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Arbitration - Switzerland

No immediate review of arbitral interim measures

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Introduction

Facts

Comment

Introduction

A clear line has emerged in Swiss arbitration law and practice with regard to the type of arbitral decisions that can be challenged before the Supreme Court and the grounds on which this can be done:

- Final awards and partial awards (ie, awards disposing of whole or part of the parties' claims or counterclaims) must be challenged within 30 days of notification on all the (exhaustive) grounds listed in the law (Article 190(2) of the Private International Law Act, Article 190(2)).⁽¹⁾
- Interlocutory awards (ie, any decision, whether substantive or procedural, which constitutes a step towards disposing of a claim or counterclaim) can and must be challenged immediately only if and to the extent that they relate to jurisdiction or to the appointment of the arbitral tribunal (Articles 190(2)(a) and (b)). For instance, interlocutory awards usually include decisions admitting liability but reserving the damage issue for a later stage of the proceeding. Otherwise, challenges against interlocutory awards can be filed only upon notification of the final award.⁽²⁾
- Procedural orders issued by the arbitral tribunal⁽³⁾ and decisions of private organs such as arbitral institutions cannot be challenged.⁽⁴⁾

Until April 13 2010, the Supreme Court had yet to decide on the possible challenge of interim measures issued by arbitral tribunals. It has now done so and excluded the possibility of an immediate challenge.⁽⁵⁾

Facts

Dutch company Y owned exclusive exploitation rights to clothing brand A. It entered into a renewable annual exclusive licence agreement with Swiss company X for the manufacture and distribution of A-branded products in various European countries through a network of A boutiques. The licence agreement provided that any dispute relating thereto should be referred to accelerated arbitration before the World Intellectual Property Organization in Geneva, with Dutch law applying on the merits.

A few months into the contractual relationship, Y notified X of the immediate termination of the contract on the basis of alleged serious material breaches, and offered to redeem all unsold supplies for approximately €1 million. X argued that the immediate termination was unjustified and continued to sell its remaining stock of A-branded clothing via the same network of boutiques, operating under the new name B.

X commenced arbitration, seeking full compensation for the damages incurred as a result of the

allegedly unjustified premature termination of the contract. Y counterclaimed in the amount of the damage incurred as a result of X's alleged material breach and sought interim measures seeking to preclude X from any further misrepresentation and sales of A-branded clothing, pending arbitration.

Following an exchange of briefs and a hearing on the interim measures and other procedural issues, the arbitrator issued a so-called 'preliminary award' requiring X, among other things, to transfer the remaining stock of A-branded clothing to Y and Y to pay the 'temporary figure' of €1 million as a sale-back price for the stock.

X challenged the preliminary award before the Supreme Court on the grounds of exceeded jurisdiction, infringement of the right to be heard and infringement of public order.

The Supreme Court declined to consider the challenge, stating that awards only can be challenged under Swiss law (Article 77 of the Supreme Court Act and Articles 190 to 192 of the Private International Law Act). In line with the overwhelming majority of commentators, the court held that interim measures, including orders for the provisional performance of relief, are not constitutive of awards within the meaning of Swiss law and as such are not subject to immediate challenge before the Supreme Court. In the case at hand, the court concluded that regardless of the terminology used by the arbitrator, the so-called 'preliminary award' was in fact an interim order for provisional performance of the relief sought pending arbitration, which was immune from any judicial review at this stage of the proceedings.

Comment

This clear-cut decision was anticipated by commentators and stands in line with the general tendency of the court to limit its interference in the arbitration process.

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Endnotes

- ⁽¹⁾ Decision 4P.117/2004, October 6 2004, in *A BV v B*, Geneva, published in *Swiss Supreme Court Report (ATF)*, Volume 130, Part III, page 755, ground 1.2.1.
- ⁽²⁾ Decision 4P.74/2003 of September 18 2003, in *A v B*, published in *ATF*, Volume 130, Part III, page 76, ground 4.
- ⁽³⁾ Unpublished Decision 4A_600/2008 of February 20 2009, in *X v Y*, ground 2.3.
- ⁽⁴⁾ Unpublished Decision 4P.226/2004 of March 9 2005, ground 3.1.
- ⁽⁵⁾ Decision 4A_582/2009 of April 13 2010, in *X SA v Y BV*. The full text of the decision, which will be published in the official reports of the Swiss Supreme Court's decisions, is available in the original French language at www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm.

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