



Arbitration Newsletter Switzerland

New precedent by the Swiss Federal Supreme Court as to Challenges of Partial Awards

In its decision of October 6, 2004, available in French under www.bger.ch/index/ and published in the official series of the Swiss Federal Supreme Court ("Supreme Court") under BGE 130 III 755 an important new precedent has been set which is of relevance for arbitrators and counsels involved in arbitration proceedings held in Switzerland. All such proceedings are to be held within the framework of Chapter 12 of the Private International Law Act ("PILA").

Previous Position of the Supreme Court

Up to now, the Supreme Court held that partial awards could be challenged by way of an action of annulment only if the appealing party could demonstrate irreparable harm if such challenge were not heard by the Supreme Court. Thereby, the Supreme Court based its position on an analogous application of provisions of the act on the organisation of the Federal Judiciary requiring such irreparable harm as prerequisite for an appeal against a partial award. This position of the Supreme Court was heavily criticized, both by scholars and legal practitioners (in particular Poudret / Besson, *Arbitrage International*, 2002, p. 638 et seq.).

Legal Framework

The relevant provisions under Article 190 PILA read as follows:

"Article 190

IX. Finality, Action for annulment

1. Principle

1 The award is final from its notification.

2 The award may only be annulled:

A if the sole arbitrator was not properly appointed or if the Arbitral Tribunal was not properly constituted;

b) if the Arbitral Tribunal wrongly accepted or declined jurisdiction;

c) if the Arbitral Tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;

d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;

e) if the award is incompatible with public policy.

3 Preliminary awards can be annulled on the grounds of the above paras. 2(a) and 2(b) only; the time limit runs from the notification of the preliminary award."

New Position of the Supreme Court

In the above new decision, the Supreme Court waived the requirement for irreparable harm for challenging partial awards. It now confirmed the view of the criticizing scholars and practitioners whereby there should be no distinction in the challenging of an award between a final award and a partial award. Both are awards resolving a matter in dispute and not just providing procedural guidance, as is the matter with interim awards.

Therefore, actions for annulment of arbitral awards can be entered now at the Supreme Court as follows:

against a final award;

against a partial award;

(both actions based on all of the provisions of Article 190, (2) a) up to e), PILA);

against preliminary awards (sometimes also referred to as interim awards or interlocutory awards), based on the provisions of Article 190 (2) a) and b), PILA, only.

Conclusions

Any Arbitral Tribunal having its seat in Switzerland will, as from now on, have to evaluate, before rendering a partial award, if so requested, whether it



wants to open the requesting party access to the Supreme Court for a potential challenge of this partial award or whether it wants to wait until rendering of the final award. Counsels in arbitration proceedings in Switzerland will have to carefully review any partial award rendered by an arbitral tribunal having its seat in Switzerland as to its potential challenge by filing an action of annulment at the Supreme Court, in order not to miss the 30 days period for filing such a challenge, which starts running after the partial award has been served.

Finally, it should be emphasized that nothing of the above does in any way loosen the substantive criteria for challenging of an arbitral award, they continue to be restricted to the narrow field of application, as established in Article 190 (2) a) to e), PILA. The change of precedent does just abolish the previous requirement to establish irreparable harm for the challenge of a partial award at the Supreme Court.

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