Challenge inadmissible due to valid waiver of right to challenge award (Swiss Supreme Court)

by *Practical Law Arbitration* with *Schellenberg Wittmer Ltd*

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In *Decision 4A_382/2021*, the Swiss Supreme Court declared inadmissible a motion to set aside an ICC award on the ground that the parties had validly excluded their right to challenge the award in the underlying contract.

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In a recently published German-language decision, the Swiss Supreme Court declared inadmissible a motion to set aside an ICC award based on article 192 of the Swiss Private International Law Act (PILA) which permits parties to waive the right to challenge an award.

The underlying dispute concerned a set of agreements regarding electric and hybrid buses. A dispute arose mainly under the engineering service agreements (ESAs), which provided that "[t]he decision of the Arbitration Committee shall be final and binding upon both parties. Neither part (sic) shall seek recourse to a law court or other authorities to appeal for revision of the decision". An ICC tribunal issued an award partially dismissing the claimant's claims.

The claimant asked the Swiss Supreme Court to partially set aside the award. In relation to the wording in the ESAs, the claimant argued that the subjective intent of the parties was not to exclude any right of recourse because:

- The parties used boilerplate clauses which had not been specifically negotiated.
- The parties' consistent course of dealing militated against a waiver, given that the other contracts between the parties did not contain any waiver.

The court dismissed the application without examining the merits or inviting the respondent to file an answer.

Referring to a Supreme Court precedent that addressed a similar waiver to that contained in the ESAs (see *Legal update, When is standard for waiver of recourse against arbitral award met (Swiss Supreme Court)*), the court held that the wording at issue, read in good faith, reflected the parties' clear intention to exclude any legal remedy or recourse to any state bodies against the award, even if the legal concepts ("recourse", "appeal", "revision") were not used in line with their technical meaning.

The claimant had not demonstrated any intention of the parties that differed from the unequivocal wording of the contract. The lack of negotiation of the arbitration clause was indicative of the parties' readily-found agreement. The fact that some contracts did not include waivers was insufficient to support a finding of an established practice between the parties that would have applied equally to the ESAs.

This decision confirms that a waiver is valid as long as the parties unambiguously express their intention to exclude any legal recourse against the award, even when the language used does not correspond to the proper legal terms.

Case: *Decision 4A_382/2021 (Swiss Supreme Court) (24 September 2021).*

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