

## Arbitration - Switzerland

Supreme Court confirms benchmarks on pre-arbitration conciliation duties

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On June 6 2007 the Supreme Court set out a number of benchmarks regarding pre-arbitration conciliation duties. In that case it held that pre-arbitration conciliation clauses must be sufficiently specific as to the truly mandatory character of conciliation to be considered as a mandatory preliminary step prior to arbitration.<sup>(1)</sup> The court held that the setting of a time limit for conciliation was a fair indication thereof. The court left open the question of whether non-compliance with a pre-arbitration conciliation requirement would affect the arbitral tribunal's jurisdiction or result in liability.

In a recent case the court confirmed its 2007 finding on the content and interpretation of pre-arbitration conciliation clauses.<sup>(2)</sup> It considered the following wording to be insufficient for the purpose of truly mandatory conciliation:

*"In the event of a dispute regarding the interpretation or performance of the [contract], the parties will first seek a friendly settlement. Possible disputes... will be referred, after the failure of the attempt of conciliation, to an arbitral tribunal"*<sup>(3)</sup>

The court reiterated that conciliation obligations are to be invoked in good faith with a fair prospect of a positive outcome. It also considered that the arbitral tribunal's dismissal of the pre-conciliation objection based on the finding that the relationship had deteriorated to such an extent that there was no other alternative but resort to arbitration was not unreasonable.

The court acknowledged the complexity of the matter and the lack of consensus on possible solutions, but did not resolve the question regarding the non-compliance with a pre-arbitration conciliation requirement. However, it implied – against the twofold alternative contemplated in its 2007 decision – that penalties could be both procedural (lack of arbitral tribunal's jurisdiction or stay of the proceedings) and material (liability for damage incurred) in stating that "it is indeed not certain that these two types of sanction could not be combined".<sup>(4)</sup> With regard to procedural penalties, the court indicated no preference towards either inadmissibility due to lack of jurisdiction or stay of the proceeding pending conciliation (as is favoured by Swiss scholars). Rather, the court suggested that the issue might best be resolved on a case-by-case basis, stating that: "there is no point deciding the disputed issue here, assuming it could have an answer adapted to all instances, which we may reasonably doubt".<sup>(5)</sup> The pre-conciliation argument was thus dismissed. Nevertheless, the award was annulled for infringement of the right to be heard, on the grounds that the award failed to address expressly one of the legal arguments raised by the defendant that could have led to another outcome altogether (absolute statute of limitations objection).<sup>(6)</sup>

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### Endnotes

(1) Decision 4A\_18/2007, June 6 2007, *X Ltd v Y*, Ground 4.

(2) Decision 4A\_46/2011, May 16, 2011, *X GmbH v Y Sàrl*.

(3) Decision 4A\_46/2011, May 16 2011, *X GmbH v Y Sàrl*, Ground 3 (authors' translation).

(4) *Id*, Ground 3.4 (authors' translation).

(5) *Loc cit* (authors' translation).

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(6) *Id.*, Ground 4.

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