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Waiver of an Arbitration Agreement Resulting from a Party's Failure to Pay the Advance on the Costs of the Arbitration

Matthias Scherer (Editor in Chief, ASA Bulletin; LALIVE) · Sunday, May 1st, 2011

According to the rules governing domestic arbitration (Art 30 of the Concordat on Arbitration, and, as of 1 January 2011, Art. 378 of the Swiss Federal Code on Civil Procedure), a party that does not pay its share of the advance on the arbitration costs requested by the arbitral tribunal risks to lose the benefit of the arbitration clause. The other party has indeed the option to pay the entire advance or to waive the arbitration clause with regard to the matter in dispute.

In its decision 4A_574/2010 of 21 March 2011 the Swiss Federal Supreme Court dealt with a dispute that had arisen among the former members of a disintegrated law firm. One of the lawyers initiated the contractually agreed arbitration process against his former partners, but ultimately neither side paid the cost advances set by the arbitral tribunal. The arbitration did not move further. Some years later the same lawyer commenced court proceedings, taking the view that the courts were competent as the arbitration agreement had become inoperative. The Supreme Court recalled that the option to declare an arbitration agreement inoperative is not open if neither party pays the advance. In this case, the arbitration clause remains valid. Moreover, it remains in any event valid for disputes that are distinct from the one before the arbitral tribunal. In the case at hand, the factual matrix included circumstances that had come to light only four years after the arbitration had come to a halt due to the parties' failure to pay the cost advances. Although the prayers for relief remained the same in the law suit subsequently initiated before the state courts, the dispute was thus distinct from the one in the arbitration.

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