Waiving the Right to Challenge an Arbitral Award Rendered in Switzerland: Caveats and Drafting Considerations for Foreign Parties
Domitille Baizeau

Article 192 of the PIL Act affords non-Swiss parties who wish to have a neutral seat of the arbitration with the option to choose the grounds for challenge of the award, if any, that they wish to exclude. Non-Swiss and in particular Englishpractitioners should however be prudent when drafting exclusion agreements. This is illustrated by a recent decision of the Federal Tribunal (February 4, 2005) upholding, for the first time, a full waiver of the right to challenge the award where foreign parties had agreed to exclude “all and any rights of appeal”. A waiver under Art.192 of the PIL Act does not affect the parties’ right to resist enforcement in Switzerland or abroad. Nonetheless, in a neutral forum like Switzerland, non-Swiss parties should be slow in waiving their right to a minimum review of the award by courts on issues such as lack of jurisdiction, procedural irregularity or violation of public policy.

When can a Nigerian Court Grant an Injunction in Aid of (International) Arbitration?
Nduka Ikeyi

This article highlights and evaluates various aspects of the Turkish International Arbitration Act.

While Nigeria’s Arbitration Act would seem to grant power to superior courts in Nigeria to grant injunctions in aid of arbitration in all cases where it may seem just to do so, a recent decision of the Federal High Court sitting in Lagos would seem to suggest otherwise. The case seems to follow the popular judicial attitude in Nigeria that an interim relief may only be granted in the course of the trial of a substantive suit. This article contends otherwise.

General Evaluation of the Turkish International Arbitration Act
Dr Nuray Eksi

The Turkish IAA was enacted in June, 2001. The IAA is mostly based on the UNCITRAL Model Law of 1985 and the Swiss PILA of 1987. The IAA has certain salient features in respect of Turkish arbitration law. One of the salient features of the IAA is that no appeal can be made to the Court of Appeal against the awards. Exclusive recourse against the award is an application for setting aside. Moreover, it is the first time in Turkish arbitration law that the arbitrators have been empowered to grant protective and provisional measures. The IAA reduces the court intervention to a minimum level during or following arbitration, and brings a new system for enforcement of awards. However, the IAA is silent on certain matters such as which provisions thereof are of a mandatory nature; lack of transitional provision; ambiguity of the place of arbitration and no provision on multi-party arbitration.

Privity to an Arbitration Agreement
Dr Daniel Busse

Groups of companies generally try to allocate the risk arising out of a major project or transaction to a particular group company; sometimes separate project companies are set up. The other contracting party will often attempt to hold other companies liable besides the signatory and request the arbitral tribunal to also assume jurisdiction over non-signatories. The article discusses arbitration practice and the view of different jurisdictions regarding the question under what circumstances the reach of an arbitration clause should be extended. It submits that the problem should be dealt with by applying the law of a specific jurisdiction rather than on the basis of general considerations such as the assumed intentions of the parties.

Interim Measures of Protection in the Context of Arbitration in China
Lijun Cao

This article first examines the statutory provisions and current practice regarding the two main interim measures of protection in the context of arbitration in China, i.e. the property preservation and evidence preservation. Detailed analyses are given on a variety of issues, including the roles and functions of the arbitration commission and the court. Interim measures in maritime arbitration, which are somehow different from those in the commercial arbitration context, are also examined in this article.
WAIVING THE RIGHT TO CHALLENGE AN ARBITRAL AWARD RENDERED IN SWITZERLAND: CAVEATS AND DRAFTING CONSIDERATIONS FOR FOREIGN PARTIES

DOMITILLE BAIZEAU*

Arbitration clauses; Awards; Exclusion clauses; International commercial arbitration; Switzerland; Waiver

It is not uncommon for arbitration clauses in international contracts to contain specific language with respect to the finality of the award. The arbitration clause may either refer to a set of arbitration rules or contain specific language to the effect that the award will be final and binding and that any right of appeal is excluded. In the latter case, the parties’ intention is usually to increase the finality of the award by avoiding lengthy and costly challenges before the state courts and ensure prompt enforcement. Commonly, there is also a concern to ensure the confidentiality of the dispute and its resolution by avoiding public court proceedings.

Whilst it may be the intention of the parties to ensure that they avoid any appeal on the merits of the award, it may not necessarily be their intention to waive any right of review of the award by the courts of the seat of the arbitration, including on issues pertaining to jurisdiction, procedural irregularity or public policy. In drafting arbitration agreements, practitioners should thus be mindful that, in some jurisdictions, language regarding the finality of the award may prevent any recourse against the award and not only a review on the merits, assuming such is available.

Ultimately, the effect of the arbitration clause and of any exclusion agreement or waiver contained therein will depend on the lex loci arbitri, which may differ from the arbitration laws of one or both parties’ legal systems. A limited number of national arbitration laws now allow for a waiver of the parties’ right to challenge an award before the courts of the seat of the arbitration. Of particular importance is Swiss law given that Zurich and Geneva are frequently selected as the seat of international arbitrations.1

The issue is well illustrated by the differences between the English and the Swiss arbitration laws with regard to (1) the rights to challenge an award and (2) the validity and effect of an exclusion agreement. Whilst English law allows for judicial review on a question of law, which is not available in Switzerland, Swiss law offers a degree of finality of arbitral awards which is not available in England, by allowing the exclusion of all forms of recourse against arbitral awards. In that regard, attention should be paid to a recent decision of the Swiss Federal Tribunal, in which, for the first time since the 1987 Swiss Private International Law Act (“the PIL Act”) came into force in 1989, it has upheld an exclusion agreement under Art.192 of the Act. In that instance, non-Swiss parties had agreed to exclude “any and all rights of appeal”.2

Right to challenge an award and right to exclude the challenge of an award in England and in Switzerland

The English Arbitration Act 1996

Where the seat of the Arbitration is in England, Wales or Northern Ireland,3 the Arbitration Act 1996 grants the parties the right to challenge an award made by a tribunal as to its substantive jurisdiction (s.67), or on the ground of serious irregularity affecting the tribunal, the proceedings or the award, including lack of due process, awards rendered ultra or infra petita, uncertainty as to the effect of the award, and violation of public policy (s.68).

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1. To the writer’s knowledge, three countries have adopted a similar model: Belgium (see Art.1717(4) of the Judicial Code, as amended in 1998—prior to that date such waiver was in fact mandatory for foreign parties: B. Hanotiau and G. Block, “The Law of 19 May 1998 Amending Belgian Arbitration Legislation” (1999) 15(1) Arbitration International 97; Sweden (see s.51 of the Swedish Arbitration Act 1999) and Tunisia (see Art.78(6) of the Tunisian Code of Arbitration 1993). Certain commentators have considered that it is part of a trend in international arbitration even if, to date, the option remains available only in a few countries: see P.M. Patocchi and C. Jermini, C. in S.V. Berti ed., International Arbitration in Switzerland (2000), at Art.192, para.2 (hereinafter “Patocchi and Jermini”); E. Gaillard and J. Savage eds., Foucard Galliard Goldmann on International Commercial Arbitration (1999), p.913.


3. See s.2(1) of the Arbitration Act 1996.
The challenge can be filed before the High Court or a county court and an appeal can be made in the ordinary way to the Court of Appeal and the House of Lords, subject to existing leave restrictions under English procedural law.4

These provisions are mandatory.5 In other words, regardless of the language used in the arbitration clause (or subsequently, e.g. in the Terms of Reference), the parties cannot waive their right to challenge the award under ss.67 and 68 of the Act, and their right to a minimum judicial review by the English courts will always be preserved. This is so even if neither party has any link with England, or if the parties have chosen the arbitration law of another jurisdiction, as long as the seat of the arbitration is in England, Wales or Northern Ireland.6

The Arbitration Act also allows the parties to appeal to the English courts on a question of law arising out of the award (s.69). The scope of such appeal is in practice restricted since it is limited to questions of English law where English law is applicable to the merits of the dispute. Moreover, leave of the court must be sought.7

Despite these limitations, appeals on a question of English law can be brought against any award rendered in England and the right of appeal in s.69 of the Act is frequently invoked before the English courts. It has been said that the provision, which existed in previous English arbitration legislation,8 reflects the English “desire to model arbitration on the state judicial system rather than [an] acceptance of arbitral jurisdiction as truly alternative and independent”.9

Unlike ss.67 and 68, however, s.69 is not a mandatory provision of the Act. The parties can “otherwise agree” and waive their right to appeal by entering into an exclusion agreement.10 As to the form of such waiver, the English courts have recently confirmed that, not only an express waiver in the arbitration clause, but also an implied waiver, can validly exclude the jurisdiction of the courts to hear an appeal on a question of law. Thus, the parties may be deemed to have “otherwise agreed” simply by agreeing to arbitrate pursuant to a set of arbitration rules which contain a provision regarding the finality of the award. This was expressly held to be the case with respect to the 1988 ICC rules, Art.24 of which provides: (1) “The arbitral award shall be final” and (2) “by submitting the dispute to arbitration by the ICC, 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”.11

The same will a fortiori be true of arbitration under the 1998 ICC Rules, which refer to a waiver of “any form of recourse” (Art.28.6) and under the LCIA Rules, which, even more explicitly, provide that “all awards shall be final and binding on the parties” and “the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, in so far as such waiver may be validly made” (Art.28.9).12 In addition, the Arbitration Act 1996 specifically states that the parties will be deemed to have excluded the jurisdiction of the English courts under s.69 if they agree that the award can be rendered without reasons.13

Whilst in practice, the right of appeal may thus be restricted to a limited number of cases, the procedure, once commenced, will entail significant costs and delay, all the more so since the decision of the High Court (or county court) can be appealed.14

This distinctive feature of English arbitration law is well known to English practitioners, including those involved in drafting arbitration clauses in international contracts. They may thus, in certain circumstances, purposely decide to insert language to the effect that any form of 11. See Sanghi Polyesters Ltd (India) v The International Investor KCFC (Kunun) [2000] 1 Lloyd’s Rep. 480. See also s.4(2) and (3) of the Arbitration Act 1996 which specifically refer to the parties’ right to make “other arrangements by agreement” by agreeing to the application of institutionalised rules.
12. See Shackleton, above, n.6, at p.64. Shackleton appears to suggest that the same would apply with regard to the rules of the German Institute of Arbitration (“the award is final and has the same effect between the parties as a final and binding court judgment”: Art.38 of the DIS Rules). See also A. Redfern, M. Hunter, N. Blackaby, and C. Partasides, Law and Practice of International Commercial Arbitration (2004) (hereinafter “Redfern and Hunter”), para.9.39, in which it is suggested that it suffices for the rules to provide that the award will be final and binding. If that were the case, reference to the UNCITRAL Rules and the new Swiss Rules (Art.32.2) would suffice. This is however controversial and undecided by the English Courts.
13. See s.69(1).
14. Albeit with leave of the High Court (or county court), provided the question is of “general importance” or there is some other “special reason” for leave to be granted to appeal to the Court of Appeal: s.69(8). For a detailed discussion on appeals on a question of law in England, see Shackleton, above, n.6 (in particular on the delay and costs issue, at p.84); Mustill and Boyd, above, n.8, and 2001 Companion; R. Merkin and W. Sapte, Arbitration Act 1996 : An Annotated Guide (1996) and B. Harris, The Arbitration Act 1996: A Commentary (2003).
appeal is excluded, in order to avoid an appeal on a question of law, considering that such language will not exclude their right to challenge the award under the Act for want of jurisdiction or serious irregularity. Difficulties may arise when such clauses are then transplanted into contracts providing for arbitration outside England, thus subject to the arbitration law of another jurisdiction, under which exclusion agreements may have a different effect. Such might be the case in Switzerland.

The Swiss PIL Act

Swiss law also allows the parties to challenge an award by way of setting aside proceedings (recours de droit public) on four grounds set out in Art.190(2) of the PIL Act: (a) incorrect constitution of the tribunal; (b) violation of jurisdiction rules; (c) awards ultra and infra petita; (d) violation of the principles of equal treatment and right to be heard; and (e) violation of public policy. Proceedings are brought before the Federal Tribunal, the highest court in the country and, even where the parties have instead opted for the jurisdiction of the cantonal court to hear the challenge, there is no right of appeal.15

Two other important differences exist with English law, which demonstrate that England and Switzerland may well be at two opposite ends of the spectrum.16 First, there is no right under the PIL Act to appeal against an award on a question of law (as exists under ss.69 of the Arbitration Act 1996). Secondly, and importantly, where the parties have no real link with Switzerland, they are entitled to waive their right to challenge the award under Art.190 (equivalent of the right of challenge on issues of substantive jurisdiction and serious irregularity under ss.67 and 68 of the Arbitration Act 1996). Art.192(1) thus provides:

"Where none of the parties has its domicile, its habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in Article 190, paragraph 2."

This provision only applies where the parties have no connection with Switzerland, i.e. precisely where the parties are unlikely to have been fully familiar with the provisions of the PIL Act when drafting the arbitration clause and, specifically, of: (1) what might constitute a valid exclusion agreement for the purpose of Art.192; and (2) its effect on a possible review of the award by any state court.

Like in England with respect to waivers of the right of appeal on a question of law, exclusion agreements under Swiss law can be entered into either in the arbitration clause or "in a subsequent agreement in writing", e.g. in the Terms of Reference.18

The only way in which the parties can partially or totally exclude their right to challenge the award, however, is by an express declaration to that effect in the agreement. This has been the consistent approach adopted by the Federal Tribunal since 1990, approved by the legal doctrine. As explained by leading Swiss commentators, "[the provision is intended to protect the parties from ill-considered waivers and their far-reaching consequences. It therefore leaves no room for an implied waiver".19

First, the parties’ agreement that the award shall be rendered without reasons, as contemplated by Art.189(2) of the PIL Act, will not operate as a waiver.20 And more importantly, the parties’ agreement to arbitrate pursuant to arbitration rules which themselves contain a provision for such waiver cannot amount to a valid exclusion agreement.21 On the other hand, although not yet specifically decided by the Federal Tribunal, it is commonly agreed amongst commentators that an express and specific reference in the agreement to the one arbitration rule providing for a waiver will suffice, e.g. Art.26.6 of the ICC Rules or Art.26.9 of the LCIA Rules.

What will otherwise constitute an express agreement reflecting the common intention of the parties will be a question of interpretation in each case.22 An illustration of the type of language which will suffice can be found in


the recent decision of the Federal Tribunal, which contains a thorough review of 15 years of Swiss case law and legal doctrine on the issue.

**Foreign parties’ waiver of right to challenge an award: the recent decision of the Swiss Federal Tribunal**

Early this year, the Federal Tribunal has, for the very first time, rejected a challenge brought under Art.190 of the PIL Act on the basis that a valid exclusion agreement had been entered into by non-Swiss (English and Czech) parties. The case concerned an application to set aside an interim award on jurisdiction rendered by a Tribunal having its seat in Zurich, in an arbitration governed by the UNCITRAL Rules. The arbitration clause in its relevant part provided as follows:

“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 Federal Tribunal first confirmed that references to arbitration rules or the award being “final and binding” or to the dispute being “finally settled” are not sufficient to constitute a valid waiver. The parties must refer to the right being waived. The issue of course is how precise such reference should be.

In that regard, the Federal Tribunal clarified that the parties’ statement is best to include, but need not include, a specific reference to Art.192 or Art.190 of the PIL Act in order for a total waiver to be valid:

“No doubt the reference made to Art. 190 PIL Act and/or Art. 192 PIL Act in the arbitration clause itself constitutes the best way to cut short any discussion on the scope of the waiver, since it allows identifying with certainty the right which is being waived. For this reason, it is advisable. That is not to say that such a reference should be a sine qua non condition for any valid waiver of a right to challenge an international arbitration award.”

The Federal Tribunal’s rationale is twofold. First, requiring a reference to the PIL Act would result in all exclusion agreements entered into prior to the coming into force of the Act as having no effect. In the Tribunal’s own words:

“It would be tantamount to excluding all waivers agreed upon before 1 January 1989, when the PIL Act came into force. Such exclusion should certainly not take on a significant practical importance in the future, considering the passing of time, all the more so because the very validity of the exclusion clauses adopted prior to the aforementioned date—a question left unanswered in ATF 116 II 639 consid. 2c in fine— is controversial. That would however mainly imply, regarding arbitration clauses concluded after the said date, disregarding, on purely formalistic grounds, the common intention of the parties, duly expressed, to waive any right to challenge an arbitral award. It goes without saying that a great number of exclusion clauses, if not most of them, would then become a dead letter.”

Secondly, where Art.192 could apply, the parties have, by definition, no link with Switzerland and cannot thus be expected to include a reference to a provision in Swiss legislation, the existence of which they are most probably unaware:

“Moreover, as one author points out, the parties could only with great difficulty do without a specialist in the PIL Act if they intend to exclude in a valid way any challenge against future awards (Karrer, [Bemerkungen zu den Art. 192/193 in ASA Bulletin 1992, 86]). Such formalism is not acceptable. As we are dealing, by definition, with parties without any territorial link with Switzerland (see Art. 192(1) PIL Act, originating from various horizons and whose legal tradition is often much different from the one characteristic of this country, nothing justifies paralysing the clear and concurring expression of their intention to waive their right to any form of recourse against an arbitral award on the sole ground that they did not expressly refer to a legal provision, the very existence of which they are probably unaware.”

The Federal Tribunal thus concluded:

“[The express declaration referred to in Art. 192(1) PIL Act must reveal in a clear and distinct manner the common intention of the parties to waive their right to challenge the decisions of the Arbitral Tribunal on the grounds provided for in Art. 190(2) PIL Act. Yet, it is not essential in order to establish such an intention that the parties cite such or such provision or that they use such or such expression. It is necessary, but sufficient, that the express declaration of the parties reveals, indisputably, their common intention to waive their right to any challenge of the award. Whether this is the case is a matter of interpretation and will always remain so, which means that it is impossible to lay down rules that are applicable with respect to all conceivable situations.” (Emphasis added.)

As to the language that will amount to an “express declaration revealing the parties’ common intention”, some guidance can be found in the Federal Tribunal’s

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24. See *consid*. 4.2.1, citing previous case law; see also below Drafting Guidelines.
26. *ibid*.
27. *ibid*.
28. *ibid*. 

consideration of the language used by the parties—one of which was an English company—in this instance.

Unsurprisingly, the Federal Tribunal’s decision turned on the interpretation of the terms “any and all rights of appeal”. The key question was whether the word "appeal" should be understood in its generic sense as encompassing all forms of appeal, recourse or review (including the *recours de droit public* under Art.190 of the PIL Act), or whether it was intended to designate an appeal in the more restrictive sense of an ordinary appeal before the state courts on the merits (such as an appeal on a question of law, although not specifically mentioned by the Federal Tribunal). Following a thorough analysis of the term “appeal”, the Federal Tribunal refused to interpret it as an English law concept in order to restrict its meaning to that of an ordinary appeal. The Federal Tribunal’s reasoning is worth quoting in full:

"[I]t is necessary to focus on the analysis of the term 'appeal'. The plaintiff contends that 'the translation, or rather the transfer of this English term (…) in the Swiss legal system, is not 'Rechtsmittel' (remedy), but 'Berufung', 'ordinary appeal', or again 'ordentliches Rechtsmittel'. This argument cannot be accepted. First, the approach consisting in transferring the term 'appeal' in the Swiss legal system, as a principle, appears open to criticism. Indeed, one must not lose sight of the fact that one is dealing with parties who have no link with Switzerland and who have chosen English as the language for both the contract (with Czech) and the arbitration. Logic thus requires that the meaning given to this term be the one that such parties, originating from different legal horizons and foreign to Swiss law, attribute to it—if their common intention in this respect can be established—or could reasonably attribute to it in the circumstances and context in which they used it.

The word 'appeal', considered from a legal point of view, has at least two accepted meanings. In the broad sense of the term, it is a generic term which embraces the most diverse rights of recourse and which corresponds to 'recours' or 'Rechtsmittel' in French and German. In this sense, the bilingual English-German dictionaries, more explicitly than the bilingual English-French dictionaries, make it a synonym of 'Berufung', 'Revision', 'Beschwerde', 'Einspruch' or even 'Rechtsbehelf'. It is the same meaning that the authors who translated Art.192 PIL Act into English to which reference is made here had in mind. Thus, Paolo Michele Patocchi and Cesare Jermini (International Arbitration in Switzerland, N 14 under Art. 192 PIL Act, p. 597) translate the marginal note of this provision ('Rennovation au recours /'Verzicht auf Rechtsmittel') by the expression 'Waiver to file an Appeal' and the terms 'recourse' and 'anfechtung', appearing in the first paragraph of the provision cited by 'right to file an appeal'. As for Christoph Müller (International Arbitration, 208) p. 207), he translates the marginal note in the same way and replaces the terms 'tou recours', in the body of the text, by 'any appeal'. However, the word 'appeal' has yet another, more restrictive, meaning, when it is used to designate the actual appeal, namely the ordinary form of recourse which generally results in a stay of the proceedings, a review of the entire case and a new decision on the merits. One is then dealing with an 'appeal on the merits' as opposed to an 'action for setting aside'. Nonetheless, the inadmissibility of this appeal stricto sensu, which entitles the state courts to review the merits of the decision, constitutes the rule with regard to international arbitration. Lastly, it is necessary to emphasize that the French word 'appeal', far from being unambiguous, is not always used to qualify the action that is usually referred to by this term. Thus, for example, in the field now being considered, Art. 1502 of the French New Code of Civil Procedure (NCCP) allows an appeal against a decision on the recognition or enforcement of an arbitral award, but in well-defined cases comparable to the grounds for challenge provided for in Art. 190(2) PIL Act".29

The Federal Tribunal then concluded that, in this instance, the term “appeal” in the arbitration clause had to be understood in its generic sense for three reasons:

"First, the question of a possible internal appeal did not arise as the arbitration rules chosen by the parties exclude this possibility (see Art. 32(2) of the UNCITRAL Arbitration Rules: 'The award … shall be final and binding on the parties …'; even more explicit, the French text of the same provision: '… Elle [la sentence] n’est pas susceptible d’appel devant une instance arbitrale …'; see also: Rolf Trittmann/Christian Duve, in Practitioner’s Handbook on International Arbitration, p. 369, n. 2). Secondly, an actual appeal per se, to be brought before a State court, was not taken into consideration either to the extent that, as previously pointed out above, the right to challenge an award by such legal action is a matter of exception in international arbitration. Lastly and mostly, by the use of the plural ‘rights of appeal’ after the redundant expression ‘all and any’ [Emphasis by the Federal Tribunal], the parties clearly showed that they had in mind all the possible and conceivable means of recourse to which the incoming awards—whatever they may be (‘all and any awards’)—could be subjected, which included setting aside proceedings within the meaning of Art. 85(c) JO and Art. 190 PIL Act’.30

It is somewhat unclear whether the Federal Tribunal’s decision would have been any different had the word “right” been in the singular rather than the plural,31 or had the words “all and any” rights, although qualified as

29. Consid. 4.2.3.2; certain references omitted.
30. Ibid, emphasis added, unless otherwise indicated.
31. See also the preliminary point made by the Federal Tribunal in the same section (consid. 4.2.3.2).
“redundant” by the Federal Tribunal, been replaced by “their” rights. 32

Equally unclear in this instance is whether the parties, and in particular the English party (the plaintiff), by referring to “rights of appeal” did intend to exclude all forms of recourse, including a motion to set aside the award under Art.190 of the PIL Act, the equivalent of which cannot be excluded in England. Yet, there remains little doubt that the Federal Tribunal will not be prepared to simply import the English law concept of “appeal” into Swiss arbitration law and that great care should be taken when drafting exclusion agreements.

The decision is thus of paramount importance for foreign, and specifically English, practitioners. They may intend to exclude the parties’ right of appeal on the merits on a question of law, which right does not exist under Swiss arbitration law, but unintentionally exclude the parties’ right to any challenge of the award before the Swiss courts as the courts of the seat of the arbitration, which right cannot be excluded in England.

Valid and invalid exclusion agreements: drafting guidelines for foreign parties

Arguably, the decision of the Federal Tribunal reflects a less restrictive approach towards recognising foreign parties’ exclusion agreements under Art.192 of the PIL Act than that adopted in the last 15 years. It is nonetheless clear that the Federal Tribunal will continue to require express language and will not admit implied waivers. By way of drafting guidelines, it appears that the following will not suffice to constitute a valid exclusion agreement under Art.192:

1. Agreement (in the arbitration clause or in a subsequent agreement such as the Terms of Reference) to arbitrate under a set of arbitration rules which contain a provision to the effect that the award is final and binding and that the parties agree to waive their right to any form of review, recourse or appeal, such as the ICC Rules and the LCIA Rules. 33
2. Agreement providing that the award shall be "final" or "final and binding" or that the dispute shall be "finally settled" by the arbitral tribunal;
3. Agreement providing that the award shall be "final" and "without appeal" ("sans appel");
4. Agreement providing that the award shall be "final and binding" and that "applications to the state courts are excluded";
5. Agreement that the award shall be rendered without reasons.

On the other hand, the following agreements are likely to validly exclude any right to challenge the award under Art.190 of the PIL Act:

1. Agreement to arbitrate that includes an express reference to the specific provision in a set of arbitration rules to the effect that the award is final and binding and the parties agree to waive their right to any form of recourse, such as Art.28.6 of the ICC Rules or Art.26.9 of the LCIA Rules;
2. Agreement providing that the award shall be "final and binding on the parties who exclude all and any rights of appeal";
3. Agreement referring specifically to Art.192 and/or Art.190 of the PIL Act.

As mentioned above, there remains some uncertainty with respect to agreements providing that the award is final and binding and that the parties exclude "any right of appeal" in the singular or "their right(s) of appeal".

35. See the Federal Tribunal decision of December 19, 1990 in ATP 116 II 639; see also Paoletti and Jermaine, above, n.1, at para.14 and Lalive, Poudret and Reynoud, above, n.15, at Art.192, para.2.
37. Not specifically decided by the Federal Tribunal but unanimously agreed by Swiss commentators: see above, n.20.
38. Not specifically decided by the Federal Tribunal but agreed by several Swiss commentators: see above, n.22.
39. As mentioned, a reference to Art.32.2 of the UNCITRAL or of the Swiss Rules would most likely not suffice. In its February 4, 2005 decision, the Federal Tribunal referred to Art.32.2 of the UNCITRAL Rules as one of the reasons why the word "appeal" had to be understood in the generic sense, but also confirmed that language to the effect that the award shall be "final and binding", even if included in the arbitration clause itself, will not suffice (consid. 4.2.1).
40. Ibid., consid. 4.2.5.1.
No effect of exclusion agreements under Art.192 of the PIL Act on enforcement proceedings

The exclusion of any challenge of the award under Art.190 does obviously not result in the absence of any control whatsoever by any state courts. First, a review of the award can be sought from the courts of the place of enforcement. Hence, an award enforced outside Switzerland in a member state of the New York Convention on the Recognition and Enforcement of Foreign Awards 1958 can still be challenged on any of the grounds of Art.V of the Convention. In addition, even with respect to enforcement in Switzerland, where the parties have entered into a valid exclusion agreement, they will be entitled to contest enforcement under the New York Convention, as if the award rendered in Switzerland was a foreign award. This is the effect of Art.192(2) of the PIL Act, which provides:

"Where the parties have excluded all setting aside proceedings and where the awards are to be enforced in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Awards shall apply by analogy."

A party is able to object to recognition and enforcement in Switzerland as if Art.V of the New York Convention was domestic law. The grounds for challenge under Art.V are wider than under Art.190, but the New York Convention will only apply by analogy and, thus, mutatis mutandis. This is so as to avoid the absurd result whereby a broader basis for challenge would be available—albeit at enforcement stage—where the parties have specifically agreed to limit the control of the Swiss courts over the award by entering into a valid exclusion agreement under Art.192(1).41

The review of the award by the courts of the place of enforcement, however, does not offer the same degree of protection as a challenge under Art.190. In fine, all that can be obtained is a judgment preventing enforcement of the award in that particular jurisdiction—which may or may not be Switzerland. The award itself stands as res judicata. No new proceedings can be brought, regardless of the ground upon which the award may have been challenged. This will, in most cases, be unsatisfactory in that one or both parties' interests will call for a new award to be rendered, e.g. where the award rendered against the claimant could be challenged for serious procedural irregularity.42 It may also be desirable for an interim award on jurisdiction to be set aside before continuing the arbitration proceedings on the merits, rather than the issue being addressed upon enforcement.

In Switzerland, a second means of review of an award rendered in Switzerland is available under the Swiss Judicial Organisation Act ("the JO Act"). The procedure (referred to in Switzerland as "revision") concerns any court decision and any arbitral award influenced by crime (even in the absence of any conviction), or where a party acquires subsequent knowledge of important facts or crucial evidence, which existed but could not be discovered before the decision was made or the award rendered.43 This means of review encompasses fraud as a ground for challenge under s.68(2)(g) of the Arbitration Act 1996.

Since Art.192 of the PIL Act only allows a waiver of the right to challenge awards under Art.190, the right to a revision of the award by the Federal Tribunal pursuant to the JO Act cannot be waived.44 However, the grounds for revision are limited and very difficult to establish. The applicant will only succeed in exceptional circumstances.45

When should foreign parties enter into exclusion agreements?

When drafting an arbitration agreement, the parties expect that the arbitral tribunal will be composed of impartial, competent and independent arbitrators. They may therefore be content to exclude any possibility to challenge an award on the grounds of, e.g. lack of jurisdiction, lack of due process or violation of public

41. See Patocchi and Jermini, above, n.1, at paras 30–32; Lalive, Poudret and Reymond, above, n.15, at Art.192, para.4.
42. See Patocchi and Jermini, above, n.1, at paras 55–56 and Lalive, Poudret & Reymond, above, n.15, at para.1. Taken literally, Art.192.2 only allows reliance on the New York Convention if the parties have excluded "all" setting aside proceedings, rather than simply one or several grounds of Art.190.2. Whilst the Federal Tribunal has not yet been called upon to decide on this issue, Swiss commentators are virtually unanimous in stating that, as a matter of logic, in case of partial waivers, the equivalent
policy, save the restricted right of revision such as is available in Switzerland and the control which may be exercised by the courts upon enforcement of the award (see above).

On a practical level, whether a waiver of the right to otherwise challenge an award is desirable will depend on the goals that the parties are trying to achieve in light of the nature of the contract, the amount potentially in dispute, and the risk of dilatory tactics by one party. The parties' concern in waiving their right to challenge an award before the state courts is usually to ensure the confidentiality of the dispute and its resolution, and to increase the finality of the award by saving time and costs. In that sense, excluding setting aside proceedings under Art.190 of PIL Act is a means to ensure that the courts of the place of the arbitration do not become involved, save in exceptional cases.

An application to have an award set aside by the Swiss Federal Tribunal under Art.190 is not confidential. The same, however, is true of any enforcement proceedings which may be brought at a later stage before the Swiss courts or the courts of the jurisdiction(s) where the successful party attempts to enforce the award.

In addition, applications under Art.190 do not result in any significant delay in the proceedings. First, they can only be made to the Federal Tribunal or cantonal court, the decision of which cannot be appealed to any superior court. Secondly, whilst the plaintiff can apply for a stay of the arbitration proceedings, it is very rarely granted. Thirdly, the Federal Tribunal does strive to deal with challenges to arbitral awards quickly and most of them are finally decided within 6 to 10 months.

As to costs, the Federal Tribunal has some discretion. According to its schedule of fees, for disputes between CHF2 and CHF10 million (€1.3 and €6.5 million), court fees between CHF20,000 and CHF80,000 (€13,000 and €52,000) can be expected. By Swiss standards, the Federal Tribunal is also generous in awarding legal costs to the successful party; in high-value disputes it is not unusual for such costs to reach CHF100,000 (€65,000) or more. Nonetheless, these amounts remain reasonable by comparison to a challenge before the English courts (with the option of an appeal to superior courts). Furthermore, there is no doubt that the costs implications of a challenge do limit the number of spurious applications and dilatory tactics in general.

The restricted nature of the grounds for challenge available under Art.190 have the same effect. They do not in any way allow for a review of the award on the merits, and can be considered as constituting a "minimum degree of judicial review" which the parties may not want to relinquish. This is all the more true in a neutral place like Switzerland, where the courts have traditionally adopted an arbitration-friendly approach and where few setting aside proceedings have succeeded in the last 15 years. The issue may be different in other jurisdictions offering less modern arbitration laws, in particular if the potential dispute involves the state or a state entity or even a local private company.

Finally, as Patocchi has highlighted, "an exclusion agreement is also likely to decrease the degree of the pressure on the arbitrators which may to some extent be regarded as a guarantee for the quality of the arbitration proceedings" and it is not always prudent for parties to international disputes to have unconditional faith in arbitrators.

Conclusion

Art.192 of the PIL Act affords non-Swiss parties who wish to have a neutral seat of arbitration with the option of "a tailor-made form of judicial review of their award" by choosing the grounds for challenge, if any, that they wish to exclude. To this end, they need to enter into a specific exclusion agreement. The Swiss Federal Tribunal has now, and for the first time, upheld an exclusion agreement under Art.192 entered into by foreign parties. There is however no more a presumption of waiver than in the past, and the Federal Tribunal continues to require clear language reflecting the parties' intention.

When drafting international contracts, foreign practitioners—in particular from England and Wales—should consider carefully the language used in arbitration agreements in light of the objectives that they are trying to achieve. On the one hand, appeals on the merits on a question of law do not exist under Swiss arbitration law and need not be excluded. On the other, language which,

46. See, e.g. the recent decision of the Federal Tribunal of February 4, 2005, No.4P 236/2004, unpublished; see also Dutoit, above, n.17, at Art.191, para.6.
47. Once the Federal Tribunal has received the advance on costs and has verified that the application was made in a timely manner, it will invite the arbitral tribunal and the defendant to comment within 30 days. The Federal Tribunal sometimes, but rarely, admits a second exchange of submissions upon request by one party if it considers that the right to be heard calls for a further exchange, which, if it takes place will usually delay the proceedings by two to four months. There is usually no oral hearing.
48. Pursuant to Art.153a of the JO Act, in particular circumstances, the maximum amount can be doubled to CHF160,000 (€104,000).
49. This practice has been criticised by commentators (see in particular, S. Besson, Réflexions sur la jurisprudence Suisse relative en matière d'arbitrage internationale, in (2003) 3 ASA Bulletin 463), but for the time being there is no sign that it will be abandoned by the Federal Tribunal: see decision of February 4, 2005, No.4P 236/2004, unpublished.
50. Patocchi and Jermini, above, n.1, at para.58.
51. Patocchi and Jermini, above, n.1, at para.57. See also Redfern and Hunter, above, n.12, at para.9.56, albeit in the context of the review of the award on the merits.
52. Patocchi and Jermini, above, n.1, at para.3.
in an agreement subject to the English Arbitration Act, would exclude any appeal on a question of law, may lead the Swiss courts to conclude that the parties intended to waive their only remedy available under Swiss law, i.e. the right to challenge the award on the limited grounds set out in Art.190(2) of the PIL Act, the equivalent of the right available under ss.67 and 68 of the English Arbitration Act. Parties may in that way unwittingly waive their right to a minimum judicial review on issues such as jurisdiction, procedural irregularity or public policy.

A waiver under Art.192 of the PIL Act does not affect the parties' right to resist enforcement of the award in Switzerland or abroad, but it is nonetheless rarely advisable. The grounds for review under Swiss law are limited, and the Swiss courts efficient; Switzerland is therefore precisely a forum where it makes little sense to waive the right to challenge an award before the courts. It might be wise in a forum where the state courts do not have adequate experience and/or might be hostile either to international arbitration in general or to one of the parties specifically (e.g. in disputes involving the state or a state entity of the forum). Unsurprisingly, these countries are less likely to allow any waiver, even for foreign parties.