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Control of the arbitral tribunal's jurisdiction in parallel proceedings and waiver of arbitration

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In a recent decision dated 26 October 2009 (4A_428/2009), the Swiss Federal Tribunal held that a party that enters into a procedural agreement in parallel state court proceedings following unsuccessful compulsory judicial conciliation does not waive its right to arbitration when that party does not proceed on the merits without making any objections.

The decision stems from a dispute between a corporation incorporated in China ("Y") and a corporation with seat in Geneva ("X") over a commercial lease. The contract was governed by Swiss law and contained an arbitration clause providing for dispute resolution by a sole arbitrator sitting in Geneva under the Swiss Rules of International Arbitration.

In November 2008, the lessee, X, complained about various defects in the leased premises and began to deposit rent on an official depositary escrow account. On 15 December 2008, X filed a claim against the lessor, Y, before the Geneva court of first instance for lease matters, seeking validation of the deposited rent. On the same day, X also filed a request for arbitration, with identical prayers for relief, before the Geneva Chamber of Commerce. X specified that the request for arbitration was filed in the alternative, in the event that the state court would decline jurisdiction.

On 14 May 2009, the compulsory conciliation attempt between the parties before the state conciliation authority failed and the parties agreed to bring the dispute directly before the Geneva court of first instance for lease matters instead of waiting for a decision by the conciliation authority.

Meanwhile, the Geneva Chamber of Commerce had set the arbitration proceedings in motion and had nominated a sole arbitrator. However, on 30 April 2009, X sought to withdraw the pending arbitration request. Y opposed this unilateral withdrawal and raised a counterclaim in the arbitration, requesting that the deposited rent be released in its favor.

In a "preliminary award on jurisdiction" dated 6 July 2009, the sole arbitrator considered that he was entitled to decide upon his own jurisdiction notwithstanding the parallel proceedings between the parties pending before the Geneva state court, in conformity with Article 186(1bis) of the Swiss Private International Law Act ("PILA"). The sole arbitrator affirmed his jurisdiction over the dispute, holding that the arbitration clause contained in the lease contract was valid and that the dispute could be submitted to arbitration. He further confirmed that the request for arbitration could not be withdrawn without the consent of the other party and held that Y had not foregone arbitration by signing the minutes of the proceedings before the state conciliation authority.

On 7 September 2009, X brought setting aside proceedings against the sole arbitrator's award on jurisdiction before the Federal Tribunal on the basis of two main arguments. Firstly, X argued that

Y had waived its right to arbitrate, within the meaning of Article 7 PILA , by expressly agreeing to submit the dispute to the Geneva court of first instance for lease matters. Secondly, X contended that by submitting their contract to Swiss law, the parties had accepted the application of the Federal Statute on Territorial Jurisdiction ("FSTJ") and had therefore reserved the possibility of submitting their dispute to the jurisdiction of the state courts.

The Federal Tribunal held that Y had not waived its right to arbitrate since it never admitted the jurisdiction of the state courts; on the contrary Y had consistently relied on the arbitration clause to bring X to arbitration. According to the Federal Tribunal, the fact that Y had signed the minutes of the meeting before the conciliation authority whereby the parties agreed to bring the dispute directly before the Geneva court of first instance for lease matters (instead of waiting for a decision from the conciliation authority) amounted to a mere procedural agreement ("accord de procédure"), aimed at accelerating proceedings until a decision of the court of first instance on its jurisdiction. Such procedural agreement could not be interpreted, even objectively, as a waiver of the arbitral clause. Considering that Y had expressly contested the jurisdiction of the Geneva state courts before the conciliation authority and had opposed the withdrawal of the arbitration request before the sole arbitrator, X could not have in good faith understood the procedural agreement to constitute a waiver of arbitration.

Unsurprisingly, the Federal Tribunal also rejected X's second argument, confirming the well-established rule that the FSTJ does not apply in the field of arbitration, and accordingly dismissed the motion to set aside.

Although not groundbreaking, this decision is interesting as it raises the question of a waiver of arbitration and tests the relationship between the control of the arbitral tribunal's jurisdiction by a court and by the arbitral tribunal itself.

In particular, that case reminds us that there is no negative effect of the "competence/competence" principle in Switzerland . If it is well established that an arbitral tribunal has the power to rule on its own jurisdiction (Article 186(1) PILA), the Swiss state court seized with the same question is not obliged to give priority to the arbitrator or to stay the proceedings in favor of the arbitration. Rather, on the basis of Article 7 PILA, the state court will have to determine the validity of the arbitration agreement. Conversely, under the relatively new Article 186(1bis) PILA adopted in reaction to the famous Fomento decision, the arbitral tribunal is entitled to 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.

There is no doubt that the sole arbitrator correctly resorted to Article 186(1bis) PILA in the present instance. That said, this case shows that, in situation of parallel proceedings, the interplay between Articles 7 and 186(1bis) LDIP can potentially lead to conflicting decisions. In order to avoid or minimize such risk, some authors advocate that when an arbitration is commenced before an arbitral tribunal sitting in Switzerland prior to Swiss state court proceedings, the Swiss state court shall apply Article 35 of the FSTJ by analogy and stay the case until the arbitral tribunal has decided on its jurisdiction. However, the added difficulty here was that both proceedings – the state court proceedings and the arbitration – were filed simultaneously.

In the decision at hand, the Federal Tribunal concluded that the sole arbitrator could not be criticized for having breached Article 7 PILA by affirming his jurisdiction. Although the result of the decision must be approved without hesitation, this last observation is rather disconcerting, as Article 7 PILA only binds Swiss courts and not arbitral tribunals sitting in Switzerland . Perhaps the confusion comes from the claimant's argument regarding the second interesting issue in this case, namely the question of a waiver of arbitration. In ruling on his jurisdiction, the sole arbitrator had to determine whether the hypotheses set out under Article 7 let a and b PILA were given, namely whether Y had taken part in the state court proceedings without making any objection

(Einlassung), thus implicitly agreeing with the other party to waive the arbitration clause.
In the present case, the answer to this question was clearly negative. Although the Federal Tribunal has acknowledged in previous decisions that parties can replace an arbitration clause by another agreement, which can stem from the parties' behavior, such waiver of arbitration will not be lightly inferred. Under Swiss law, it should be clear that a party is giving up its right to arbitrate, even more so if such waiver is not express but implicit. If a party's intention is not obvious, a Swiss court will interpret its conduct objectively, according to the "principe de la confiance" by determining how such conduct could have been understood by the other party in good faith and considering all circumstances. Here, it was clear from the record that Y had made several reservations regarding the jurisdiction of the state court and was relying on the arbitration agreement. The only reason for the parties' agreement to bring the case directly to the court of first instance instead of awaiting a decision of the conciliation authority – which would not have been binding on the state court anyway – was to accelerate the proceedings for a ruling by the court on jurisdiction and not to waive arbitration. This is consistent with the approach taken by the Federal Tribunal in previous decisions that there is no waiver of rights when a party's involvement in the proceedings is limited to the challenging of the jurisdiction of the state court or the arbitral tribunal in question.

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Article 7 PILA states that : "If the parties have concluded an arbitration agreement with respect to an arbitrable dispute, the Swiss court before which the action is brought shall decline its jurisdiction unless:
a. The defendant proceeded to the merits without contesting jurisdiction;
b. The court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or
c. The arbitral tribunal cannot be constituted for reasons for which the defendant in the arbitration proceeding is manifestly responsible". It should be pointed out however that the Swiss Parliament is currently contemplating the introduction of the negative effect of the "competence/ccompetence" principle in the Swiss legislation. According to the parliamentary initiative of Mr Lüscher, a Swiss court would be obliged to stay proceedings until the arbitral tribunal, regardless of its seat, would have ruled on its jurisdiction unless a prima facie review by the state court would show that there is no arbitration agreement between the parties.
In the case at hand, the state court did not suspend the proceedings to await the sole arbitrator's ruling on jurisdiction. As it appears, the court ordered a suspension of the proceedings only subsequently, after the filing of the motion to set aside the sole arbitrator's award on jurisdiction before the Federal Tribunal. According to the case law of the Federal Tribunal, such determination will be made on a prima facie basis if the arbitral tribunal has its seat in Switzerland.
At the time of writing, the Geneva court of first instance for lease matters had not yet issued any decision regarding its jurisdiction over the dispute.
See e.g. Voser/Gisberger, International Arbitration in Switzerland, 2008, p. 113, § 432.
Poudret/Besson, Comparative Law of International Arbitration, 2007, p. 428, §499.
See e.g., the Fomento decision (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)
See e.g. decision of the Federal Tribunal dated 24 June 2005 (4C.23/2005).
See e.g. decision of the Federal Tribunal dated 29 October 2008 (4A _210/2008), §3.3.1.2.

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