

Arbitration - Switzerland

Validity of conventional waiver of judicial challenge against arbitration awards

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July 14 2011

The Supreme Court has recently issued a decision relating to the validity of the conventional waiver of judicial challenges against Swiss international arbitration awards.⁽¹⁾

Article 192 of the Private International Law Act expressly allows parties to waive all or part of the legal grounds for challenges against international awards issued in Switzerland, provided that none of the parties is domiciled or has its habitual residence in Switzerland, and that none has a business establishment there.

Traditionally, the Supreme Court followed a restrictive practice whereby it admitted the validity of such waivers only subject to a clear and unequivocal joint declaration by the parties to exclude all ordinary and extraordinary judicial challenges against the award. However, express reference to the relevant legal provisions or to the waived remedy was not required.⁽²⁾ The court deemed insufficient:

- a mere statement that an award will be final and binding on all parties upon its issuance;
- reference to arbitration rules stipulating that an award will be final and binding on all parties upon its issuance; and
- a general waiver of all (unspecified) challenges against the award.⁽³⁾

However, the court recently departed from its earlier, more restrictive practice and considered a waiver stipulated in the arbitration agreement to be sufficiently explicit. The relevant clause stipulated that:

"neither party 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".⁽⁴⁾

It is unclear from the court's reasoning how far the first part of the clause (ie, the waiver of all judicial remedies in connection with the contract) influenced the interpretation of the waiver of the appeal section, or indeed whether this decision heralds a relaxation of the court's position with regard to waivers. Consequently, the best advice remains for parties intending to waive some or all the judicial challenges against an international award to be issued in Switzerland to do so through a clear and explicit provision.

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Endnotes

(1) Decision 4A_486/2010, March 21 2011, in *X v Y SA*. The full text is available, in French, at www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm.

(2) See ATF, 131 III 173, Ground 4; 134 II 260, Ground 3 (admitted).

(3) Decision 4A_194/2008, August 21 2008 in *X v Y*, Ground 2.2 (denied); and Decision 4A_224/2008, October 10 2008, in *X AS v Y GmbH*, Ground 2.6 (denied).

(4) Decision 4A_486/2010, section in fact.

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