



## Arbitration Newsletter Switzerland

# "Waiver of Annulment under Article 192 PILA" or "How final is final?"

The Swiss Federal Supreme Court ("Supreme Court") published recently a decision, where it accepted for the first time that an arbitration agreement did provide for a waiver of annulment as provided for in Article 192 PILA (BGE 131 III 173; 4P.236/2004, decision of February 4, 2005, now also published in ASA Bulletin No. 3, 2005, together with an English translation and a comment added by Prof. François Perret, Geneva, pp. 496 et seq.; this comment does, however, address factual issues underlying this decision not dealt within the ambit of this notice).

The relevant Article 192 (1) PILA reads as follows:

*"If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190 (2)."*

It seems that Switzerland is, together with Belgium, the only country which provides for such a waiver of annulment.

Shortly after the PILA has been enacted in 1989, the Supreme Court rendered in 1990 a decision, which set the bench mark for assuming such waiver of annulment (BGE 116 II 639). It did so, however, by way of an obiter dictum only, stating that a reference to the ICC Rules, in particular Article 24, as of that time, stating that the award is "final" could not be construed as waiver of annulment under Article 192 (1) PILA. Such waiver would have to be assumed only if the parties to the agreement were clearly making reference to the legal remedy to be waived and explicitly state such waiver. Thereafter, about ten further decisions were rendered by the Supreme Court, all of them using BGE 116 II 639 as yardstick and all of them declining a waiver of annulment in the

particular case. Amongst the wordings deemed to be insufficient to construe an application of waiver of annulment under Article 192 (1) PILA were:

specific reference in the terms of reference stating that the award to be issued by the arbitral tribunal is "final" (BGE 118 II 359);

reference to arbitration under the Commission d'Arbitrage de la Chambre de Commerce de Genève, concluding with the sentence "The applications to the State Courts are excluded" (4P.265/1996);

"any decision taken by the said Court shall be without appeal or recourse to ordinary courts and is binding on the parties' concerned" (4P.62/2004).

The practice of the Supreme Court has, therefore, been consistent so far, neither the reference to any institutional rules of arbitration, providing that the award to be rendered is final, nor any reference in an arbitration agreement as to the finality of the award to be rendered and/or excluding access to state courts in general terms were considered as valid waiver of annulment under Article 192 (1) PILA.

In the most recent decision of the Supreme Court (BGE 131 III 173), the following arbitration agreement was at the source of the dispute:

*"All and any awards or other decisions of the arbitral tribunal shall be made in accordance with the UNCITRAL rules and shall be final and binding on the parties who exclude all and any rights of appeal from all and any awards in so far as such exclusion can validly be made..."*

In admitting such arbitration agreement as waiver of annulment under Article 192 (1) PILA, the Supreme Court did first deal with the term "exclude all and any



rights of appeal" and came to the conclusion that the term "appeal" should not be interpreted narrowly, being applied only to "appeal" in the strict sense of the word, but rather be applied to any legal remedy available. This was of relevance since the sole action of annulment available against arbitration awards, as provided for in Article 190 (2) PILA, is not an appeal in the strict sense of the word but a constitutional review ("staatsrechtliche Beschwerde", "recours de droit public"). Furthermore, particular emphasis was added by the Supreme Court to the fact that the parties wanted to exclude "all and any rights of appeal", which should embrace, using the plural as to "rights", all legal remedies available. Finally, the Supreme Court gave also weight to the term "in so far as such exclusion can validly be made", which it interpreted as a clear will of the parties to exclude any legal remedies, to the extent possible.

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Whilst one can put a question mark as to why the Supreme Court did, just within a few months and with rather similar arbitration clauses, come to different decisions (under the cases 4P.62/2004 and 4P.236/2004), it remains, nevertheless, clear that the bench mark established already in BGE 116 II 639 continues to stand and, consequently, the jurisprudence developed subsequently based on this decision, remains relevant. Therefore, only under very specific circumstances a waiver of annulment under Article 192 (1) PILA can be assumed.

The relevant consequence for legal practitioners to be derived from this recent Supreme Court decision is that caution should, as from now on, be exercised in drafting extensive arbitration agreements, going beyond the clauses generally proposed by the various arbitration institutions. If such agreements are drafted in similar terms as in the above recent case, access to the Supreme Court may become barred – a result which at least the losing party does not want to achieve! But, as stated above, the previous bench mark continues to apply, namely, the parties must clearly and explicitly waive the right to file an appeal, neither a simple reference to institutional arbitration rules, providing for finality of the award to be rendered, nor a general qualification of the arbitration agreement excluding access to state courts, will do so.

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