



PESTALOZZI LACHENAL PATRY
ATTORNEYS AT LAW

LOEWENSTRASSE 1, 8001 ZURICH, SWITZERLAND
TEL. +41 1 217 91 11 - FAX +41 1 217 92 17 - ZRH@PLPLAW.CH

Office Zurich

Jurisdictional Challenges: Parallel Proceedings / Need for Stay?

Dr. Marc D. Veit

marc.veit@plplaw.ch



Office Zurich

The Problem: Forum Running

- Contract between X Ltd. (state A) and Y Ltd. (state B) provides for arbitration in state C
- Dispute arises, X Ltd. sues Y Ltd. before state courts in state A
- Y Ltd. raises plea of lack of jurisdiction and initiates arbitration



Office Zurich

Arbitral Tribunals or State Courts: Who must defer to whom?

- Modern Approach:
 - ↳ Competence-Competence of the Arbitral Tribunal

- Definition:
 - ↳ „Jurisdiction of the arbitral tribunal to decide on its jurisdiction, subject to remedy to the competent state court on the jurisdiction issue.“



Office Zurich

Competence-Competence: Parallel Proceedings

“An arbitral tribunal that considers itself to be prima facie competent pursuant to the relevant arbitration agreement should, consistent with the principle of competence-competence, proceed with the arbitration (“Current Arbitration”) and determine its own jurisdiction, regardless of any other proceedings pending before a national court or another arbitral tribunal in which the parties and one or more of the issues are the same or substantially the same as the ones before the arbitral tribunal in the Current Arbitration (“Parallel Proceedings”). Having determined that it has jurisdiction, the arbitral tribunal should proceed with the arbitration, subject to any successful setting aside application.”

(International Law Association Recommendation No. 1 on Lis Pendens and Arbitration, adopted on 4-8 June 2006)



Office Zurich

Switzerland: The Fomento Case

- Fomento de Construcciones y Contratas S.A. vs. Colon Container Terminal S.A. (BGE 127 III 279)
 - ↳ Lis pendes rule (art. 9 PILS) is part of public policy
 - ↳ If the requirements of art. 9 PILS are met, an arbitral tribunal in Switzerland must stay the arbitration.
 - ↳ Requirements for stay according to Fomento:
 - Same parties,
 - Same cause of action,
 - Same subject matter,
 - Decision will be rendered within a reasonable time,
 - Decision is capable of being enforced in Switzerland.
- Consequence: Widespread attempts of unwilling respondents to sabotage proceedings.



Office Zurich

Fomento is often Misunderstood

- *"The risk that a foreign court, hostile to arbitration, may interfere with the arbitration does not need to be considered in the present case. In fact, the judgment of that court would not be enforceable in Switzerland. The principle of res judicata and of lis pendens, however, apply only to foreign judgments which are capable of being recognized in Switzerland."* (BGE 127 III 279)
- The ultimate decision on the validity of the arbitration agreement must be based on Swiss arbitration law.



Office Zurich

The Swiss Legislator Intervenes

- New art. 186 (1^{bis}) Swiss Private International Law Statute (effective as of early 2007):
 - ↳ *„The arbitral tribunal shall decide on its own jurisdiction notwithstanding an action on the same matter between the same parties before a state court or another arbitral tribunal unless there are serious reasons to stay the proceedings.“*



Office Zurich

"Serious Reasons to Stay" (1)

- Waiver of the arbitration agreement?
 - ↳ Idea: By not (timely) objecting to the jurisdiction of the state court, a party waives the arbitration agreement.
 - ↳ Validity of the arbitration agreement according to art. 178 (2) PILS:
 - Valid if conforming to the law chosen by the parties, or
 - Valid if conforming to the law governing the subject matter of the dispute/main contract, or
 - Valid if conforming with Swiss law.
 - ↳ Waiver must be valid in all circumstances foreseen in art. 178 (2) PILS
 - ↳ Unlikely that decision of foreign state court will be decisive



Office Zurich

"Serious Reasons to Stay" (2)

→ "Battle of Arbitration Agreements"

↳ Example:

- "Tolling Agreement" between X AG and Y Ltd providing for ICC arbitration in Zurich
- Debt arises "under" Tolling Agreement in favour of Y Ltd
- "Settlement Agreement" between X AG and Y Ltd providing for arbitration in Zurich under Swiss Rules
- Y Ltd starts arbitration under Swiss Rules
- X AG disputes jurisdiction of arbitral tribunal under Swiss Rules and initiates ICC arbitration



Office Zurich

"Serious Reasons to Stay" (3)

- Deadline in arbitration agreement to initiate arbitration proceedings
 - ↳ Arbitration is initiated only to meet deadline while state court proceedings are pending



Office Zurich

"Serious Reasons to Stay" (4)

- Preliminary question is pending before state court/arbitral tribunal?
 - ↳ Preliminary questions that are not arbitrable:
 - Existence of company?
 - Validity of a patent?
 - Etc.
 - ↳ Often no lis pendens situation, but nevertheless may qualify as "serious reasons to stay" the arbitration.



Office Zurich

→ Thank you for your attention!