

Supreme Court rules on waiver of challenge

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Introduction

In a recently published decision, the Supreme Court held that the following arbitration clause contained a valid waiver of challenge against the award:

"Awards rendered in any arbitration hereunder shall be final and conclusive and judgment thereon may be entered into any courts having jurisdiction for enforcement thereof. There shall be no appeal to any court from awards rendered hereunder."(1)

The Supreme Court also held that such a waiver extended to the applicant's subsidiary request for revision.

Legal basis

Pursuant to Article 192(1) of the Private International Law Act:

"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)".

Applicable principles

The Supreme Court recalled that a waiver of challenge must be admitted restrictively.(2) While a specific reference to Article 190 or 192 of the Private International Law Act is not required, the parties' express statement must clearly bring out their joint will to waive any challenge.(3) The Supreme Court also summarised(4) its previous decisions on this issue:

- In ATF 131 III 173, it found that the clause excluding "all and any rights of appeal from all and any awards insofar as such exclusion can validly be made" constituted a valid waiver of challenge within the meaning of Article 192(1). The Supreme Court made a detailed analysis of the term 'appeal' and distinguished between an appeal in a broad sense (ie, all judicial remedies) and an appeal in a narrow sense (ie, a specific remedy that allows a full review on the merits). However, it noted that an appeal in the narrow sense is exceptional in international arbitration. Therefore, when parties waive an appeal, it should be understood as an appeal in the broad sense, namely the challenge proceedings.
- In a March 20 2007 decision (4P 206/2006), the Supreme Court found that a clause in Arabic, the English translation of which could be interpreted to read that the award was "definitive and not open to appeal [or irrevocable]", did not bring out the parties' will to waive any challenge as clearly as in the previous decision.

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- In a March 21 2011 decision (4A_486/2010), the Supreme Court found that the following clause constituted a valid waiver of challenge:

"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."

- In a January 4 2012 decision (4A_238/2011), the Supreme Court found that the clause reading "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", also constituted a valid waiver of challenge.
- In an April 3 2014 decision (4A_577/2013), the Supreme Court found that a clause providing that "neither party shall seek recourse to a law court nor other authorities to appeal for revision of this decision" could be understood only as the parties' will to exclude any intervention of the state courts to review the award.
- In ATF 143 III 55, the Supreme Court found that the clause providing that "the decision of the arbitrator in any such proceeding will be final and binding and not subject to judicial review" and that "appeals to the Swiss Federal Tribunal from the award of the arbitrator shall be excluded" satisfied the requirements of Article 192(1).

Application of principles

Applying these principles to the arbitration clause at hand, the Supreme Court found that it constituted a valid waiver of challenge because it undoubtedly brought out the parties' will to waive any right to challenge any decision of the arbitral tribunal before any state court. In support of this finding, the Supreme Court held⁽⁵⁾ that:

- the parties' will was reinforced by the first part of the sentence, which not only insisted on the finality of the award, but also provided that it could be enforced before the competent state court;
- the link between the words 'appeal' and 'awards' established that the parties did not intend to exclude the state courts' jurisdiction merely for their future claims but for any remedy against the award; and
- the word 'appeal' must manifestly be comprised in its broadest sense (ie, any type of remedy) because:
 - an internal appeal was not available under the applicable United Nations Commission on International Trade Law Arbitration Rules;
 - an appeal in the narrow sense was not provided by the different applicable laws and there was thus no interest for the parties to exclude such an appeal; and
 - the only remedy against an award issued by an arbitral tribunal seated in Switzerland that the parties could waive was the challenge to the Supreme Court.

Request for revision

The Supreme Court also dealt with the applicant's subsidiary request for a revision of the award further to the alleged discovery of a ground for recusal of an arbitrator. It referred to a previous decision (ATF 142 III 521),⁽⁶⁾ in which it had stressed the need to admit that the discovery of such a ground after the expiration of the period to challenge an award entitled a party to request the revision of the award. However, as in that decision, the Supreme Court left this question open because the request for revision was inadmissible in any event. The applicant had discovered the ground for recusal before the expiration of the period to challenge the award, and the Supreme Court considered that it was against the rules of good faith to allow a party which had waived any challenge against the award to file a request for revision on the basis of the same ground for recusal that it had agreed not to raise as a ground for challenge.⁽⁷⁾

The Supreme Court thus found that the challenge and the subsidiary request for revision were inadmissible.

Comment

This decision confirms the Supreme Court's practice in relation to waivers of challenge. When interpreting arbitration clauses to determine whether they contain such a waiver, the term 'appeal' should be understood as referring to the remedy that parties have against an award in Switzerland, namely the challenge proceedings.

Regarding the revision proceedings, the Supreme Court's practice before the entry into force of the Swiss Federal Tribunal Statute in 2007 was that a request for revision was to be declared inadmissible if the ground for revision also qualified as a ground for challenge under Article 190(2) of the Private International Law Act.⁽⁸⁾ However, in two 2008 decisions, the Supreme Court questioned whether it would not be more appropriate to allow a revision if the ground for revision was discovered only after the expiration of the period to challenge the award, but it left the question open.⁽⁹⁾ In a 2016 decision, the Supreme Court stressed the need to allow parties to file a request for revision of the award further to the discovery of a ground for recusal of an arbitrator after the expiration of the period to challenge the award, but it also left this question open.⁽¹⁰⁾ The decision in this case follows the same path as the 2008 and 2016 decisions. Together with these decisions, it might announce a future decision where the Supreme Court would hold admissible a request for revision based on a ground that would also qualify as a ground for challenge, provided that the ground was discovered after the expiration of the period to challenge the award. Ideally, this future decision would also analyse whether a waiver of challenge excludes any revision for a circumstance that would also qualify as a ground of challenge. In any event, such a decision may be pre-empted by the forthcoming revision of Chapter 12 of the Private International Law Act that is likely, and would be welcome, to resolve the issue.

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Endnotes

- (1) Supreme Court, 4A_53/2017, October 17 2017 (in French).
- (2) Ground 2.1.1.
- (3) *Id.*
- (4) Ground 2.1.2.
- (5) Ground 2.2.
- (6) For further details please see "[Independence of arbitrators in large international law firms](#)".
- (7) Grounds 3.1 and 3.2.
- (8) ATF 118 II 199 ground 4; ATF 129 III 727 ground 1.
- (9) Supreme Court, 4A_528/2007, April 4 2008, ground 2.5; Supreme Court, 4A_234/2008, ground 2.1.
- (10) ATF 142 III 521 ground 2.3.5.