

No More Lis Pendens between Swiss Courts and Arbitrators

Article 186 of the Swiss Law of International Private Law (the Swiss Law) was amended on October 6, 2006. A new paragraph 1bis was added to that provision. It reads:

[Le tribunal arbitral] statue sur sa compétence sans égard à une action ayant le même objet déjà pendante entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure.

Free translation: The arbitral tribunal rules on its jurisdiction without taking into consideration proceedings involving the same cause of action and between the same parties already pending before another arbitral tribunal or a court, unless there are serious reasons to stay the proceedings.

My understanding is that the rationale of the amendment is to abrogate the 2001 *Fomento* ruling of the Swiss Federal Court. In *Fomento*, the Swiss highest court held that the lis pendens provision of the Swiss Law (art. 9) applied between a foreign court and an arbitral tribunal sitting in Switzerland. As the foreign court has been seized first (and as the judgement could be enforced in Switzerland), the arbitral tribunal had to decline jurisdiction. Because it had not done so, the award was set aside.

Whether there can be lis pendens between an arbitral tribunal and a court is a hotly disputed issue. It could be argued that they cannot both have jurisdiction. This is certainly the French view. But *Fomento* was a good example of an actual lis pendens situation. The reason why the foreign court had taken jurisdiction was that the parties had failed to challenge it in a timely fashion.

New paragraph 1bis of article 186 is applicable as of March 1st, 2007.