Arbitrator's procedural order is generally not subject to setting aside proceedings (Swiss Supreme Court)

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In *decision 4A_555/2016*, the Swiss Supreme Court considered whether an arbitrator's letter, containing procedural directives, constituted a procedural order exceptionally subject to setting aside proceedings.

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In a French-language decision dated 10 October 2016, the Swiss Supreme Court held that an arbitrator's letter, containing procedural directives, did not constitute a procedural order for the purposes of setting aside proceedings. Although a domestic case, its main holding is equally applicable in international arbitration.

The dispute concerned the dissolution of a partnership agreement between two Geneva lawyers, X and Z. The agreement's arbitration clause included mandatory pre-arbitral mediation. After Z's request for arbitration, the (second appointed) sole arbitrator took up his mandate in April 2016. Since no pre-arbitral mediation took place, and relying on *Decision 142 III 296* of the Swiss Supreme Court (discussed in *Legal update, Failure to comply with mandatory pre-arbitral tier can result in stay of arbitration (www.practicallaw.com/5-626-4025)*), X requested that the request for arbitration be deemed invalid or, alternatively, that the proceedings be suspended and a deadline set for mediation. The arbitrator responded with a letter containing procedural directives as well as a preliminary assessment regarding jurisdiction in view of the mediation tier. He further outlined that the issues raised would be subject to a conference call with the parties. X considered this letter constituted an interim decision and appealed against it.

The Swiss Supreme Court reviewed the decisions which are subject to setting aside proceedings and held that an ordinary procedural order can generally not be challenged. The only exception is a procedural order containing an implicit decision regarding the tribunal's competence. In determining whether or not an implicit ruling on competence was made, it is the content and not the designation used which is relevant. The Supreme Court's decision serves as a reminder that an arbitrator's procedural order does not, in general, contain an implicit decision concerning the tribunal's competence.

Since the letter in question did not definitively decide the issues raised (in particular the necessity of pre-arbitral mediation and the related question of competence), and since the arbitrator implicitly reserved the right to render an interim decision after the conference call, the Supreme Court denied that the letter was subject to setting aside proceedings. Therefore, it did not enter into the matter for obvious lack of inadmissibility.

Case: *Decision 4A_555/2016 (www.practicallaw.com/w-004-5536)* (Swiss Supreme Court).

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