Precautionary taking of evidence in support of current proceedings

19 February 2019

Litigation, Switzerland

Introduction

Under the Civil Procedure Code (CPC), the Swiss courts usually take evidence only after the parties have fully pleaded all particulars. The taking of evidence is often preceded by multiple exchanges of written submissions (eg, statements of claim and defence, replies, rejoinders and comments on *novas*). However, in certain cases, it may be unreasonable to wait until the proceedings have fully developed to take certain evidence. For such cases, Swiss law provides for the so-called 'precautionary taking of evidence'.

On 9 August 2018 the Zurich Commercial Court issued a noteworthy decision on such a request, which recapped earlier decisions and scholarly discussions.

Facts

The applicant and the opponent were both active in the aviation sector. The claimant regularly supported the respondent with respect to selling its aircraft in a European state and expected to be remunerated. The dispute arose in connection with the parties' latest remuneration agreement, which had been concluded in September 2014. The only original copy of the remuneration agreement was kept with an escrow agent in Zurich (the original contract). The claimant based its claim for remuneration on the original contract, whose exact wording and detailed terms had not been available to the parties.

The parties had already brought several lawsuits against each other, chiefly regarding the escrow agent's production of the original contract. At the time the present judgment was rendered, an International Chamber of Commerce arbitration in Geneva was pending in which the respondent had requested the production of the original contract. In parallel with these arbitration proceedings, the applicant had filed its request with the Zurich Commercial Court for the precautionary taking of evidence based on Article 158(1)(b) of the CPC, ordering the escrow agent to produce the original contract. The claimant argued that it had a legitimate interest in the court's precautionary taking of evidence in this regard.

CPC basis (Article 158)

Under Article 158(1) of the CPC, the courts have the general power to order the precautionary taking of evidence if the applicant shows *prima facie* that:

- the evidence is at risk of being lost or becoming unavailable; or
- the applicant has a legitimate interest in having the evidence taken at the current time.

Such precautionary taking of evidence is possible both before and after a claim on the merits has been filed with a court or in an arbitration. However, if a party requests the court to take evidence based on Article 158 while proceedings on the merits are pending, the threshold to meet the requirement of a legitimate interest will be higher.

Typically, applicants must prove that:

- their claim is based on substantive law;
- the evidence sought to be taken is a necessary cornerstone to prove the claim; and
- there is a specific reason for the precautionary taking of evidence.

In general, the courts grant such requests only where the strength of the case rests on the evidence sought.

Zurich Commercial Court considerations

On 9 August 2018 the Zurich Commercial Court took a rather narrow view on the issue. First, it considered that the production of the original contract had already been requested both as a matter of contractual right and as part of a procedural production request in the pending arbitration. It was therefore to be expected that the arbitral tribunal would issue a decision on the matter sooner or later. Accordingly, the court held that these were not circumstances which would justify the precautionary taking of evidence. In the court's view, the applicant could be expected to wait for the decision of the International Chamber of Commerce arbitral tribunal on whether the original contract must be produced.

The Zurich Commercial Court then added a further reason for refusing the application. It considered that even if the applicant had shown that it had a legitimate interest, the precautionary taking of evidence would not have been permissible in the case at hand.

According to Swiss Federal Tribunal jurisprudence, the precautionary taking of evidence is excluded if it has the same effect as granting a judgment on the merits (eg, a contractual claim to produce the same document). In the case at hand, the applicant would have needed the respondent's consent to obtain the original contract.

Therefore, the claimant should have taken action against the respondent to give its consent. If a request for the precautionary taking of evidence leads to the same result as a judgment on the merits, the latter would as a matter of fact preclude the former and the precautionary production of evidence would in effect amount to a definitive judgment on the merits, which is not permissible according to the Swiss Federal Tribunal.

Comment

The judgment follows existing case law on assessing the existence of a legitimate interest for the precautionary taking of evidence. In principle, the precautionary taking of evidence is possible while both arbitration and litigation proceedings are pending. In this respect, both proceedings are regarded as equivalent by the Swiss legislature. However, the requirements are higher if the proceedings are pending when the application is based

solely on a legitimate interest in the sense of Article 158(1)(b) of the CPC. The chances of success are higher in cases where evidence is at risk or where the underlying law provides for a claim to precautionary evidence, such as in the law on contracts for works and services (Article 367(2) of the Code of Obligations).

Following the Federal Court's jurisprudence, the commercial court also acknowledged that the precautionary taking of evidence, as well as interim measures in general, must not amount to a corresponding substantive claim in fact being admitted. An example of this is the principal's right to information and return of anything received as a result of the agent's activities according to Article 400 of the Code of Obligations (the law of agency contracts). Such claims must be decided in proceedings on the merits, possibly even in summary proceedings, but cannot be undercut by a simple request for the precautionary taking of evidence.

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