relief, duly construed in light of the claimant's entire brief, expressed – at least implicitly, in a manner which could easily be identified – the claimant's intent to claim for interest to accrue until total payment of the capital. As a corollary, the court endorsed the sole arbitrator's refusal to award interest on the other party's claim because this party's prayer for relief set forth a limited amount only and nowhere in the brief could the court find an indication that this party intended to claim for interest.

Comment

Parties which avail of arbitration will naturally conclude that, whenever they are seeking payment, they should ensure that:

- their prayer for relief on the merits is limited to the amount to be paid;
- this amount is accompanied by 'at minimum', 'to be further determined in the proceedings' or a similar formula; and
- no legal or contractual basis is set forth in the prayers for relief.

However, for arbitrators, it may be difficult to assess when the *ultra petita* cap allows them to consider that this part of the party's reasoning is tantamount to a prayer for relief, and when the *infra petita* (ie, the tribunal's duty to decide on all prayers) threshold requires them to do so.

For further information on this topic please contact [Frank Spoorenberg](mailto:Frank.Spoorenberg@Tavernierschanz.com) at Tavernier Tschanz by telephone (+41 22 704 3700), fax (+41 22 704 3777) or email (spoorenberg@tavernierschanz.com).

Endnotes

(1) Supreme Court Decision 4A_440/2010. The full text of the decision is available in French at www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm. This decision is also to be published in the Supreme Court's official case reporter.

(2) See unpublished Decisions 4A_392/2008, December 22 2008, Ground 2.3 and 4A_258/2008, October 7 2008, Ground 3.3. The issue is particularly important in connection with sport-related arbitration, where disputed amounts are not necessarily as important as they tend to be in commercial arbitration.

(3) See Decision 4P.117/2004 of October 4 2004, published in the *Official Report of the Swiss Supreme Court's decisions* (ATF) Volume 130, Part III, page 755 on the complementarities and independence of additional awards or rectification proceedings, and annulment proceedings. In that decision the Supreme Court expressly acknowledged that an additional award (or rectification award) could be the object of annulment proceedings without those having an impact, in terms of content, deferral of the appeal deadline or enforcement of the original award.

(4) Along the same lines, the court confirmed the lack of any priority rules for annulment, complement or rectification proceedings under Swiss law in Decisions 4P.154/2005 and 4P.98/2005, November 10 2005, and Decision 4P.219/2004, January 12 2005.

(5) Author's translation.

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