

Arbitration - Switzerland

Immediate Appeal against Interim Awards

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Must interim awards be challenged immediately or only together with the final award? For many years, the answer to this question turned on whether an interim award resulted in 'irreparable harm' to a party. The Swiss Supreme Court recently changed this practice. The answer now depends on whether the interim award is characterized as a partial award or as an interlocutory decision.

A 'partial award' is any decision that disposes of part of the parties' claims or counterclaims. Partial awards are now treated like final awards: they must be challenged immediately (ie, within 30 days).

An 'interlocutory decision' (or award) is any decision, whether substantive or procedural, which is merely one step towards disposing of a claim or counterclaim. Interlocutory decisions must be challenged immediately to the extent that they relate to jurisdiction or the appointment of the arbitral tribunal. This limitation means that interlocutory decisions must be challenged immediately if the basis for the challenge is: (i) that the tribunal wrongly found or denied jurisdiction; or (ii) that the arbitrators' appointment was improper (Articles 190(2)(a) and (b) of the Private International Law Act). However, if the challenge is based on one of the other three available grounds to challenge awards - a lack of due process, a decision granting more than requested or less than conceded, or a violation of public policy (Article 190.2(c), (d) or (e)) - the challenge must be filed upon receipt of the final award, regardless of whether the interlocutory award results in irreparable harm to a party.

This change results from two decisions of the Swiss Supreme Court.⁽¹⁾ Further decisions should clarify the application of the key distinction between the two categories of interim awards: partial and interlocutory.

The new practice departs from the rules applicable to appeals against interim court decisions and is more in line with Article 190(3) of the Private International Law Act.

For further information on this topic please contact [Pierre-Yves Tschanz](mailto:tschanz@ttv.ch) 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) *A v B*, September 18 2003, 4P.74/2003 published as ATF 130 III 76, excerpt in Bull ASA, 2004.132, and *A BV v B*, October 6 2004, 4P.117/2004 published as ATF 130 III 755, excerpt in Bull ASA, 2004.794. Both decisions are also available from the website of the Supreme Court at www.bger.ch (using the French-language version, select "jurisprudence", then "principaux arrêts dès 1954").

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Author

**Pierre-Yves
Tschanz**





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