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Swiss Federal Tribunal applies Article 186 (1bis) of the Swiss Private International Law Act in a case involving parallel proceedings before two arbitral tribunals

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Article 186 of the Swiss Private International Law Act (“PIL Act”) provides as follows:

“1. The arbitral tribunal shall decide on its own 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. Any objection to its jurisdiction must be raised prior to any defense on the merits.

3. The arbitral tribunal shall, in general, decide on its jurisdiction by a preliminary decision.”

In a recent decision[i], the Swiss Federal Tribunal applied – to the best of our knowledge for the first time – Article 186 (1bis) PIL Act [ii] in a case involving parallel proceeding before two arbitral tribunals.

The facts of the case can be summarized as follows. In 1989, Professor A. entered into a license agreement with X. SA, under which X. SA was to develop a compound invented by Professor A. into marketable drug specialties and pay royalties corresponding to a percentage of sales of such specialties to Professor A. In 1992, the parties signed an amendment to the 1989 license agreement modifying the calculation method and the duration of X. SA’s obligation to pay royalties to Professor A. In 2005, following a dispute between Y. (to which Professor A. had assigned all of his rights under the license agreement and its amendments) and X. SA over the interpretation of the 1992 amendment, Y. initiated ICC arbitration proceedings against X. SA in which it sought the payment of royalties due under the 1989 license agreement as amended by the 1992 amendment. In a partial award dated 19 November 2008, the arbitral tribunal dismissed X. SA’s interpretation of the 1992 amendment and concluded that Y. was entitled to the payment of royalties during a defined period of time.

A few weeks after the issuance of the partial award, X. SA declared that it rescinded the 1992 amendment on the ground of an essential mistake. At the same time, X. SA initiated a second arbitration in which it requested that the arbitral tribunal declare that it had validly rescinded the 1992 amendment. A few days later, X. SA requested a stay of the first arbitration proceedings

pending a decision on the validity of the rescission of the 1992 amendment by the second arbitral tribunal. The first arbitral tribunal refused to stay the proceedings. X. SA challenged this decision before the Swiss Federal Tribunal, arguing, among others, that the second arbitral tribunal had exclusive jurisdiction to decide on the validity of the rescission of the 1992 amendment, so that the first arbitral tribunal did not have jurisdiction to decide on this issue.

The Swiss Federal Tribunal dismissed X. SA's challenge and found that the first arbitral tribunal did have jurisdiction to decide on the validity of the rescission of the 1992 amendment. The Swiss Federal Tribunal's decision is interesting in many respects, two of which are worth mentioning in this short contribution.

First, the Swiss Federal Tribunal found that the issue of the validity of the rescission of the 1992 amendment was one of the elements of the dispute submitted by the parties to the first arbitral tribunal and was thus covered by the arbitration clause contained in the 1989 license agreement [iii] and the terms of reference signed by the parties.[iv]

Second, the Swiss Federal Tribunal held that the question of the jurisdiction of arbitral tribunals to which a same matter between the same parties is submitted is not governed by Article 181 PIL Act [v] (on which X. SA had relied to argue that the second arbitral tribunal had exclusive jurisdiction to decide on the validity of the rescission of the 1992 amendment), but by Article 186 (1bis) PIL Act. In accordance with this provision, the first arbitral tribunal was entitled to decide on its own jurisdiction notwithstanding the second arbitration proceedings initiated by X. SA (unless there would have been serious reasons to stay the proceedings, but no such reasons existed in the present case).

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[i] Swiss Federal Tribunal decision 4A_210/2008 dated 29 October 2008 (available on the Swiss Federal Tribunal's website at www.bger.ch).

[ii] Article 186 (1bis) PIL Act was adopted with effect from 1 March 2007, essentially in response to the decision rendered by the Swiss Federal Tribunal in the famous *Fomento* case (Swiss Federal Tribunal decision dated 14 May 2001, reported at ATF 127 III 279, available on the Swiss Federal Tribunal's website at www.bger.ch). In the *Fomento* case, the Swiss Federal Tribunal held that the *litis pendens* provision of Article 9 PIL Act also applied to international arbitration, thus requiring an arbitral tribunal in Switzerland to stay arbitration proceedings during the pendency of an action filed earlier in a foreign court if the foreign court is expected to issue, within a reasonable time, a decision that is capable of recognition in Switzerland. This decision has elicited extensive comments and complaints that shall not be repeated here, given that the matter is now governed by Article 186(1bis) PIL Act.

[iii] The arbitration clause covered “*any dispute arising under, or in connection with this agreement*”.

[iv] The terms of reference provided that “*the issues to be determined by the Arbitral Tribunal shall be those resulting from the parties' pleadings and submissions, including forthcoming pleadings and submissions, and which are relevant to the adjudication of the parties' respective claims and defences*”.

[v] Article 181 PIL Act provides, under the heading *lis pendens*, that the arbitral proceeding is pending as of the time when one of the parties submits its request to the arbitrator or arbitrators designated in the arbitration agreement or, in the absence of such designation, from the time when one of the parties initiates the procedure for the constitution of the arbitral tribunal.


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