

Arbitration - Switzerland

Supreme Court Clarifies Pre-arbitration Conciliation Requirement

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An arbitral award has been challenged on the grounds that it had not gone through pre-arbitration conciliation. The relevant part of the arbitration clause read:

"Any controversy or dispute relating to the present contract and which cannot be resolved amicably (including by conciliation under the World Intellectual Property Organization rules) shall be submitted to an arbitral tribunal which alone shall have jurisdiction to decide finally, to the exclusion of the ordinary courts. Moreover, the arbitral tribunal alone shall have jurisdiction to decide on any dispute concerning the applicability of this arbitration clause. Negotiations already underway shall in no way constitute a hindrance to the initiation of arbitration proceedings."

A dispute arose under a licence agreement and unsuccessful settlement discussions ensued. When the licensor proposed to submit the dispute to arbitration, the licensee terminated the contract and demanded damages. The licensor initiated arbitration, during which an unsuccessful settlement offer was made. The licensee protested to the arbitral tribunal that the arbitration could not proceed because the licensor first had to initiate conciliation proceedings. The final award was in favour of the licensor, finding that the arbitral tribunal had jurisdiction and that the request for arbitration had not been premature.

The award was challenged before the Supreme Court, which hears challenges directly, resulting in a fast and high-level review.⁽¹⁾

The court examined whether pre-arbitration conciliation was required, and found that it was not. The court relied on the facts as established by the arbitral tribunal, since the fact-finding proceedings were not challenged. The court held that the legal principles of contract interpretation should be applied to the clause in dispute and, after a detailed review, it concluded that such principles had not been violated by the arbitral tribunal. The absence of a time limit for conciliation in the clause played a significant role, as did the statement that arbitration may be commenced while negotiations are underway.

The court left open the question of whether non-compliance with a pre-arbitration conciliation requirement affects the arbitral tribunal's jurisdiction or results in liability.

A practical point for drafters of conciliation-arbitration and mediation-arbitration clauses is that failure to clarify the parties' intent as to the operation of such clauses may affect the finality of the award. This risk also applies to the enforcement of the award, as lack of jurisdiction constitutes grounds for challenge under the New York Convention.

A further reason to reject the challenge was that even if conciliation had been required prior to commencing arbitration, this requirement could not have been asserted in good faith in this instance since the party challenging the award had neither proposed nor initiated conciliation before or during the arbitration, but had merely objected to jurisdiction, thus negating its alleged interest in conciliation proceedings. The court typically dismisses challenges by parties which attempt to preserve grounds to challenge an unfavourable award when they could act to remedy the problem during arbitration.

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(1) Decision 4A_18/2007 of the Swiss Supreme Court, issued on June 6 2007, is available in German on the court's website, www.bger.ch. The full text is available at www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm (search term '4A_18/2007').

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