

## Arbitration - Switzerland

### When is a Partial Award Binding on the Arbitral Tribunal?

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Facts  
Decision

#### Facts

X initiated arbitration proceedings against Z under a joint venture agreement. A partial award on liability held that X had standing to claim under the joint venture agreement and that Z was in breach of its contractual obligations. At the subsequent hearing on the quantum of damages, Z produced a document entitled "Certificate of Incorporation", showing as X's date of incorporation a date subsequent to the creation of the joint venture agreement and the filing of the request for arbitration. Based on this document, Z challenged the jurisdiction of the tribunal and X's standing. Having given the parties the opportunity to submit written arguments, the tribunal rendered its final award. The tribunal held that it had jurisdiction and that X was not a legal entity. Consequently, the tribunal declared the proceedings closed for lack of a legal person on the claimant's side. "X, a division of Y, a pseudonym of Y Inc" challenged the award before the Swiss Supreme Court, asserting that the final award contradicted the partial award in violation of the principle of *res iudicata* (ie, a final and binding decision has been issued), rendering the final award incompatible with the procedural public order.

#### Decision

An arbitral tribunal violates the public order if it renders a decision without regard to the binding force of a prior decision or if, in the final award, it departs from its opinion contained in an interim award settling a preliminary matter concerning the merits.

There are two types of partial award in a broad sense. Partial awards in the strictest sense, which contain a decision on a quantitatively limited part of the claims that have been presented to the tribunal, fall under the principle of *res iudicata*, with the principle applying only in relation to those claims which the tribunal has decided. By contrast, preliminary or interim awards, which settle preliminary questions of procedure or merits, are not covered by *res iudicata*. However, in contrast to procedural orders or directives, this form of award is binding on the arbitral tribunal.

The partial award in the case at hand can be characterized as a preliminary award, as it dealt with preliminary questions concerning the merits (the claimant's standing, the extent of the obligations imposed on the respondent by the joint venture agreement, and the latter's liability with respect to the claimant). Thus, the award did not have *res iudicata*. However, it was binding on the arbitral tribunal. The issue therefore arises as to whether the tribunal disregarded the binding nature of the partial award.

In its partial award, the arbitral tribunal dealt with the question of whether the claimant had standing to claim, in the sense of having a sufficient legal interest. It did not deal with the claimant's capacity to be a party to the proceedings, nor the claimant's capacity to sue. Therefore, the tribunal was free to deal with these issues in the final award without departing from its partial award. Consequently, the claimant's claim of violation of the procedural public order was not founded.

Source : *X Inc, un pseudonyme de Y Inc contre Z Corporation et Tribunal arbitral*, April 3 2002, 4P.282/2001, published as ATF 128 III 191; also available from the website of the Swiss Supreme Court, [www.bger.ch](http://www.bger.ch) (using the French-language version, select "jurisprudence", then "principaux arrêts dès 1954").

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