

Arbitration - Switzerland

Arbitrators May Decide Jurisdictional Issues Pending before Foreign Court

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Article 186 of the Swiss Private International Law Act reads as follows:

"1 The arbitral tribunal shall itself decide on its jurisdiction.

1bis It shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a state court or another arbitral tribunal, unless there are serious reasons to stay the proceedings.

2 A plea of lack of jurisdiction must be raised prior to any defence on the merits.

3 The arbitral tribunal shall, as a rule, decide on its jurisdiction by preliminary award."

Paragraph 1bis was added with effect from March 1 2007.⁽¹⁾ Its purpose is to clear up any uncertainty arising from the Swiss Supreme Court decision in the *Fomento Case*.⁽²⁾

In *Fomento*, the defendant in a Panamanian court case subsequently initiated arbitration proceedings in Switzerland. The jurisdiction of both the court and the arbitrators turned on whether, among other things, the defendant had waived the arbitration agreement by not asserting it in time in the Panamanian action. The arbitrators decided the issue while the matter was still pending before the Panamanian Supreme Court. The Swiss Supreme Court held that the arbitrators should have stayed their decision pending a final Panamanian ruling on jurisdiction. It based its decision on Article 9 of the Private International Law Act, which provides that a Swiss judge must stay a case if a prior action is pending abroad and the foreign court is expected to issue, within a reasonable time, a decision that is capable of recognition in Switzerland.

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Extending Article 9 to arbitration proceedings when jurisdiction is disputed raises complex issues. It is not even clear whether the question is one of *lis pendens* (ie, prior action pending) in the traditional sense.

The Swiss court relied on the public policy of avoiding conflicting decisions and on the fact that the Panamanian courts were better placed to decide whether, as a matter of Panamanian procedure, the arbitration agreement was raised in a timely manner.

However, some commentators were concerned that the efficacy of arbitral proceedings could be endangered by abusive proceedings and the acceptance of jurisdiction elsewhere - hence the need for Article 186(1bis).

By contrast, others argue that the amendment is superfluous, since an arbitral tribunal applying Article 9 will still have to decide in effect on its own jurisdiction when evaluating whether the foreign court decision is capable of recognition in Switzerland (as it will not be recognized if there is a valid arbitration agreement). However, the *Fomento* decision does not leave much scope for the arbitrators to review whether the arbitration agreement is valid before staying their proceedings on jurisdiction.

In any event, Article 186(1bis) creates greater legal certainty as to what Swiss arbitrators should do when faced with a jurisdictional objection which is already pending before a foreign court. The new rule, on the arbitrators' behaviour, complements the rule on the corresponding behaviour of the courts, which is often referred to as the 'negative effect' of the arbitrators' power to decide on their own jurisdiction.

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Endnotes

(1) Swiss Federal Parliament,
http://www.parlament.ch/ab/frameset/d/s/4714/231679/d_s_4714_231679_231680.htm

(2) ATF 127 III 279, <http://relevancy.bger.ch/cgi-bin/JumpCGI?id=BGE-127-III-279&lang=fr&zoom=OUT>.

(3) A Bucher/P-Y Tschanz, *Private International Law and Arbitration - Basic Documents*, 1995.

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