

Arbitration - Switzerland

Arbitrators' Jurisdiction Limited by Waiver Issue Pending in Foreign Courts

August 02 2001

Facts
Decision

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A recent case concerned a dispute over a construction contract that was terminated by both parties. The contractor filed its claim in court in Panama, where the work was carried out. The employer objected to the state court's jurisdiction on the basis of the arbitration clause in the construction contract, but its arbitration defence was dismissed by the state court as untimely. The employer appealed and commenced International Chamber of Commerce arbitration in Geneva. Its appeal was successful and so the decision of the court of first instance was overruled. Thereafter, the Geneva arbitral tribunal found that it had jurisdiction over the dispute. Soon after the award, however, the appellate court's decision was reversed by the Supreme Court of Panama, which found the employer's arbitration defence to be untimely. In light of this judgment, the contractor then challenged the Geneva jurisdictional award before the Swiss Supreme Court.

Decision

The Swiss Supreme Court set aside the award on jurisdiction. The court held that the arbitral tribunal should have stayed its proceedings pending a final decision by the Panama courts. The arbitral tribunal could have resumed its proceedings if this final decision was unlikely to be rendered within a reasonable time or would not be recognized in Switzerland.

The court reasoned that the foreign state courts should be allowed to decide first a plea already pending before them that the arbitration clause was void or had been waived by the parties, in accordance with the principle of *lis pendens* (pending lawsuit). According to the Supreme Court, the foreign state courts were also in a better position than the arbitral tribunal to decide, under their own law, whether an objection to their jurisdiction was timely made or not. The decision also elaborates on the conditions for a waiver to be recognized in the context of a state court action.

The May 14 2001 decision can be found on the web site of the Swiss Supreme Court at www.bger.ch (1).

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Endnotes

(1) Using the French language version, select "*Jurisprudence*", then "*arrêts dès 2000*", and enter "4P.37/2001".

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