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Arbitration Newsletter Switzerland

Amendment of Article 186 of the Private International Law Act ("PILA")

An important amendment of the PILA is on its way. Today the Senate ("Ständerat") approved, without further deliberation, the amendment of Art. 186 PILA. The Congress ("Nationalrat") did so already in June of this year. The amendment should therefore become effective in the first months of next year.

The proposed and now approved amendment of 186 (1) (bis) PILA reads as follows:

"The arbitral tribunal decides on its jurisdiction irrespective whether the same claim between the same parties is already pending at a state court or at another arbitral tribunal, except if notable reasons would justify a stay of the proceedings."

The background for this amendment is to be found in the famous Fomento decision of the Swiss Supreme Court (BGE 127 III 279; Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A., of May 14, 2001; 4P.37/2001). Fomento and Colon entered into a contract for the building of a port in Panama. Differences came up and Fomento initiated proceedings at a state court in Panama. Colon objected to the jurisdiction of the Panamese Court based on an arbitration clause contained in the agreement, however, such objection was apparently raised belated and, therefore, rejected by the Panamese Court. Colon filed an appeal against this decision at an appellate court in Panama and initiated, at the same time, arbitration proceedings in Geneva. The appellate court approved the appeal of Colon. Before the appellate proceedings became final in Panama, the arbitral tribunal in Geneva decided that it would have jurisdiction to hear the case, against which decision Fomento then filed an action for annulment at the Swiss Supreme Court. In the meantime the decision of the appellate court in Panama was turned over by the Supreme Court of Panama, hence approving the jurisdiction of the Panamesian Court. The Swiss Supreme Court annulled the decision to accept jurisdiction by the arbitral tribunal in Geneva. In doing so the Swiss Supreme Court stated that the arbitral tribunal would have to follow the rules established for state courts in art. 9 PILA for lis pendens. Therefore, the arbitral tribunal should have made a prognosis for the likelihood of an enforcement of the Panama decision in Switzerland ("Vollstreckungsprognose") and could have continued its proceedings only if the decision of the Panama Court would not be enforceable in Switzerland.

The Fomento decision of the Supreme Court was widely criticised (for more details see Kaufmann - Kohler / Stucki, International Arbitration in Switzerland, 2004, p.31 n.66), since art. 9 PILA was not intended to be applied also for arbitration.

The above amendment of art. 186 PILA does re-establish full "Kompetenz-Kompetenz" of arbitral tribunals sitting in Switzerland under the rules of PILA. It is again in the exclusive discretion of an arbitral tribunal acting in Switzerland under the provisions of the PILA to decide whether in case of parallel proceedings - be it in a state court or in another arbitral tribunal, - it wants to continue the case or whether it sees notable reasons for a stay under the prevailing circumstances of the particular case.

The proposed amendment of art. 186 PILA does not have any specific transitional provisions. It seems therefore appropriate to apply - mutatis mutandis - the transitional provisions applicable at the introduction of PILA (article 195 - 199 PILA). An arbitral tribunal will therefore be in a position to apply the new provision of art. 186 (1) (bis) PILA immediately after the amendment has become into force.

The above amendment is certainly most welcome. An area of concern will soon be resolved and ASA has

proven its skills not only in arbitration but also in the field of politics by having this amendment implemented in a very efficient way.

September 28, 2006

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