

Switzerland : Contesting arbitrators fees

Facts: An arbitral tribunal requested several advances towards its fees and expenses. Claimant paid the requested advances, but complained that they were excessive and requested an accounting. The tribunal eventually disclosed its hourly rate and the number of hours worked. Claimant claimed that the hourly rate was excessive and eventually referred the issue to the arbitration institution. The arbitration institution indicated a lower rate as being a maximum, which meant a substantial refund from the tribunal. Claimant then challenged the three arbitrators before the arbitration institution for lack of independence. Two weeks later the tribunal issued its final award. Because the award had been issued in the meantime, the arbitration institution declined to decide on the challenge. Claimant then challenged the award before the Swiss Supreme Court. The main basis was a lack of independence of the arbitrators, for essentially two reasons. First, having referred the question of fees to the arbitration institution, claimant feared that the arbitrators' conflict of interest would make them partial against claimant; second, before issuing its award, the tribunal cancelled two tentative hearing dates.

Held: Arbitrators independence is not affected by a disagreement about their fees. The fact that the tribunal had to reduce its fees as a result of claimant's involvement of the arbitration institution did not cause the arbitrators to lose their impartiality. A challenge against the arbitrators does not stay the arbitration, so that the arbitrators may render their award while the challenge is pending. The hearings that were cancelled were only tentative.

The objection to the arbitrator's independence should anyway have been raised immediately upon the event, i.e. when the arbitrators disclosed their hourly rate or when the arbitration institution set a lower maximum allowable rate.

Source: 4P.263/2002, A. Ltd. v B. SA and C GmBH Swiss Supreme Court decision June 10, 2003 (decision in French), not (yet) published; available from the website of the Swiss Supreme Court, <http://www.bger.ch> (using the French language version, select "jurisprudence", then "Arrêts dès 2000").

PS: For cases started after January 2004 before any of the Swiss Chambers of Commerce active in arbitration (Basle, Bern, Geneva, Lausanne, Lugano, Zurich), new uniform rules will apply. The new Swiss rules are patterned after the UNCITRAL Rules and will be the subject of a conference hosted by the Swiss Arbitration Association on January 23, 2004 (for information on the conference, see <http://www.arbitration-ch.org>). The new rules provide for a schedule of fees instead of hourly rates.

The content of this article does not constitute legal advice and should not be relied on in that way. Specific advice should be sought about your specific circumstances.