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The Swiss Federal Court Dismisses Two Appeals Concerning the Constitution of an Arbitral Tribunal

Georg von Segesser (von Segesser Law Offices) · Wednesday, July 7th, 2010

In two decisions both dated 11 January 2010, published on 16 April 2010 (cases 4A_256/2009 and 4A_258/2009), the Swiss Federal Supreme Court dismissed two appeals regarding the irregular constitution of an arbitral tribunal by stating that the complainant failed to sufficiently substantiate his allegations.

Background

In 2006, two ICC arbitrations were initiated. They had the same factual background, but were based on different (yet interconnected) agreements. In the first arbitration (dealt with in the decision 4A_256/2009), AY ("AY"), a company incorporated under the laws of the Czech republic, initiated an arbitration against X ("X"), a Czech citizen. In the second arbitration (dealt with in the decision 4A_258/2009), X (Respondent in the first arbitration) initiated an arbitration against Y ("Y"), a Czech citizen, sole owner of AY (Claimant in the first arbitration).

In both arbitrations, the arbitral tribunal was composed of arbitrator Q ("Q") (nominated by X), arbitrator P ("P") (nominated by AY in the first arbitration and by Y in the second) and of the Chairman O ("O") (nominated by the co-arbitrators). The tribunal decided not to consolidate the proceedings.

After the tribunal rendered the awards, X appealed before the Federal Supreme Court against both awards. In both proceedings, X argued that P and O were biased and that, therefore, there was no guarantee that the arbitral tribunal was impartial and independent of the parties.

Decision

The Federal Supreme Court dismissed both appeals.

As to P's lack of independence, X argued that, end of Mai 2007, the Czech media reported that P had been nominated as arbitrator by Y or by persons connected with Y in approximately ten different arbitration proceedings. In fact, P had become the "house arbitrator" ("Hausschiedsrichter") of Y. With respect to two (out of ten) proceedings, X personally knew of such nominations as he was acquainted with the proceedings. X further argued that in one further ICC arbitration between AY and a certain Mr. Z, P's nomination had not been confirmed.

X had challenged P's nomination as co-arbitrator in both arbitrations for lack of independence

before the ICC Secretariat pursuant to Article 11 of the ICC Rules. The ICC Court nevertheless confirmed P's nomination without stating the grounds for dismissal of the challenge submitted by X.

The Federal Supreme Court held that X's appeal was insufficiently substantiated and that X failed to sufficiently show circumstances giving rise to justifiable doubts as to the independence of P. X's assertion that P had "recently" been nominated in numerous cases of Y or by persons connected with Y was based solely on a newspaper article of 20 May 2007 which was too vague to serve as evidence in an evidentiary hearing purposed to clarify whether or not X's assertion was true. Whether or not P lacked independence could thus not be decided based on said article. The Federal Supreme Court continued that X should have named the different arbitrations proceedings by specifying the timing and the involved parties, by stating which party had appointed P and by showing what the relationship of that party to Y or to persons connected to Y was. Also the fact that P's nomination in another ICC arbitration between AY and a certain Mr Z had not been confirmed did not lead to any conclusions as to P's independence in these proceedings the Federal Supreme Court concluded.

As to O's lack of independence, X brought forward that, end of October 2008, at the occasion of an arbitration in London between a trust established by X and a company B, X learned of several interconnections of O with companies (where O served as a member of the board of directors) and with persons who were connected to or closely worked with Y. In particular, X argued that O was a member of the board of directors of a company C collecting for Y (or one of the companies controlled by Y) one of the largest claims in the Czech Republic and that said company was receiving instructions from Y. To substantiate his allegations X submitted e-mails showing the described interconnections and dependencies.

The Federal Supreme Court held that X's arguments were insufficient to show O's lack of independence. In particular, X had not shown to what extent the connection of the company C to Y was supposed to influence O's impartiality and independence in these proceedings. Rather, the Federal Supreme Court held, the cooperation described by X did not go beyond an "ordinary business relationship".

Comment

Switzerland is known as an arbitration friendly place among others because the Federal Supreme Court only rarely interferes with the work of the arbitral tribunals. In these two cases, however, the commentators cannot escape the impression that the Federal Supreme Court circumvented the actual problem by stating that the complainant did not sufficiently substantiate his allegations. It seems somehow unsatisfactory to require a strict proof regarding the question of the number and time frame of previous appointments of an arbitrator by the same party or an affiliate of it . Such proof will not be possible for the complainant. For this reason, at least if it refers to past appointments, the exact fact should be established before the course of the ICC confirmation procedure. It should also be kept in mind that, to the knowledge of the authors, situations of "house arbitrator" do exist which is sometimes used as an argument against arbitration as a method of dispute resolution.

Georg von Segesser / Petra Rihar

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