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Aims & Scope:

Switzerland is generally regarded as one of the World's leading sites for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced not only by Swiss arbitrators but also by many of the world's best-known arbitration practitioners. The Statistical report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983, the Bulletin has carved a unique niche for its detailed focus on arbitration case law and practice worldwide as well as for its judicious selection of scholarly and practical writing in the field. Its regular contents include:

- Articles
- Leading cases of the Swiss Federal Tribunal
- Other leading cases of other Swiss Courts
- Selected landmark cases from jurisdictions worldwide
- Arbitral awards and acts under various auspices including ICC, ICSID and The Swiss Chambers of Commerce ("Swiss Rules")
- Forthcoming conferences
- Notices of publications and reviews
- An annual index in English, French and German

Each case and article is published in its original language with a comprehensive head note in English, French and German.

Books for Review:

Books related to the topics discussed in the Bulletin may be sent for review to the Editors (Pierre Lalive and Matthias Scherer), Lalive Attorneys-at-Law, P.O. Box 6569 35, Rue de la Mairie, 1211 Geneva 6, Switzerland

3.3 Cela étant, force est d'admettre que les parties ont valablement renoncé à recourir contre la sentence présentement attaquée. Il s'ensuit l'irrecevabilité du recours dirigé contre cette sentence.

La recourante, qui succombe, devra payer les frais judiciaires (art. 66 al. 1 LTF) et indemniser l'intimée (art. 68 al. 1 et 2 LTF).

Par ces motifs, le Tribunal fédéral prononce:

1. Le recours est irrecevable.
2. Les frais judiciaires, arrêtés à 75'000 fr., sont mis à la charge de la recourante.
3. La recourante versera à l'intimée une indemnité de 85'000 fr. à titre de dépens.
4. Le présent arrêt est communiqué aux mandataires des parties et au Tribunal arbitral ad hoc.

Pitfalls of Waiver Agreements under Article 192 PILS in Multi-Contract Settings: Some Remarks on Swiss Federal Court Decision 134 III 260

CESARE JERMINI* - MANUEL ARROYO**

1. Introduction

Given the difficulty in predicting the future, it is time and again striking to see parties waive their right to challenge the award to be rendered in a prospective arbitration. The decision of the Swiss Federal Court summarised and commented hereafter quite plainly demonstrates that such waiver may prove a rude awakening very different from the one intended.

2. Swiss Federal Court Decision 134 III 260¹

(i) Caption

Waiver Agreement (Art. 192 PILS): A valid waiver agreement also encompasses want of jurisdiction pleas pursuant to Art. 190(2)(b) PILS; such agreement can be opposed to a party contending that the dispute does not fall within the objective scope of the arbitration agreement.

(ii) Facts of the case and procedural history

An Italian and a French company (X and Y) were both shareholders of an Italian holding company which in turn held 63 per cent of another Italian company. In September 2002, X and Y entered into a *put & call* agreement that contained an arbitration clause pursuant to which all disputes concerning the interpretation and/or contract performance, or otherwise deriving from the contract or in connection with it, were to be referred to the exclusive

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¹ Decision of the Federal Court (DFC) 134 III 260 (4A.500/2007) of 6 March 2008, ASA Bull. 1.2009, p. 94.

jurisdiction of an arbitral tribunal.² The *put & call* agreement was executed in July 2005, whereby X transferred its shares to Y against consideration.³

In 2002, the Italian holding company mentioned above had also issued 399'984 warrants (call options). Thereupon, Y and X discussed the possibility of extending the *put & call* agreement (which only encompassed the shares) to the warrants. During the following negotiations, an exchange of letters took place, including several draft agreements. X then called upon Y to proceed with the acquisition of the warrants in July 2005. However, Y refused to do so on the ground that it had not entered into any agreement and thus was not under an obligation to acquire the warrants. Ever since, the parties have been in dispute over this issue. While X argued that an agreement was reached orally and subsequently confirmed by way of the mentioned exchange of letters, Y insisted on the negotiations not having proved successful, with no contract having been concluded.⁴

In April 2006, X filed suit for payment of the price of the warrants against Y before the Court of Milan. Y, on its part, initiated arbitral proceedings against X in November 2006 and moved for a declaration that it was not obliged to acquire the warrants and hence did not owe any sum to X; at the same time, Y demanded that X be ordered to pay 25 million Euros to Y for having violated the arbitration agreement.

In the arbitration, X raised a jurisdictional objection claiming the arbitral tribunal had no jurisdiction regarding the controversy over the warrants. Subsidiarily, X applied for an order obliging Y to pay the price of the warrants, should the tribunal nonetheless find jurisdiction. On 31 October 2007, the arbitral tribunal, by majority award, found jurisdiction over the warrants dispute and declared that Y did not owe X the price of the warrants; further, all monetary claims of both parties were dismissed, including the claimed 25 million Euros compensation for violation of the arbitration agreement.

Unsatisfied with the award, X challenged it before the Swiss Federal Court seeking the setting aside of the award and a declaration that the arbitral tribunal lacked jurisdiction to determine the controversy on the purported warrants agreement.⁵

² The original Italian version of the clause read thus: "[...] tutte le controversie relative all'interpretazione e/o all'esecuzione del Contratto, o comunque derivanti dal Contratto o in relazione allo stesso, saranno devolute alla competenza esclusiva di un collegio arbitrale [...]."

³ DFC 134 III 260 at pp. 260-261.

⁴ DFC 134 III 260 at pp. 261-262.

⁵ DFC 134 III 260 at p. 262.

(iii) The Federal Court decision

The Federal Court concluded that the setting aside application brought by the award loser, that is the Italian company (X), was inadmissible. In so finding, the Court admitted the objection raised by Y, the opponent, who invoked a waiver agreement contained in the *put & call* agreement to argue that X was barred from challenging the award. The Court refused to hear the application on the following grounds:

To begin with, the Court referred to its established case law pursuant to which it is sufficient that the parties' common intent to waive any challenge be clearly reflected in the waiver agreement, without there being any need to mention Article 190 and/or Article 192 PILS. Establishing whether or not such intent existed, is a question of interpretation, the Court held.⁶

The Court then delved into the interpretation of the relevant clause in the *put & call* agreement which provided thus:

"The parties henceforth waive any ordinary and extraordinary recourse against the decision to be rendered."⁷

In the Court's judgement, there could hardly be any doubt about this clause meeting the requirements established by Article 192(1) PILS⁸ and the aforementioned case law. The parties' common intent to abstain from any legal remedies against the upcoming decision was crystal clear from the clause. Even though the term "*decision*" certainly was more generic than "*award*", it could, in the given context, only target the decision of the arbitrators, the Court concluded. Moreover, the clause more or less matched that quoted in a recent decision as an example of a formally valid waiver,⁹ and apart from that, the challenging party did not question the formal validity of the waiver agreement.¹⁰

However, the challenging party argued that the extension of the arbitration agreement set out in the *put & call* agreement to the specific agreement concerning the warrants was a question regarding both the appeal's formal admissibility, as well as its well-foundedness on the merits;

⁶ DFC 134 III 260 cons. 3.1 at p. 263.

⁷ In the original Italian version, the clause provided: "*Le Parti rinunciano fin d'ora ad ogni ricorso ordinario e straordinario contro la decisione che sarà resa.*" Cf. DFC 134 III 260 cons. 3.2.2 at p. 264.

⁸ Art. 192(1) PILS provides: "*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, fully waive the challenge of awards; they may also limit the waiver to one or several of the grounds for challenge listed in Art. 190(2).*"

⁹ Reference was made to DFC 4P.114/2006 of 7 September 2006, cons. 5.3.

¹⁰ DFC 134 III 260 cons. 3.2.2 at p. 264.

therefore, it was submitted, the Federal Court could only declare the appeal inadmissible in case it concluded that the arbitration agreement indeed encompassed the (disputed) agreement on the warrants, which assessment required that the Court first address the want of jurisdiction plea raised by the challenging party.¹¹

The Federal Court rejected this line of argument, holding that this approach would result in rendering waiver agreements inoperative whenever the invoked ground for challenge is the lack of the arbitral tribunal's jurisdiction.¹² Yet, the exclusion of any challenge pursuant to Article 192(1) PILS undeniably also includes such ground, the Court held;¹³ for the rest, it is well established that the parties are empowered to confine the waiver to the issue of an arbitral tribunal's jurisdiction.¹⁴ A challenge based on the ground provided in Article 190(2)(b) PILS¹⁵ is open where the arbitral tribunal has determined an issue which it had no jurisdiction to rule upon – be it that there was no arbitration agreement at all, or that the said agreement was circumscribed to certain issues which did not encompass the claims in question.¹⁶

In fact, an arbitral tribunal only has jurisdiction if, amongst other conditions, the dispute falls within the arbitration agreement, and the arbitral tribunal does not exceed the limitations imposed by the request for arbitration and the terms of reference, as the case may be. As a consequence, where a party contends that an arbitral tribunal wrongly assumed the power to determine an issue which the parties did not refer to arbitration, that party is raising a jurisdictional issue.¹⁷

The present case was just about that, the Court stressed. In questioning the jurisdiction *ratione materiae* (i.e. the subject-matter jurisdiction) of the arbitral tribunal, the challenging party contended that the tribunal could not deduce from the arbitration agreement in the *put & call* agreement its jurisdiction to determine whether the parties were bound by another specific contract regarding the warrants. In other words, the challenging party considered that the arbitral tribunal misjudged the objective scope of the

¹¹ DFC 134 III 260 cons. 3.2.4 at pp. 264-265.

¹² See Art. 190(2)(b) PILS.

¹³ Express reference was made to DFC 131 III 173 cons. 4.2.3.1 at pp. 178-179.

¹⁴ DFC 134 III 260 cons. 3.2.4 at p. 265, with reference to DFC 4P.98/2005 of 10 November 2005, cons. 4.2.

¹⁵ Pursuant to Art. 190(2)(b) PILS, an arbitral award rendered in Switzerland may be set aside if the arbitral tribunal wrongly found or declined jurisdiction.

¹⁶ DFC 134 III 260 cons. 3.2.4 at p. 265, with reference to DFC 116 II 639 cons. 3 at p. 642.

¹⁷ DFC 134 III 260 cons. 3.2.4 at p. 265, with reference to DFC 4P.114/2001 of 19 December 2001, cons. 2b.

arbitration agreement by including an issue (existence or non-existence of the disputed contract on the warrants) that, in its view, was outside the scope of the arbitration agreement; in short, the challenger contended that the arbitral tribunal determined a question which the parties did not submit to it and thus exceeded its powers.¹⁸

However, the Court argued, in including the waiver agreement in the *put & call* agreement, the parties waived once and for all any possibility of challenging the arbitral tribunal's decision on its own jurisdiction, whatever the reasons might have been. The parties thereby took the risk of the arbitrators assuming jurisdiction on an issue which did not fall within the arbitration agreement. For this reason, it is out of question to argue, with hindsight, that the waiver in dispute is only valid if the tribunal rightly found jurisdiction *ratione materiae*. Arguing this way amounts to unduly limiting the scope of the waiver agreement by extracting from its range of application cases where the arbitral tribunal wrongly extended its jurisdiction to legal relationships linked to the same parties but under another title, not covered by the arbitration agreement. It is unjustifiable, according to the Court, to make the validity of a (complete) waiver contingent on the well-foundedness of a ground which could have been raised had there been no waiver. In particular, where the arbitral tribunal's alleged want of jurisdiction is at stake, there is no need to distinguish between the case where the arbitrators extended their jurisdiction to a (purported) legal relationship having no connection whatsoever with the one the parties submitted to arbitration and the case where the arbitrators, for instance, ruled on a non-arbitrable dispute.¹⁹

In closing, the Court turned to the criticism levelled at DFC 131 III 173²⁰ by legal commentators, which criticism the challenger expressly invoked. In so doing, the Court noted, the challenger overlooked that the said decision concerned the subjective scope of the arbitration agreement (jurisdiction *ratione personae*) and, as a consequence, the subjective scope of the waiver agreement contained therein; and it was exactly on this point that the mentioned commentators passed criticism. The Court therefore did not deem it necessary to address the issue. The subjective scope of an arbitration agreement containing a waiver of challenge indeed raises a particular problem as far as the formal requirements are concerned, given that under Article 192(1)(a) PILS a waiver is subject to an express statement by the parties to the arbitration agreement. This, the Court stressed, does not likewise apply in cases as the present one where both parties to the arbitration

¹⁸ DFC 134 III 260 cons. 3.2.4 at p. 265.

¹⁹ DFC 134 III 260 cons. 3.2.4 at p. 266.

²⁰ On this decision, see para. 3(i)(b) below.

agreement made the express statement required by Article 192 and the dispute solely regards the objective scope of said agreement.²¹

Given the foregoing, the parties validly waived their right to appeal from the challenged award, the Court concluded. As a result, the appeal was inadmissible, with the losing challenger having to bear the court costs and compensate the opposing party for its legal representation costs.²²

3. Comments

(i) Overview of the Federal Court case law on Article 192 PILS: towards a more liberal approach as to the requirements for a valid waiver of challenges against arbitral awards

Though analysing the entire Federal Court case law on Article 192 PILS would obviously go far beyond the scope of this case note, it is worth delineating its general development, because it shows that the decision commented herein finds its place within a line of rulings pointing towards a more and more liberal approach as to the requirements for a valid waiver under Article 192 PILS.²³

(a) Case law from 1989 to 2004

To begin with, in the first²⁴ pertinent decision,²⁵ the Court held in 1990 that under Article 192 PILS the parties had to expressly state and name which legal means to challenge the award they intended to waive so that the mere reference to arbitration rules containing a provision declaring the award to be final and binding was insufficient.²⁶ The intended waiver of any challenge of the award having to be expressly declared, not even a clause providing “no appeal allowed (*sans appel*)” would conform to the requisite expressness in terms of Article 192 PILS. The following year, the Federal Court issued a virtually identical decision ruling out the possibility of indirectly waiving any challenge of the award through reference to arbitration rules.²⁷

²¹ DFC 134 III 260 cons. 3.2.4 at pp. 266-267.

²² DFC 134 III 260 cons. 3.3 at p. 267.

²³ For an overview, see also DFC 131 III 174 seqq.

²⁴ That is, the first after the entering into force of the PILS on 1 January 1989.

²⁵ See DFC 116 II 639 of 19 December 1990.

²⁶ In that instance, the Court referred to Art. 24 (*Finality and enforceability of award*) of the former 1988 ICC Rules (see DFC 116 II 639 cons. 2c), which provision read thus: “*The arbitral awards shall be final. By submitting to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made.*”

²⁷ See DFC of 9 April 1991 cons. 3 (ASA Bull. 1991, pp. 162-163). Here too, the provision in question was Art. 24 of the 1988 ICC Rules. The Court also reiterated that even a clause expressly excluding any sort of appeal (“*jedes Rechtsmittel ausgeschlossen*”) would not meet the standard.

In 1992, the Court referred to the 1990 precedent to deny the validity of an arbitration clause pursuant to which the arbitrators were to decide the dispute in a final manner (“*endgültig*”) under the ICC Rules of Arbitration.²⁸ On the same ground, the Court in 1993 likewise deemed insufficient a clause stating that the arbitral tribunal would finally rule on the dispute (“*définitivement tranché*”).²⁹ In 1997, an arbitration clause providing that the arbitral award to be rendered would be final and binding on the parties came under scrutiny. The clause further stated: “*The application to the State Courts are (sic) excluded.*”³⁰ In the Court’s view, a term as generic as “*application*” in any event failed to meet the requirement prescribed by the Court’s case law that the right which the parties were waiving be indicated; indeed, the aforementioned sentence in the arbitration clause did not reveal whether the parties intended to exclude any type of legal remedies against the prospective award, or whether they simply meant to exclude court proceedings so as to resolve any potential disputes through arbitration.³¹

In line with the above case law, three subsequent decisions rendered between 2002 and 2004 affirmed that the mere statement that the award be final and binding was insufficient to meet the requirement to expressly waive any type of challenge.³² A 2004 decision again ruled out the possibility to waive any challenge against the award through an indirect reference to the applicable arbitration rules, which in that instance read as follows: “*Any decision taken by the said Court [of Arbitration for Sport] shall be without appeal or recourse to ordinary courts, and is binding on the parties concerned.*”³³

(b) Reversal of the practice in 2005

The 2005 landmark decision summarised below reversed the above case law by lowering the threshold and giving up the restrictive approach adopted

²⁸ DFC 118 II 359 of 18 August 1992 (see page 359 for the arbitration clause, even though the consideration of the Court concerning Art. 192 PILS, i.e. cons. 2, was not published; see ASA Bull. 2005, p. 500); see further DFC 4A.224/2008 of 10 October 2008, cons. 2.6.3, where a similar clause was considered insufficient to exclude any challenge against the award (in that instance, the clause read: “[...] werden diese Streitigkeiten nach der Vergleichs- und Schiedsordnung der Internationalen Handelskammer, Paris, von drei gemäss dieser Ordnung ernannten Schiedsrichtern endgültig entschieden. X. A.S. und Y. GmbH vereinbaren, den gefällten Schiedsspruch zu anerkennen und sich demselben zu unterwerfen.”).

²⁹ DFC 4P.99/1993 of 15 November 1993 cons. 2 (referred to in DFC 131 III 173 cons. 4.2.1; ASA Bull. 2005, p. 500).

³⁰ DFC 4P.265/1996 of 2 July 1997 cons. 1a (cf. ASA Bull. 1997, pp. 497-498).

³¹ DFC 4P.265/1996 of 2 July 1997 cons. 1a (cf. ASA Bull. 1997, pp. 497-498).

³² Cf. DFC 4P.207/2002 of 10 December 2002 cons. 1 (reproduced in ASA Bull. 2003, at p. 588); DFC 129 III 675 of 8 July 2003 cons. 2.3; DFC 4P.64/2004 of 2 June 2004 cons. 2.1 (reproduced in ASA Bull. 2004, at p. 786).

³³ See DFC 4P.62/2004 of 1 December 2004 cons. 1.2 [emphasis added].

by the Court during the previous fifteen years. In that instance, the Court found the following clause to constitute a valid waiver pursuant to Article 192 PILS:

"All and any awards or other decisions of the Arbitral Tribunal [...] 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 [...]"³⁴

In the Court's judgement, this clause met the express waiver requirement within the meaning of Article 192 PILS. The Court, amongst others, stressed that the 1990 precedent, which emphasised the need to exactly state which legal means to challenge the award the parties were waiving, was not to be taken literally as requiring the parties to make reference to Article 190 PILS and/or Article 192 PILS in the arbitration clause. Through the 1990 precedent the Court simply intended to clarify that the requisite express declaration, as demanded by Article 192 PILS, must reveal in a plain and distinct manner the parties' common intent to waive their right to challenge the arbitral award on the grounds set forth at Article 190(2) PILS.³⁵ However, in order to ascertain such intention it is not indispensable that reference be made to a given statutory provision or a particular expression be utilised by the parties. It is necessary, but also sufficient, that the declaration unequivocally reveal the parties' common intent to waive any challenge against the award, the Court held.³⁶ This approach was reaffirmed in several subsequent decisions despite the criticism passed by some legal commentators.³⁷

(c) Criticism levelled at the 2005 decision

The main criticism levelled at the 2005 landmark decision did not concern the reversal of the previous practice in terms of lowering the express waiver threshold. Rather, the decision met with harsh criticism for failing to deal with the question whether the waiver agreement could also be invoked

³⁴ DFC 131 III 173 of 4 February 2005 cons. 4.2.3.2.

³⁵ These grounds being (a) the improper constitution of the tribunal or improper appointment of the sole arbitrator; (b) the erroneous finding or declining of jurisdiction; (c) the award being *ultra petita* or *infra petita*; (d) violations of the equality of the parties or the right to be heard; (e) the issuing of an award which is contrary to public policy.

³⁶ DFC 131 III 173 of 4 February 2005 cons. 4.2.3.1.

³⁷ See DFC 4P.198/2005 of 31 October 2005, cons. 1.1; DFC 4P.98/2005 of 10 November 2005, cons. 4.1; DFC 4P.154/2005 of 10 November 2005, cons. 4; DFC 4P.114/2006 of 7 September 2006, cons. 5.2; DFC 4A.194/2008 of 21 August 2008, cons. 2.1; DFC 4A.224/2008 of 10 October 2008, cons. 2.6.2; see in particular DFC 133 III 235 of 22 March 2007 cons. 4.3.1, where the Court stressed that given the just mentioned concurring decisions there was no reason to depart from this approach notwithstanding the criticism of some authors.

by a non-signatory, i.e. is a third party that undisputedly did not sign the contract containing both the arbitration clause and the waiver agreement.³⁸

In the relevant arbitration, the arbitrators had found the arbitration agreement in the disputed main contract to be applicable to the non-signatory party; in its decision upon challenge, the Federal Court implicitly admitted that the extension of an arbitration agreement to a non-signatory party, as decided by the arbitral tribunal, automatically applied also to the waiver clause contained therein and therefore found the waiver to be binding also on the non-signatory party. However, as FRANÇOIS PERRET pointed out, the decision of the arbitral tribunal on the extension of the arbitration agreement could not exempt the Federal Court from examining whether the waiver agreement could be advanced by the non-signatory, given that the arbitration and the waiver agreement constitute two different agreements, with the determination of their respective subjective scope (*ratione personae*) being incumbent on two different adjudicatory bodies, i.e. the arbitral tribunal on the one hand and the Federal Court on the other. Whether the non-signatory and respondent in the challenge proceedings before the Federal Court was entitled to rely on the waiver agreement could only be judged by the Federal Court.³⁹ Despite being the solely competent authority to make such determination, the Court avoided addressing the issue and considered the challenge to be inadmissible, without analysing whether all preconditions of Article 192 PILS were met, in particular without addressing the question as to which entities were parties to the waiver agreement. In other words, the Court failed to verify whether a valid waiver agreement existed between the award challenger and the non-signatory respondent.⁴⁰

Several commentators endorsed the criticism directed at the 2005 precedent. In particular, besides subscribing to PERRET's view,⁴¹ it was also emphasised that where arbitrators extend the subjective scope of the arbitration agreement comprising a valid waiver in terms of Article 192 PILS

³⁸ See, among others: SEBASTIEN BESSON, *Etendue du contrôle par le juge d'une exception d'arbitrage; renonciation aux recours contre la sentence arbitrale: deux questions choisies de droit suisse de l'arbitrage international*, *Revue de l'arbitrage* 2005, pp. 1080-1082.; FRANÇOIS PERRET, *ASA Bull.* 2005, pp. 520-524; JEAN-FRANÇOIS POUDRET/SEBASTIEN BESSON, *Comparative law of International Arbitration*, 2nd ed., note 839 at p. 782 in fine; PAOLO MICHELE PATOCCHI/CESARE JERMINI, *Basler Kommentar IPRG, Honsell/Vogt/Schnyder/Berti* (eds.), Basel 2007, note 19 at Art. 192; BERNHARD BERGER/Franz KELLERHALS, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Bern 2006, note 1688, footnote 263.

³⁹ FRANÇOIS PERRET, *Commentaire*, *ASA Bull.* 2005, pp. 523-524.

⁴⁰ FRANÇOIS PERRET, *op.cit.*, p. 524.

⁴¹ See BERGER/KELLERHALS, *op.cit.*, p. 592, note 263; POUDRET/BESSON, *op.cit.*, N 839; PATOCCHI/JERMINI, *op.cit.*, N 19 at Art. 192 PILS; BESSON, *op.cit.*, pp. 1080, 1082.

to a non-signatory, the arbitrators' (interim or final) award on jurisdiction must be open to challenge despite the waiver agreement.⁴²

That position - which is justified given the need for an agreement in writing of *all* parties to such waiver prescribed by Article 192 PILS - has now, albeit *obiter*, been recognised also by the Swiss Federal Court in the very decision commented herein (DFC 134 III 260 at p. 267).⁴³

(ii) Conclusions

The above overview highlights the distinct lowering of the standard effectuated in 2005 by the Federal Court with respect to waiver clauses under Article 192 PILS, which ultimately results in less awards being open to challenge. That, in turn, diminishes the case and workload of the Court, which actually was one of the two intended legislative purposes when introducing Article 192 PILS in 1989, the other being ensuring a maximum of effectiveness of dispute resolution through arbitration.⁴⁴

The decision of March 2008 commented in this case note is in line with that aim, particularly given that the unsuccessful challenger was ordered to pay 160'000 Swiss Francs for court costs and compensation to the opposing party,⁴⁵ and this although the Court's reasons for the dismissal only comprised four and a half pages.⁴⁶ The signal could not be clearer and reaffirms the Court's general off-hands approach when it comes to ruling on challenges against arbitral awards rendered in international arbitrations having their seat in Switzerland and, coherently, the increasingly liberal approach towards waivers pursuant to Article 192 PILS.

As a consequence, and as shown in the recent decision summarised above, parties are ill-advised to enter into waiver agreements under Article 192 PILS (also) in multi-contract scenarios, where the waiver in one contract may eventually apply to a controversy on another contract not containing a waiver (but which the arbitrators - rightly or not - deem to be in connection with the first contract and thus covered by the extended arbitration agreement

and waiver) so that the want of jurisdiction plea, as all other grounds for challenge, will be doomed to failure.⁴⁷

This caveat is all the more appropriate if one considers, independently from the specific multi-contract scenario, that the grounds for setting aside an award pursuant to Article 190 PILS are limited to such very basic guarantees (of due process and against the violation of public policy) that no party - given the unpredictability of the outcome of an arbitration - should be willing to waive them in advance.⁴⁸

⁴² PATOCCHI/JERMINI, *op.cit.*, N 19 at Art. 192 PILS; BESSON, *op.cit.*, p. 1080; see also BERGER/KELLERHALS, *op.cit.*, p. 592, rightly stressing that such determination is to be made ex officio and with unfettered powers.

⁴³ POUURET/BESSON, *op.cit.*, N 839; PATOCCHI/JERMINI, *op.cit.*, N 19 at Art. 192 PILS.

⁴⁴ See DFC 4P.198/2005 of 31 October 2005, cons. 2.1, with a reference to the *travaux préparatoires* of the PILS (cf. *Botschaft zum IPRG, BBl 135/1983 I*, p. 465).

⁴⁵ The court costs amounted to 75'000 Swiss Francs, the compensation of the opponent's costs to 85'000 Swiss Francs.

⁴⁶ That is, without considering the pages summarising the facts of the case, the procedural history and the preliminary observations (see cons. 3 of DFC 134 III 260, at pp. 263-267).

⁴⁷ The exclusion of the jurisdictional plea is all the more dire given that this is the plea most likely to prove successful (statistically, a jurisdictional plea in terms of Art. 190(2)(b) PILS is, e.g., almost five times more likely to succeed than a challenge of an award under Art. 190(2)(d) PILS on the ground that the right to be heard was violated: cf. Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis*, ASA Bull. 2007, p. 455).

⁴⁸ PATOCCHI/JERMINI, *op.cit.*, N 55 seqq. at Art. 192 PILS.