Arbitration - Switzerland

Supreme Court rules on Private International Law Act

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May 03 2012

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Introduction

Article 192 of the Private International Law Act allows the parties to waive all or part of the legal grounds for challenges against international awards issued in Switzerland, as long as they:

- are not domiciled in Switzerland;
- are not seated in Switzerland; and
- have no business establishment in Switzerland.

In a recent decision the Supreme Court held that Article 192 is consistent with Article 6 of the European Convention on Human Rights.(1)

Facts

Mr X, a Tunisian businessman, and his three sons concluded four contracts, including an option agreement, with French firm Z. Under the agreement, Z had a call option on all shares in Company A held by X and his sons.

The agreement included an arbitration clause which included the following waiver:

> "*Neither Z nor the Grantors [ie, X and his three sons] shall be entitled to commence or maintain any action in a court of law upon any matter in dispute arising from or concerning this Agreement or a breach thereof except for the enforcement of any award rendered pursuant to arbitration under this Agreement. The decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law.*"

On June 2007 Z exercised its option, but X and his sons refused to comply. On August 2008 Z started an International Chamber of Commerce arbitration against X and his sons. The place of arbitration was Geneva. The arbitral tribunal upheld Z's claims and ordered the immediate transfer of the shares as per Z's option. X sought the annulment of the award before the Supreme Court, mostly on jurisdictional and public order grounds. Z objected to the admissibility of the challenge, relying on the conventional waiver.

Decision

The court reaffirmed the validity of a conventional waiver under Swiss law, subject to a clear and unequivocal joint declaration by the parties to exclude all ordinary and extraordinary judicial challenges against the award.(2)

In the case at hand, the court considered that the waiver met the minimum requirements of Article 192. In particular, the court had no sympathy for X's argument that the parties had merely intended to exclude ordinary means of appeal and not extraordinary means of appeal (typically, the annulment proceeding before the Supreme Court). The court found support in the fact that the legal systems related to the parties (ie, US, French and Tunisian law) did not provide for an ordinary appeal against awards rendered in international commercial arbitration, but only for an extraordinary appeal. Thus, the waiver must have been intended to extend to the extraordinary appeal. However, the court declined to clarify, once and for all, the scope of the term 'appeal' from the perspective of Article 192, and whether it is inclusive or exclusive of the

annulment proceeding before the Supreme Court.(3) The court considered that such determination was best made in light of the concrete circumstances of the case.

The court further confirmed the compatibility of Article 192 with Article 6 of the European Convention on Human Rights. A conventional waiver of rights is also admissible under Article 6 of the convention, subject to the condition that such waiver be expressed in an unequivocal manner and not run counter to any important public interest. The court considered that the wording of Article 192 and the restrictive practice developed thereunder were consistent with these requirements.

Comment

It is not the first time that the question of the applicability of fair trial guarantees has been discussed in the context of international commercial arbitration,(4) and it could be argued that the provisions of Article 6 of the convention are not directly applicable to arbitration proceedings as such, as they are not directed by a state court or other state adjudicating authorities within the meaning of 'human rights instruments'. However, it is the state's duty to monitor – through annulment and enforcement proceedings – that arbitration tribunals seated within the jurisdiction conduct arbitration proceedings in a way that is consistent with Article 6. While the parties may choose to waive their right to such control, even under the convention,(5) it is paramount that such waiver not be accepted lightly in law and in practice. With this decision, the Supreme Court stated for the first time that Article 192 of the act, as construed in practice, offers sufficient guarantees in this respect. Thus, the control of the fair process is being left to the enforcement courts.

This case appears to confirm the general tendency towards a relaxation of Supreme Court practice when assessing the validity of a waiver stipulated in the arbitration agreement (for further details please see "Validity of conventional waiver of judicial challenge against arbitration awards").

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Endnotes

(1) Supreme Court Decision 4A_238/2011. The full text of the decision (in French) can be found at www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.html.

(2) See, in particular, Decisions 4A_486/2010, March 21 2011, ATF, 131 III 173, Ground 4 and ATF, 134 II 260, Ground 3 (waivers admitted); see Decisions 4A_194/2008, August 21 2008, Ground 2.2 and 4A_224/2008, October 10 2008, Ground 2.6 (waivers denied).

(3) See, for example, *Besson, Chronique de jurisprudence étrangère, Revue de l'arbitrage*, 2005, p 1071 and p 1082, proposing a standard application of 'appeal', which the Supreme Court rejected in the present decision.

(4) See, for example, Jacot-Guillarmod, "*L'arbitrage privé face à l'article 6 § 1 de la Convention européenne des Droits de l'Homme*", in Matscher, Petzold (eds), *Protecting Human Rights: The European Dimension, Studies in honour of Gérard J Wiarda*, 1988, p 281; Hodges, "The Relevance of Article of the European Convention on Human Rights in the Context of Arbitration Proceedings", Volume 10, *International Arbitration Law Review*, 2007, p 163; Besson, "Arbitration and Human Rights", Volume 24, *ASA Bull*, 2006, p 395; Flauss, "*L'application de l'article 6(1) de la Convention européenne des Droits de l'Homme aux procédures arbitrales*", *Gaz Pal*, July 3 1986, p 407. In an earlier decision (Decision 4P_105/2006, August 4 2006), the Supreme Court had denied the admissibility of annulment grounds derived from Article 6 of the European Convention on Human Rights under Article 192 of the Private International Law Act.

(5) *Schuler-Zgraggen v Switzerland, European Court of Human Rights*, Judgment of 24 June 1993, Series A No 263, p 19, Paragraph 58:

> "*The Court reiterates that the public character of court hearings constitutes a fundamental principle enshrined in paragraph 1 of Article 6 (art. 6-1). Admittedly, neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public, but any such waiver must be made in an unequivocal manner and must not run counter to any important public interest.*"

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