

Switzerland: Unchallengeable Awards

Pierre-Yves Tschanz

When choosing to arbitrate in Switzerland, the parties have an option which seems to be often overlooked. They can limit, even exclude altogether, the grounds to challenge awards in court (Swiss Private International Law Act, Art. 192).

This exclusion agreement is a radical step, as it removes court control over even fundamental defects. Some might query whether there are limits to the validity of waiving in advance the right to a fair trial (such as enshrined in Article 6(1) of the European Convention on Human Rights).

When an award is challenged, the question arises whether the parties actually meant to exclude grounds to challenge awards. This determination is made by the Swiss Supreme Court, since jurisdiction to review awards lies directly with the Supreme Court.

After several cases in which the Supreme Court found that there was no exclusion agreement, it has for the first time found one in its decision of 4 February 2005.

The arbitration agreement read: *“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 insofar as such exclusion can validly be made [...]”*

The Court found this language to be sufficiently explicit to exclude any challenge of the award. This finding is based in particular on the consideration that (i) by using the word “exclude”, the parties stated in an express manner their common intention to exclude, in advance, their right to any remedy against any future award; (ii) and by using the plural “rights of appeal” after the sweeping words “all and any”, the parties demonstrated that they had in mind all the possible and conceivable means of recourse that may be used against future awards – whatever they may be (“all and any awards”), including setting aside proceedings within the meaning of Article 190(2) of the Swiss Private International Law Act.

If this language does not qualify as an exclusion agreement, it is difficult to see what does – short of an express reference to Article 192 of the PIL Act. This case can also serve as a reminder that, as always, parties should beware of boilerplate language and ensure that they write exactly what they mean.

Source: A. vs B., C. and UNCITRAL Arbitral Tribunal, February 4, 2005, 4P.236/2004 published as ATF 131 III 173, also published in ASA Bulletin 2005 p. 496-507 (original French language) along with an English translation on p. 508-519. Also available from the website of the Swiss Supreme Court, www.bger.ch (direct link: full text on http://wwwsrv.bger.ch/cgi-bin/AZA/JumpCGI?id=04.02.2005_4P.236/2004, excerpt published in official collection on http://clir.bger.ch/cgi-bin//ConvertDocCGI?ds=navigate&d=doc_de_2005_BGE_131_III_173).