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Domestic Review of Investment Treaty Arbitrations: The Swiss Experience

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The number of challenges of arbitral awards rendered under investment treaties has increased steadily in recent years, alongside a marked increase in the number of non-ICSID investment treaty arbitrations.¹ These cases underline the importance of carefully considering the seat of a non-ICSID investment treaty arbitration. Unlike ICSID awards, which are subject only to the ICSID annulment procedure,² and which cannot therefore be challenged before local courts, non-ICSID investment treaty arbitration awards, whether *ad hoc* or rendered under the auspices of an institution, raise the possibility of intervention by local courts at the place of arbitration.

In recent years, domestic court decisions on challenges of investment arbitration awards have been rendered in a number of jurisdictions. Canadian courts for example have ruled on four such requests with respect to awards rendered by NAFTA tribunals,³ and in one case, a challenge was partially upheld.⁴ Swedish courts have also dealt with a number of such requests,⁵ and

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¹ According to the most recent UNCTAD figures, 290 investment treaty arbitrations were instituted between 1987 and 2007, with 108 of those being non-ICSID arbitrations. The largest portion of these 108 cases were conducted under the UNCITRAL rules (80), with the Stockholm Chamber of Commerce and the ICC accounting for 14 and 5 arbitrations respectively. In 2007, 8 new non-ICSID investment treaty arbitrations were instituted. (UNCTAD, "Latest developments in investor-state dispute settlement", IIA Monitor No.1 (2008): International investment agreements, UNCTAD/WEB/ITE/IIA/2008/3.

² Art. 53(1) ICSID Convention.

³ *Bayview Irrigation District No. 11 v. United Mexican States*, 2008 CarswellOnt 2682 (WL) (Ont. Sup. Ct. J., 5 May 2008), online: <http://ita.law.uvic.ca/annulment_judicialreview.htm>; *United Mexican States v. Karpa*, 193 O.A.C. 216, 74 O.R. (3d) 180, online: <http://ita.law.uvic.ca/annulment_judicialreview.htm>; *Canada v. S.D. Myers Inc.*, 2004 FC 38, [2004] 3 F.C.R. 368, online: <http://ita.law.uvic.ca/annulment_judicialreview.htm>.

⁴ *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664, 89 B.C.L.R. (3d) 359, online: <http://ita.law.uvic.ca/annulment_judicialreview.htm>.

⁵ *CME Czech Republic B.V. v. Czech Republic*, Svea Court of Appeal, 15 May 2003, 42 ILM 919 (2003), Stockholm Arbitration Report 2/2003, online: <http://ita.law.uvic.ca/annulment_judicialreview.htm>; *Nagel v. Czech Republic*, Svea Court of Appeal, 30 May 2005, Stockholm International Arbitration Review 1/2005, online: <<http://www.kluwerarbitration.com>>; *Sedlmayer v. Russian Federation*, Svea Court of Appeal, 15 June 2005, Stockholm International Arbitration Review 2/2005.

have also upheld a challenge on one occasion.⁶ In England, the courts first faced investment arbitration setting aside proceedings in *Ecuador v. Occidental Exploration & Production Company*, which took roughly three years to resolve.⁷ Other jurisdictions which have handled such proceedings include the United States,⁸ France⁹ and Belgium.¹⁰

In view of its established reputation as an arbitration-friendly jurisdiction, it is not surprising that Switzerland has emerged as one of the leading seats of investment-treaty arbitration and has also had its fair share of domestic review proceedings. Indeed, the Swiss Federal Supreme Court (the “Supreme Court”) has to date ruled on four requests for investment arbitration awards to be set aside.

The purpose of this paper is to briefly summarise the four annulment cases the Supreme Court has considered, after having first set out the Swiss legal framework governing the annulment of arbitral awards.

1. The Swiss Legal Framework

Switzerland has a strong tradition as a host to international arbitrations that dates back to the 19th century.¹¹ In 1989, the Swiss legislator adopted the

⁶ *Petrobart v. Kyrgyz Republic*, Supreme Court of Sweden, 28 March 2008, case note available in IBA Arbitration Newsletter (September 2007).

⁷ Four judgments were rendered in the case. The first two related to the preliminary question of whether a challenge to an arbitral award rendered under a treaty between states was justiciable before the English courts. Both the court of first instance and the Court of Appeal found that it was: *Republic of Ecuador v. Occidental Exploration & Production Company*, [2005] EWHC 774 (Comm), aff’d [2005] EWCA Civ 1116. The third and fourth judgments were those of the court of first instance and the Court of Appeal, respectively, rejecting Ecuador’s challenge of the investment treaty award: *Republic of Ecuador v. Occidental Exploration & Production Company*, [2006] EWHC 345 (Comm), aff’d [2007] EWCA Civ 656. The English courts also rejected a challenge of an investment treaty award in *Czech Republic v. European Media Venture*, [2007] EWHC 2851 (Comm). All these decisions are available online: <http://ita.law.uvic.ca/annulment_judicialreview.htm>.

⁸ *Tembec v. United States of America*, Memorandum Opinion, 14 August 2008 (US District Court for the District of Columbia); *International Thunderbird Gaming Corporation v. United Mexican States*, 473 F. Supp.2d 80 (US District Court, District of Columbia, 2007), online: <http://ita.law.uvic.ca/annulment_judicialreview.htm>, aff’d 255 Fed.Appx. 531, 2007 WL 4165398 (Court of Appeals, D.C. Circuit, 2007); *Loewen Group Inc. v. United States of America*, Memorandum Opinion, 31 October 2005 (US District Court for the District of Columbia), online <http://ita.law.uvic.ca/annulment_judicialreview.htm>.

⁹ Cour d’appel de Paris, 25 September 2008, *Czech Republic v. Pren Nreka*, online <http://ita.law.uvic.ca/annulment_judicialreview.htm>.

¹⁰ Tribunal de première instance, 23 November 2006, *Republic of Poland v. Eureka B.V.*, online <http://ita.law.uvic.ca/annulment_judicialreview.htm>.

¹¹ Stephan Wilske, “The Global Competition for the “Best” Place of Arbitration for International Arbitrations”, 1(1) *Contemp. Asia Arb. J.* (2008) at 31.

Swiss Private International Law Act (“**PILA**”). Articles 190-192 of the PILA govern setting aside proceedings for international arbitral awards. For these provisions to apply, the arbitral tribunal must have its seat in Switzerland and at least one of the parties must be domiciled or have its habitual residence outside Switzerland at the time of the conclusion of the arbitration agreement.¹²

In line with Switzerland’s arbitration-friendly approach, the legal framework for challenges is restrictive, making successful challenges rare, and provides for a highly efficient procedure. Article 190 sets out the grounds on which an award can be challenged, while article 191 provides for one of the particularities of the Swiss system: direct recourse to the Supreme Court. Moreover, article 192 allows for a waiver of the right to appeal an award, permitting parties without any connection to Switzerland to waive the right to challenge the award. In this section, we will first address the procedural aspects of a challenge, and then turn to the various grounds which can be invoked in seeking the setting aside of an award. Lastly, we will discuss the waiver of the right to appeal.

1.1 The Procedural Aspects of Challenging an Award

One of the particularities of the Swiss legal framework is that all challenges of arbitral awards are heard directly by the highest Swiss court, the Federal Supreme Court.¹³ A challenge will therefore be heard by only one instance. The only exception to the Supreme Court’s sole jurisdiction is where the parties explicitly agree to the jurisdiction of a Cantonal court.¹⁴ The Supreme Court’s sole jurisdiction has the effect of significantly speeding up setting aside proceedings. In comparison to most jurisdictions which allow for an award to be challenged in two or three consecutive court instances, challenges to awards in Switzerland are rapidly adjudicated.¹⁵ Indeed, a statistical analysis of 220 cases conducted in 2007 showed that the average amount of time it takes for the Supreme Court to dispose of a challenge is 166 days.¹⁶ When only more recent cases are taken into account, the duration

¹² Art. 176(1) PILA.

¹³ Art. 191(1) PILA.

¹⁴ Art. 191(2) PILA.

¹⁵ See for ex. the first challenge of an investment treaty award in the English courts, which reached the Court of Appeal and took a total of just under three years to be resolved: *Republic of Ecuador v. Occidental Exploration & Production Company*, [2006] EWHC 345 (Comm), aff’d [2007] EWCA Civ 656.

¹⁶ Félix Dasser, “International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis”, *ASA Bull.* 3/2007, p. 444 at 452.

is even shorter: “[T]oday, a challenge is typically disposed of by the [Supreme Court] within less than five months after it has been filed.”¹⁷

The procedure followed by the Supreme Court itself also greatly contributes to the speedy resolution of a request to set aside an award. A request for setting aside must be filed with the Supreme Court within thirty days of receipt of the arbitral tribunal’s award.¹⁸ It must be fully reasoned and specify in detail the grounds on which the award is challenged. A mere notice of challenge is not sufficient. As a general rule, there is only one round of written pleadings.¹⁹ A second round is only ordered in exceptional cases in which the Court considers it indispensable to ensure that the right of the parties to be heard is respected.²⁰ For example, in one of the cases discussed below, *Republic of Lebanon v. France Télécom*, the challenging party requested a second round of written pleadings. The Supreme Court recalled its previous jurisprudence that a second round of pleadings is only admissible where it is found to be justified as a result of new elements contained in the arbitral tribunal’s or the respondent’s observations filed with the Supreme Court. It ruled that no elements in that case, including the high value or political importance of the dispute, justified a second round.²¹ Such a request was also dismissed by the Court in the *Czech Republic v. Saluka* case.²² Moreover, the procedure is generally limited to an exchange of written pleadings, with no costly hearings taking place.²³ Roughly two to four months after the last written submission is filed, the Supreme Court renders its decision, however it does not at that stage provide any reasoning.²⁴ The reasons are issued by the Court four to six weeks later.²⁵

In addition to speed, another advantage of the sole jurisdiction of the Supreme Court is that it allows for greater uniformity in the application of the law concerning challenges of arbitral awards. The Court has also

¹⁷ *Ibid.* at 457.

¹⁸ Art. 100 LTF.

¹⁹ Art. 102 al. 3 LTF; Bernard Corboz, “Le recours au Tribunal fédéral en matière d’arbitrage international”, *Semaine Judiciaire*, January 2002, p.1 at 15.

²⁰ DFT 133 I 98, consid. 2.2; Corboz, *ibid.*

²¹ DFT 4P.98/2005, 10 November 2005, ASA Bull. 1/2006, p. 92, consid. 3.

²² DFT 4P.114/2006, 7 September 2006, ASA Bull. 1/2007, p. 123, consid. 3.

²³ As Besson notes: “des débats oraux sont possibles en théorie (art. 57 LTF), mais une requête en ce sens n’a guère de chance d’être accordée.” (Sébastien Besson, “Le recours contre la sentence arbitrale internationale selon la nouvelle LTF (aspects procéduraux)”, ASA Bull. 1/2007, p. 2 at 31.)

²⁴ Elliott Geisinger & Viviane Frossard, “Challenge and Revision of the Award” in Gabrielle Kaufmann-Kohler & Blaise Stucki, eds., *International Arbitration in Switzerland: A Handbook for Practitioners* (The Hague: Kluwer Law International/Schulthess, 2004) p. 135 at 141.

²⁵ *Ibid.*

acknowledged the need for uniformity by referring all arbitral cases to the same chamber.

It should be noted that although the Supreme Court has the power to order a stay of enforcement of a challenged award,²⁶ such a stay is granted only rarely.²⁷ Indeed, a party seeking such a stay must demonstrate “that the immediate enforcement of the award exposes it to serious and irreparable harm in its ‘legitimate legal interests’; and the challenge itself [must have] very strong *prima facie* chances of success.”²⁸

1.2 The Grounds for Challenging an Award

Article 190 PILA sets out an exhaustive²⁹ and restrictive list of five grounds on which an award can be challenged:

2. The award can be set aside:
 - a. if the appointment of an arbitrator was incorrect or if the constitution of the arbitral tribunal was incorrect;
 - b. if the arbitral tribunal has wrongfully assumed or refused jurisdiction;
 - c. if the arbitral tribunal has ruled on points in dispute which were not submitted or if it has not decided on filed requests;
 - d. if it has violated the principle of equal treatment of the parties or their right to be heard;
 - e. if the decision violates public policy.

²⁶ Art. 103 als. 1, 3 LTF.

²⁷ Elliott Geisinger & Viviane Frossard, “Challenge and Revision of the Award” in Gabrielle Kaufmann-Kohler & Blaise Stucki, eds., *International Arbitration in Switzerland: A Handbook for Practitioners* (The Hague: Kluwer Law International/Schulthess, 2004) p. 135 at 141.

²⁸ *Ibid.*

²⁹ See for ex. DFT 127 III 279, consid. 1.a: “Le recours ne peut être formé que pour l’un des motifs énumérés *de manière exhaustive* à l’art. 190 al. 2 LDIP (ATF 119 II 380 consid. 3c p. 383).” [emphasis added] Contrary to other jurisdictions, the scope of review cannot be enlarged by agreement of the parties. The Swiss approach in this respect is in line with that adopted recently by the United States Supreme Court in *Hall Street Associates LLC v. Mattel Inc.* (128 S.Ct. 1396 (WL), ASA Bull. 3/2008, p. 616), which resolved a conflict between various federal Court of Appeals judgments by ruling that the parties to an arbitration could not supplement by agreement the grounds for vacatur and modification set out in the Federal Arbitration Act. In Germany, on the other hand, a recent decision by the Supreme Court appears to open the door for agreements on expanding the scope judicial review to the merits (ASA Bull. 4/2007, p. 810). The decision, which “broke with precedents dating back 130 years”, has been criticised for being “legally erroneous ... [f]rom an international perspective ... ” (Reinmar Wolff, “Party Autonomy to Agree on Non-Final Arbitration?”, ASA Bull. 3/2008, p. 626 at 626, 640.)

3. Interim decisions can only be set aside for the grounds of para. 2 litt. a and b; the deadline for the filing of the motion begins to run with the service of the interim decision.³⁰

No right to appeal an award on a question of law, as is provided for under section 69 of the English Arbitration Act 1996 for instance,³¹ exists in the PILA. As is set out in paragraph 3 of article 190, only the grounds in article 190(2)(a) and 190(2)(b) may be invoked against interim awards. Paragraph 3 was notably applied by the Supreme Court in the first decision summarised below, *Poland v. Saar Papier*, which dealt with an Interim Award on jurisdiction and merits (quantum was left to be determined in a Final Award).³²

The Supreme Court has recognised that each of the grounds set out in article 190(2) PILA is to be interpreted narrowly,³³ an approach which is clearly reflected in the statistics. Indeed, of 221 cases brought before the Supreme Court in the time span between 1989 and 2005, only twelve resulted in a complete or partial setting aside of the award.³⁴ Setting aside 49 cases in which the request was found to be inadmissible or was withdrawn, the success rate for challenges which the Supreme Court considers on the merits can be calculated to be roughly 7%.³⁵ The Supreme Court therefore upholds a

³⁰ Art. 190(2, 3) PILA (English translation from Stephen V. Berti et al., eds., *International Arbitration in Switzerland: An introduction to and a commentary on articles 176-194 of the Swiss Private International Law Statute* (The Hague: Kluwer Law International/Helbing & Lichtenhahn, 2000), p. 569).

³¹ Under section 69(3) of the Arbitration Act 1996 (c.23), a Court can grant leave to appeal an arbitral award on a question of English law where it is satisfied:

- (a) that the determination of the question will substantially affect the rights of one or more of the parties,
- (b) that the question is one which the tribunal was asked to determine,
- (c) that, on the basis of the findings of fact in the award –
 - (i) the decision of the tribunal on the question is obviously wrong, or
 - (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
- (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

³² Swiss Supreme Court, 20 September 2000, ASA Bull. 3/2001, p. 487.

³³ DFT 116 II 721, 723; DFT 115 II 102, 105; Elliott Geisinger & Viviane Frossard, "Challenge and Revision of the Award" in Gabrielle Kaufmann-Kohler & Blaise Stucki, eds., *International Arbitration in Switzerland: A Handbook for Practitioners* (The Hague: Kluwer Law International/Schulthess, 2004) p. 135 at 135.

³⁴ Félix Dasser, "International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis", ASA Bull. 3/2007, p. 444 at 452.

³⁵ *Ibid.* at 453.

challenge quite rarely, but does not hesitate to annul if fundamental rules have been violated.³⁶

1.2.1 Incorrect Constitution (art. 190(2)(a) PILA)

The constitution of the arbitral tribunal is considered to be “incorrect” where the award is not rendered by the arbitrators who were validly appointed, either because it was not a complete tribunal which rendered the award, or because a person who was not entitled to do so participated in the tribunal’s decision-making.³⁷ It is less clear what amounts to an incorrect appointment of an arbitrator. Geisinger & Frossard argue that article 190(2)(a) PILA is very narrow in scope as it guarantees only the parties’ right to an independent and impartial adjudicator, and is not triggered merely by a failure to follow the procedures agreed upon by the parties.³⁸ On the other hand, Bernard Corboz, a Supreme Court judge and former Vice-President of the Court, writes that “an appointment is incorrect where the contractual clauses (even those incorporated by reference) dealing with the procedure to be followed to choose the arbitrators have not been respected.”³⁹ Although a 1994 decision by the Supreme Court clearly adopted the same stance as Geisinger & Frossard,⁴⁰ subsequent jurisprudence appears to have tempered this approach somewhat.⁴¹ Article 190(2)(a) PILA is also applicable where an arbitrator is not sufficiently independent and impartial according to Swiss constitutional law.⁴² In any event however, Dasser reports that this ground has only been successful in roughly 4% of cases in which it is invoked.

³⁶ It is interesting to note that the cases in which the challenging party invoked only one ground had the highest rate of success (14%), while the rate dropped significantly thereafter: the statistics show success rates of 3% and 8.5% in cases in which respectively two and three grounds are invoked, and of 0% in cases in which four or all five grounds are invoked. (*Ibid.* at 454.)

³⁷ Bernard Corboz, “Le recours au Tribunal fédéral en matière d’arbitrage international”, *Semaine Judiciaire*, January 2002, p.1 at 16.

³⁸ Elliott Geisinger & Viviane Frossard, “Challenge and Revision of the Award” in Gabrielle Kaufmann-Kohler & Blaise Stucki, eds., *International Arbitration in Switzerland: A Handbook for Practitioners* (The Hague: Kluwer Law International/Schulthess, 2004) p. 135 at 143.

³⁹ Bernard Corboz, “Le recours au Tribunal fédéral en matière d’arbitrage international”, *Semaine Judiciaire*, January 2002, p.1 at 16 [our translation].

⁴⁰ Swiss Supreme Court, 30 June 1994, ASA Bull. 1/1997, p. 99 at 103-104: “Eine Missachtung von lediglich durch die Parteien vereinbarten Anforderungen (Art. 180 Abs. 1 lit. a IPRG), welche über die rechtsstaatlichen Garantien hinausgehen, vermag die Nichtigkeit des Schiedsspruch nicht zu bewirken.”

⁴¹ DFT 4P.188/2001, ASA Bull. 2/2002, p. 321 at 326-327; see discussion in Elliott Geisinger & Viviane Frossard, “Challenge and Revision of the Award” in Gabrielle Kaufmann-Kohler & Blaise Stucki, eds., *International Arbitration in Switzerland: A Handbook for Practitioners* (The Hague: Kluwer Law International/Schulthess, 2004) p. 135 at 143, N. 16.

⁴² Bernard Corboz, “Le recours au Tribunal fédéral en matière d’arbitrage international”, *Semaine Judiciaire*, January 2002, p.1 at 16.

1.2.2 Violation of Jurisdictional Rules (art. 190(2)(b) PILA)

If this ground is invoked, the Supreme Court can fully review the arbitral tribunal's decision on jurisdiction.⁴³ In essence, a party can set aside an award if the arbitral tribunal has applied the arbitration agreement against a party which is not bound by it, or, inversely, has failed to apply the clause. It could therefore be said to be the least restricted of the five grounds in article 190(2). Unsurprisingly, it is also the ground which was the most likely to be successfully invoked to set aside an award. According to the statistics gathered by Dasser, 12.5% of the cases in which this ground was invoked resulted in at least a partial setting aside of the challenged award.⁴⁴ As complex jurisdictional issues are a hallmark of investment disputes, this ground is likely to attract the attention by disgruntled parties. In *Czech Republic v. Saluka*,⁴⁵ for instance, the *ratione temporis* application of the bilateral investment treaty emerged as the key issue.

1.2.3 Awards *ultra* or *infra petita* (art. 190(2)(c) PILA)

Under article 190(2)(c) PILA, a party can challenge an award on the basis that the arbitral tribunal went beyond what was requested by the parties, that it awarded something different than what was sought, or that it failed to decide on formally valid claims.⁴⁶ A tribunal may however employ legal reasoning different to that presented by the parties in applying the applicable law, pursuant to the *iura novit curia* principle.⁴⁷ The tribunal's discretion is limited by the prohibition of taking the parties by surprise. The ground in article 190(2)(c) is, according to the statistics, the second-most likely to prove successful, with 6.7% of the cases in which it is invoked resulting in at least a partial annulment of the award.⁴⁸

⁴³ Stephen V. Berti & Anton K. Schnyder, "Article 190" in Stephen V. Berti et al., eds., *International Arbitration in Switzerland: An introduction to and a commentary on articles 176-194 of the Swiss Private International Law Statute* (The Hague: Kluwer Law International/Helbing & Lichtenhahn, 2000) p. 569, at 579, N. 51; DFT 117 II 97, consid. 5a.

⁴⁴ Félix Dasser, "International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis", ASA Bull. 3/2007, p. 444 at 455.

⁴⁵ DFT 4P.114/2006, 7 September 2006, ASA Bull. 1/2007, p. 123.

⁴⁶ Stephen V. Berti & Anton K. Schnyder, "Article 190" in Stephen V. Berti et al., eds., *International Arbitration in Switzerland: An introduction to and a commentary on articles 176-194 of the Swiss Private International Law Statute* (The Hague: Kluwer Law International/Helbing & Lichtenhahn, 2000) p. 569, at 580, N. 57.

⁴⁷ *Ibid.*, citing DFT 120 II 175.

⁴⁸ Félix Dasser, "International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis", ASA Bull. 3/2007, p. 444 at 455. See also the recent annulment of an arbitral award in 4A_400/2008 of 9 February 2009.

1.2.4 Violation of due process (art. 190(2)(d) PILA)

An award can be set aside if a party's right to be heard or right to equal treatment has been violated. In order for a challenge on this ground to be admissible, the concerned party must have protested the violation of due process to the arbitral tribunal immediately upon becoming aware of it.⁴⁹ Although the provision is drafted quite broadly, it is interpreted rather restrictively by the Supreme Court.⁵⁰ For example, a violation of equal treatment in practice requires a finding of gross procedural unfairness, while "the parties do not have an unlimited right to adduce evidence, but [can] only [adduce] evidence which is material and relevant to adjudicate the case."⁵¹ Statistics show that the ground was one of the least likely to be successful, with a success rate of less than 3%.⁵²

1.2.5 Breach of Public Policy (art. 190(2)(e) PILA)

The public policy ground is extremely limited, and as the Supreme Court itself has indicated, the chances of obtaining a decision setting aside an award on this ground are extremely slim ("*extrêmement minces*").⁵³ "[E]ven clear violations of law and manifestly false findings of fact are not in themselves sufficient to constitute a violation of public policy."⁵⁴ For an award to be set aside under this ground, it must violate "fundamental legal principles."⁵⁵ In practice, the chances of successfully invoking a violation of public policy are virtually nil. Indeed, the statistics gathered by Dasser show that between 1989 and 2005, the Supreme Court did not uphold a single

⁴⁹ DFT 116 II 644; DFT 119 II 388; See Stephen V. Berti & Anton K. Schnyder, "Article 190" in Stephen V. Berti et al., eds., *International Arbitration in Switzerland: An introduction to and a commentary on articles 176-194 of the Swiss Private International Law Statute* (The Hague: Kluwer Law International/Helbing & Lichtenhahn, 2000) p. 569, at 581, N.62.

⁵⁰ Elliott Geisinger & Viviane Frossard, "Challenge and Revision of the Award" in Gabrielle Kaufmann-Kohler & Blaise Stucki, eds., *International Arbitration in Switzerland: A Handbook for Practitioners* (The Hague: Kluwer Law International/Schulthess, 2004) p. 135 at 147.

⁵¹ *Ibid.*, citing DFT 4P.114/2003, 14 July 2003.

⁵² Félix Dasser, "International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis", *ASA Bull.* 3/2007, p. 444 at 455.

⁵³ DFC 132 III 389, consid. 2.1: "il doit désormais être clair, dans l'esprit de quiconque conclut une convention d'arbitrage donnant lieu à l'application des art. 176 ss LDIP, que ses chances de succès seront extrêmement minces le jour où il voudra attaquer une sentence arbitrale en invoquant le motif de recours prévu à l'art. 190 al. 2 let. e LDIP."

⁵⁴ Stephen V. Berti & Anton K. Schnyder, "Article 190" in Stephen V. Berti et al., eds., *International Arbitration in Switzerland: An introduction to and a commentary on articles 176-194 of the Swiss Private International Law Statute* (The Hague: Kluwer Law International/Helbing & Lichtenhahn, 2000) p. 569, at 583, N. 75 ; DFT 116 II 634.

⁵⁵ DFT 117 II 606/7; Berti & Schnyder, *ibid.*, at 582, N. 71.

challenge based on a violation of public policy.⁵⁶ Recent cases have not been any more favourable to challenges on this ground.⁵⁷

1.3 Waiver of the Right to Challenge an Award

Another particularity of the Swiss legal framework is that, pursuant to article 192 PILA, parties can agree to waive their right to challenge an international arbitral award before the Swiss courts, or can specifically exclude one or more of the grounds in article 190(2) PILA from being invoked in any subsequent challenge.⁵⁸ The enactment of this rule marked a departure from the previous approach in Swiss law, which was not to recognise such waivers. As with other aspects of the PILA, such as the sole jurisdiction of the Supreme Court, the departure was motivated by a desire to make the arbitral process more efficient, and to reduce the burden on Swiss courts.⁵⁹

However, article 192 PILA grants this privilege only to non-Swiss parties. Indeed, in order for a waiver to be valid, neither of the parties to the agreement can have its domicile, habitual residence or place of business in Switzerland:

*Provided that neither of the parties has its domicile, habitual residence or place of business in Switzerland, they can agree, in express terms either in the arbitration agreement or in a subsequent agreement, to waive the right to file an appeal; they can also exclude some of the grounds set out in Article 190 para. 2.*⁶⁰

A company is not considered to have its place of business in Switzerland if it does not have its registered office or a branch in the

⁵⁶ Félix Dasser, "International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis", ASA Bull. 3/2007, p. 444 at 455.

⁵⁷ The Supreme Court has rejected challenges on the grounds of public policy in a number of recent cases: see Swiss Supreme Court, 21 August 2008, ASA Bull. 4/2008, p. 793; Swiss Supreme Court, 20 June 2008, ASA Bull. 4/2008, p. 771.

⁵⁸ See Domitille Baizeau, "Waiving the right to challenge an arbitral award rendered in Switzerland: Caveats and Drafting Considerations for Foreign Parties", [2005] Int.A.L.R. 69, at 69, with respect to rarity of such an approach among domestic legal frameworks.

⁵⁹ Paolo Michele Patocchi & Cesare Jermini, "Article 192" in Stephen V. Berti et al., eds., *International Arbitration in Switzerland: An introduction to and a commentary on articles 176-194 of the Swiss Private International Law Statute* (The Hague: Kluwer Law International/Helbing & Lichtenhahn, 2000) p. 597, at 600, N. 1.

⁶⁰ Art. 192(1) PILA (English translation from Stephen V. Berti et al., eds., *International Arbitration in Switzerland: An introduction to and a commentary on articles 176-194 of the Swiss Private International Law Statute* (The Hague: Kluwer Law International/Helbing & Lichtenhahn, 2000), p. 597).

country.⁶¹ However, a foreign company having a subsidiary in Switzerland may conclude a waiver agreement, as a subsidiary is a separate legal entity.⁶² It is uncertain whether a party can unilaterally waive its right to challenge an award pursuant to article 192 PILA. Patocchi & Jermini suggest that any such waiver has to be reciprocal in order to be valid,⁶³ and this opinion appears to be shared by the Supreme Court.⁶⁴

A waiver pursuant to article 192 must be clear and express, and it must be in writing, as is required of the arbitration agreement pursuant to article 178(1) PILA.⁶⁵ As a result, article 192 does not allow for an implied waiver.⁶⁶ On the other hand, it is not necessary that the waiver explicitly mentions article 190 or article 192.⁶⁷ The Court ruled that what was required for a waiver to be valid was the following:

*the express declaration referred to in [article 192(1) PILA] 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 ground provided for in [article 192(1) PILA].*⁶⁸

In the case, the Court found that an agreement to “exclude all and any rights of appeal from all and any awards insofar as such exclusion can validly be made” constituted a valid waiver pursuant to article 192 PILA. In contrast,

⁶¹ Art. 21(1, 2, 4) PILA ; See Patocchi & Jermini, *ibid.*, at 604, N.8; Bernard Corboz, “Le recours au Tribunal fédéral en matière d’arbitrage international”, *Semaine Judiciaire*, January 2002, p.1 at 9; DFT 118 II 510, consid. 1.

⁶² Elliott Geisinger & Viviane Frossard, “Challenge and Revision of the Award” in Gabrielle Kaufmann-Kohler & Blaise Stucki, eds., *International Arbitration in Switzerland: A Handbook for Practitioners* (The Hague: Kluwer Law International/Schulthess, 2004) p. 135 at 153.

⁶³ Paolo Michele Patocchi & Cesare Jermini, “Article 192” in Stephen V. Berti et al., eds., *International Arbitration in Switzerland: An introduction to and a commentary on articles 176-194 of the Swiss Private International Law Statute* (The Hague: Kluwer Law International/Helbing & Lichtenhahn, 2000) p. 597, at 605, N. 16.

⁶⁴ In a recent case, the Supreme Court referred to the “common intention of the parties to waive their right to challenge”: “the express declaration referred to in [article 192(1) PILA] 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 ground provided for in [article 192(1) PILA].” [emphasis added] (DFT 4P.236/2004, ASA Bull. 3/2005, p. 508, consid. 4.2.3.1.)

⁶⁵ Bernard Corboz, “Le recours au Tribunal fédéral en matière d’arbitrage international”, *Semaine Judiciaire*, January 2002, p.1 at 9.

⁶⁶ Paolo Michele Patocchi & Cesare Jermini, “Article 192” in Stephen V. Berti et al., eds., *International Arbitration in Switzerland: An introduction to and a commentary on articles 176-194 of the Swiss Private International Law Statute* (The Hague: Kluwer Law International/Helbing & Lichtenhahn, 2000) p. 597, N. 19, at 605; Domitille Baizeau, “Waiving the right to challenge an arbitral award rendered in Switzerland: Cavets and Drafting Considerations for Foreign Parties”, [2005] *Int.A.L.R.* 69, at 71.

⁶⁷ DFT 4P.236/2004, ASA Bull. 3/2005, p. 508, consid. 4.2.3.1.

⁶⁸ DFT 4P.236/2004, ASA Bull. 3/2005, p. 508, consid. 4.2.3.1.

in the *Czech Republic v. Saluka* case discussed below, the Court rejected Saluka's argument that the provision in the applicable bilateral investment treaty which set out that the tribunal's decision "shall be final and binding" was intended to be a waiver.⁶⁹ The first case in which the Supreme Court upheld a partial waiver, in other words an exclusion of only some of the grounds in article 190 PILA, is the *Lebanon v. France Télécom* case, also discussed below.⁷⁰

2. The Supreme Court's Decisions on Challenges to Investment Arbitration Awards

The numerous arbitration proceedings involving investment treaties with a seat in Switzerland have to date given rise to four challenges brought before the Supreme Court. In this section, we briefly summarise the Supreme Court's decisions in these four cases.

2.1 Republic of Poland v. Saar Papier (Germany) (20 September 2000)⁷¹

The first setting aside proceedings before the Swiss Supreme Court involving an investment treaty award were initiated in the context of an arbitration between Poland and a German company, Saar Papier. The arbitration had arisen out of a dispute over the classification of recovered paper under Polish environmental laws. In May 1990, the head of the Foreign Investment Agency of Poland issued a license to Saar Papier, a German company which produces paper products, authorising it to establish a Polish subsidiary. One of the aims of the Polish subsidiary was to produce paper products out of imported recovered paper, and this was known to the Polish authorities. In July 1991 however, the Polish authorities banned the importation of recovered paper on the grounds that it constituted waste, which could not be imported pursuant to the applicable environmental protection law.

Saar Papier initiated arbitral proceedings against Poland under the German-Polish bilateral investment treaty (German-Polish BIT), and the tribunal issued an award in October 1995, finding that the ban amounted to expropriation and awarding the claimant 2,3 million Deutsch Marks ("DM")

⁶⁹ DFT 4P.114/2006, 7 September 2006, ASA Bull. 1/2007, p. 123.

⁷⁰ DFT 4P.98/2005, 10 November 2005, ASA Bull. 1/2006, p. 92.

⁷¹ Swiss Supreme Court, 20 September 2000, ASA Bull. 3/2001, p. 487.

in compensation. In June 1996, Saar Papier initiated a second arbitration against Poland, in which it advanced that the 1995 award was only a partial award and claimed a further 31,118,876.94 DM in damages. In an interim award issued in January 2000, the tribunal ruled that it had jurisdiction over the claim and found in favour of Saar Papier on the merits, leaving the question of quantum to a subsequent final award. The seat of the second arbitration was Zurich. Poland sought to set aside the interim award before the Swiss Supreme Court. It alleged among other things that the dispute had already been decided in the October 1995 award, and that therefore the tribunal lacked jurisdiction. The Court dismissed Poland's challenge in a September 2000 decision.

In its decision, the Court first addressed a crucial preliminary issue which it faced for the first time: whether the dispute resolution provision in a bilateral investment treaty could qualify as an arbitration clause within the meaning of Chapter 12 of the PILA, given that the claimant is not a direct party to the German-Polish BIT.⁷² The Court first noted that the German-Polish BIT could be conceptualised as a contract concluded in the interest of a third party, constituting an offer to enter into an arbitration agreement. That offer could be said to be accepted by the investor's initiation of proceedings.⁷³ It however left open the question of exactly which of the parties' acts could be qualified as being constitutive of an arbitration agreement, since Poland had not claimed that the German-Polish BIT arbitration provision was only binding in respect of Germany, and as a result of Poland's participation in the arbitration proceedings.⁷⁴ The Court concluded that Chapter 12 of the PILA is applicable on the grounds that the seat of the arbitration was Zurich, that neither of the parties was domiciled in Switzerland, and that the parties had not excluded in writing the application of the PILA.⁷⁵ The Court further added that arbitrability of an investment treaty dispute is not affected by the fact that one of the parties is a state.

The Court then set out that, pursuant to article 190(3) PILA, interim awards could only be challenged on the grounds provided in article 190(2)(a) and (b) PILA, respectively the improper constitution of the tribunal and the incorrect determination on jurisdiction.⁷⁶ Because Poland's challenge did not have anything to do with the improper constitution of the tribunal, the Court deduced that it was based on article 190(2)(b) PILA.

⁷² *Ibid.*, consid. 1.

⁷³ *Ibid.*, 1.c.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, consid. 1.d.

⁷⁶ *Ibid.*, consid. 2.b.

The Court however found that a *res judicata* defense such as that raised by Poland does not go to the arbitral tribunal's jurisdiction, and that it therefore does not fall within the scope of article 190(2)(b) PILA.⁷⁷ According to the Court, such a defense would rather qualify as a challenge based on the violation of public policy pursuant to article 190(2)(e) PILA,⁷⁸ a ground which was not available to Poland as interim awards can only be challenged on the ground of lack of jurisdiction or improper composition of the arbitral tribunal (article 190(3) PILA).

Poland also claimed that the tribunal lacked jurisdiction because the scope of the BIT's arbitration clause was limited to disputes over measures which amount to expropriation or nationalisation, which it alleged was not the case here.⁷⁹ The Court confirmed that it was free to review whether the tribunal correctly determined its jurisdiction,⁸⁰ however this did not mean it was free to review the tribunal's conclusions on the merits, nor that it could consider new factual or legal assertions.⁸¹

The Court first dismissed Poland's arguments to the extent that they disputed the arbitral tribunal's finding that during the relevant period, the Polish authorities had not interpreted Polish law so as to ban the import of recovered paper. The judges found that the tribunal's factual findings on the question were binding on the Supreme Court.⁸² The Court considered that Poland's arguments sought to question the tribunal's legal reasoning⁸³ and in certain cases constituted new legal arguments, and therefore did not fall within the limited scope of art. 190(2) PILA.⁸⁴ Indeed, the Supreme Court noted that one of the arguments amounted to an attempt to appeal the award on the merits, and as a result declined to consider it further.⁸⁵ Two of Poland's other arguments, including one that Saar Papier lacked capacity in that it did not have legal personality, were rejected on the basis that the challenged award did not contain any rulings on the matters to which they related, and that Poland could not raise arguments at the stage of the annulment proceedings if they had not been previously raised.⁸⁶

⁷⁷ *Ibid.*, consid. 3.b.

⁷⁸ *Ibid.*, consid. 3.b.

⁷⁹ *Ibid.*, consid. 4.a.

⁸⁰ *Ibid.*, consid. 4.b.

⁸¹ *Ibid.*, consid. 4bb.

⁸² *Ibid.*, consid. 4.c.

⁸³ *Ibid.*, consid. 4.d.

⁸⁴ *Ibid.*, consid. 4.e, 4.f.

⁸⁵ *Ibid.*, consid. 4.d.

⁸⁶ *Ibid.*, consid. 4.e, 4.f.

The Supreme Court therefore rejected Poland's challenge of the interim award.

2.2 Saar Papier v. Republic of Poland (1 March 2002)⁸⁷

The second investment treaty award to be considered by the Supreme Court in the context of setting aside proceedings was rendered in the same case as the decision discussed above. Indeed, after the interim award in *Saar Papier v. Republic of Poland* was upheld by the Supreme Court in September 2000, the arbitral tribunal went on to issue a final award on quantum on 19 June 2001. Despite having found in favour of Saar Papier on the merits in the interim award, the tribunal dismissed Saar Papier's claim of 31,118,876.--DM in its entirety and ordered the parties to each cover half of the arbitration costs, as well as their own costs. The dispositif of the award also confirmed that "[a]ny other or further claims of the Parties are denied."

It was now Saar Papier's turn to challenge the final award before the Supreme Court, and it did so on four separate grounds: that the award exceeded the tribunal's jurisdiction (article 190(2)(b) PILA), that the award was *infra petita* (article 190(2)(c) PILA), that it violated the parties' right to be heard (article 190(2)(d) PILA), and that it violated public policy (article 190(2)(e) PILA). This challenge is the only Swiss one to date in an investment treaty case which was initiated by the investor and not by the state.

Saar Papier's challenge on the ground of a violation of public policy was based on the fundamental principles of protection of confidence, prohibition of abuse of rights and discrimination, the protection of the weaker party, and the prohibition of expropriation without compensation. It notably argued that the tribunal had erroneously interpreted the German-Polish BIT in defining the damage caused to it as the value of the investment and not as lost profits.⁸⁸ By limiting the concept of damage to "direct damage", the tribunal violated the international law prohibition of expropriation without compensation, and therefore also violated public order. Procedural defects also allegedly arose from the tribunal's decision to decline to consider certain evidence brought on the definition of damage in international law.⁸⁹

In its decision on the challenge, the Supreme Court first repeated the general approach to be taken to the public policy ground in article 192(2)(e)

⁸⁷ Swiss Supreme Court, decision of 1 March 2002 (unpublished), online: <http://ita.law.uvic.ca/documents/Saarpapier2_001.doc>, consid. 2.a, ASA Bull. 2/2009, p. 325.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

PILA, which it had set out in its previous jurisprudence: that an award violating public order had to violate a fundamental principle of law both in its reasoning and in its result.⁹⁰ A violation of public order does not arise from a flawed appreciation of the evidence, an incorrect finding of fact, or even a clear breach of a legal norm. The Court provided examples of what would constitute a violation of a fundamental principle, such as where a state appropriates the assets of a company without any compensation, or where a state measure is contrary to the international law prohibition of discrimination.

The Supreme Court noted that Saar Papier never argued that it had not received any consideration for its investment.⁹¹ It noted further that no right to full compensation exists under international law, referring in this respect to the *European Convention on Human Rights*.⁹² The Court therefore concluded on this point that the tribunal did not violate public policy. With respect to Saar's claim that the tribunal had erroneously interpreted the BIT in not defining Saar's damage as lost profits, the Court ruled that a tribunal's erroneous interpretation of the law could not in any event constitute a violation of public policy. It therefore did not consider the issue further.⁹³

The Court then turned to Saar Papier's allegation that the award violated procedural norms, notably the right to be heard, and should therefore be set aside pursuant to articles 190(2)(d) and (e) PILA.⁹⁴ The Court noted that the right to be heard gives the parties, among other things, the right to comment on all material facts and to present their legal positions. It also noted that a party loses its right to object to a violation of the right to be heard if it does not raise an objection in a timely fashion during the arbitration. In the case at hand, the arbitral tribunal had, after many rounds of pleadings, closed the proceedings by way of a procedural order. Saar Papier had later requested the tribunal to conduct a hearing, an application the tribunal refused. The Supreme Court ruled that the tribunal's dismissal of Saar Papier's application was neither a violation of the right to be heard, nor a violation of procedural public policy.⁹⁵

Saar Papier further invoked article 190(2)(c) PILA, claiming that the award was *infra petita*. It alleged that in dismissing Saar Papier's claim in the

⁹⁰ *Ibid.*, consid. 2.b.

⁹¹ *Ibid.*, consid. 2.c.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*, consid. 3.

⁹⁵ *Ibid.*, consid. 3.a.

amount of 31,118,876 DM, it omitted to rule on the additional 0.94 DM Saar Papier had originally claimed (Saar Papier had claimed a total of 31,118,876.94 DM). The Court however gave no credence to this argument, stating that it was clear from the award that the claim to the entire claimed amount was rejected by the tribunal.⁹⁶ The omission to include the 0.94DM in the dispositif of the award was merely accidental. The Court also ruled that the award could not be considered to be beyond the tribunal's jurisdiction pursuant to article 190(2)(b), or to be *ultra* or *infra petita* pursuant to article 190(2)(c), since the Tribunal had specifically ruled in the dispositif of the award that "[a]ny other or further claims of the Parties [were] denied". In the opinion of the Court, this finding clearly meant that the Tribunal had dismissed all the claims the parties had actually made.⁹⁷

Finally, Saar Papier argued that the tribunal had violated Saar Papier's right to be heard on grounds that the tribunal did not consider some of the evidence Saar Papier had adduced. The Court however quickly dismissed the argument, stating that the tribunal had considered the evidence not to be relevant and that it was free to do so according to the principle of *iura novit curia*.⁹⁸

The Supreme Court therefore dismissed Saar Papier's challenge of the final award.

2.3 Republic of Lebanon v. France Télécom Mobiles International SA (France) & FTLM S.A.L. (Lebanon) (10 November 2005)⁹⁹

The third decision to be rendered by the Supreme Court with respect to a challenge of an investment treaty award was issued in a case involving Lebanon and France Télécom. It was notably the first time the Supreme Court ruled that the parties had agreed to a partial waiver of the right to challenge awards pursuant to article 192 PILA.

In 1994, the Republic of Lebanon entered into a build-operate-transfer (BOT) contract with France Télécom ("FT") to establish a GSM network for

⁹⁶ *Ibid.*, consid. 3.b.

⁹⁷ *Ibid.*, consid. 3.c.

⁹⁸ *Ibid.*, consid. 3.d.

⁹⁹ Two decisions were rendered by the Supreme Court in this case, both on 10 November 2005. The first was a judgment on Lebanon's challenge of the main award: DFT 4P.98/2005, 10 November 2005, ASA Bull. 1/2006, p. 92. The second was a judgment on Lebanon's challenge of the tribunal's dismissal of a request for correction of the main award: DFT 4P.154/2005, 10 November 2005, ASA Bull. 1/2006, p. 106.

mobile telephones. Subsequently, FT created a local subsidiary, FTML, to implement the contract. After a dispute arose, FTML initiated ICC arbitration under the contract. By a subsequent agreement, Lebanon, FTML and FT agreed to submit their disputes to an arbitral tribunal constituted under the bilateral investment treaty between France and Lebanon (“French-Lebanese BIT”), applying the UNCITRAL Rules and sitting in Geneva. The arbitral tribunal rendered an award on 31 January 2005, ordering Lebanon to pay US\$ 266 million to the telecom operators.

Lebanon challenged the award before the Swiss Supreme Court and applied in parallel to the arbitral tribunal for a correction of the award. In seeking the correction of the award, Lebanon complained that there was a divergence between the operative part and the reasons of the award as to the interest due. When the arbitral tribunal dismissed the application for a correction on the grounds that the error was in the reasons whereas the operative part of the award was accurate, Lebanon also challenged this decision before the Supreme Court. The Supreme Court therefore rendered two separate decisions, one on each of the challenges, on 10 November 2005.

2.3.1 The challenge of the main award

In its challenge of the main award, Lebanon relied on two of the grounds set out in article 190 PILA. It first contended pursuant to article 190(2)(b) PILA that the arbitral tribunal had wrongly concluded that it had jurisdiction over the dispute. Second, it argued that the award violated public policy pursuant to article 190(2)(e) PILA.

With respect to the first ground, the Court found that the parties had validly waived, pursuant to article 192 PILA, any challenge of the award based on the tribunal's alleged lack of jurisdiction. The Court noted that it was sufficient for such a waiver that there be an express declaration that clearly sets out the common intent of the parties to waive the right to challenge the award.¹⁰⁰ The Court noted further however that a partial waiver would have to expressly refer to the relevant PILA provision, or otherwise clearly define the ground itself, in order to be valid:

...si les parties ne souhaitent exclure le recours que pour l'une ou l'autre des motifs énumérés à l'art. 190 al. 2 LDIP – ce qui est possible (cf. art. 192 al. 1 in fine LDIP) -, on en voit pas qu'elles puissent le faire sans mentionner expressément le ou les motifs exclus dans la clause arbitrale, que ce soit par l'indication de la ou des lettres correspondantes de l'art. 190 al. 2 LDIP, la reprise du texte

¹⁰⁰ DFT 4P.98/2005, 10 November 2005, ASA Bull. 1/2006, p. 92, consid. 4.1.

*légal ou toute autre formulation permettant d'identifier à coup sûr le motif exclu.*¹⁰¹

The Court found that the waiver agreement contained in the following clause of the parties' arbitration agreement was a valid partial waiver of the ground contained in article 190(2)(b):

The Parties undertake that they will not challenge the jurisdiction of the UNCITRAL Tribunal whether before the UNCITRAL Tribunal itself or before any national courts. For the avoidance of doubt, the Parties and Y. do not hereby waive their right to challenge any award in the UNCITRAL Arbitration in the place where the award is made or to resist enforcement thereof in the country or countries where enforcement is sought on the grounds contained in the applicable arbitration laws of those countries, save that the Parties will not do so on the ground that the UNCITRAL Tribunal lacked jurisdiction to consider one or more of the issues before it.

Indeed, it held that the text of the agreement was perfectly clear, and that therefore there was no need for an explicit reference to article 190(2)(b) PILA for the waiver to be valid.¹⁰² As a result, the Court found Lebanon's challenge to be inadmissible insofar as it was based on the tribunal's lack of jurisdiction.

Lebanon also argued that the tribunal was bound by a decision of a Lebanese administrative body ordering the operators to pay US\$ 300 million, and that therefore the award violated public policy pursuant to article 190(2)(e) PILA. Although the Supreme Court held that an arbitral tribunal would violate public policy if it did not take into account the *res judicata* effect of a prior decision, it found that it was questionable whether administrative decisions benefited from such *res judicata* effect.¹⁰³ It however left the issue open, finding that the arbitrators had not amended the decision but merely examined whether the debt underlying it was justified.

Lebanon also claimed that the award was contrary to public policy in that it violated the principle of *pacta sunt servanda* to the extent that it admitted the operators' claim to exploit the GPRS network but rejected the Lebanese counterclaim for compensation. The Court confirmed that the legal

¹⁰¹ *Ibid.*, consid. 4.1.

¹⁰² *Ibid.*, consid. 4.2.

¹⁰³ *Ibid.*, consid. 5.1.

principle of *pacta sunt servanda* was a fundamental one the violation of which would be incompatible with the Swiss juridical order.¹⁰⁴ However, it stressed the limitations of the ground by repeating the Court's jurisprudence stating that in order for there to be a violation of the principle, the tribunal must have refused to give effect to a clause while at the same time admitting that it bound the parties, or conversely must have given effect to a clause which it recognized did not bind the parties:¹⁰⁵

*En d'autres termes, le tribunal arbitral doit appliquer ou refuser d'appliquer une disposition contractuelle en se mettant en contradiction avec le résultat de son interprétation à propos de l'existence ou du contenu de l'acte juridique litigieux.*¹⁰⁶

The Court found that in the award in question, there was no such contradiction, and that the tribunal's conclusion was attributable merely to its interpretation of the contract, which was outside the Court's power of review.¹⁰⁷

2.3.2 The challenge of the tribunal's dismissal of the application for correction

Lebanon's separate challenge of the tribunal's dismissal of its application for a correction of the main award was based on all the grounds in article 190(2) PILA, with the exception of article 190(2)(d) PILA. In its decision, the Supreme Court first confirmed its earlier position to the effect that a corrected award, or a decision declining a request to correct an award, while being part and parcel of the main award, can be challenged separately.¹⁰⁸ It found however that the grounds on which Lebanon relied were insufficient to set aside the tribunal's decision.

Lebanon first claimed that the tribunal's dismissal was not signed by its president, alleging that the tribunal was therefore irregularly constituted pursuant to article 190(2)(a) PILA. The Court rejected the argument, finding that article 190(2)(a) PILA does not allow parties to raise any and all formal defects of the arbitral award, but only those which tend to show the irregular constitution of the tribunal.¹⁰⁹ The Court found that the absence of the signature of the president was a simple oversight, and that the evidence

¹⁰⁴ *Ibid.*, consid. 5.2.1.

¹⁰⁵ *Ibid.*, consid. 5.2.1; citing DFT 4P.71/2002, 22 October 2002, ASA Bull. 2/2003, p. 376, consid. 3.2.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, consid. 5.2.1, 5.2.2, citing DFT 4P.12/2000, 14 June 2000, consid. 4a/bb.

¹⁰⁸ DFT 4P.154/2005, 10 November 2005, ASA Bull. 1/2006, p. 106, consid. 1.1, 1.2.

¹⁰⁹ *Ibid.*, consid. 3.1.

showed that the president had in fact taken part in the tribunal's decision-making, as was demonstrated by the fact that the original produced by the defendants was signed by the president.¹¹⁰

Lebanon also argued, pursuant to article 190(2)(b) PILA, that the tribunal exceeded its jurisdiction by modifying the main award in an inadmissible way. The Court gave short shrift to the argument however, first noting its conclusion in its decision of the same date on the challenge to the main award that the parties had agreed to waive any challenge on the grounds that the tribunal lacked jurisdiction. The Court left open the question of whether this waiver also applied to corrected awards, as it found that in any event Lebanon's argument could be advanced in the case at hand because the tribunal declined to modify the main award.¹¹¹

The Court also rejected Lebanon's third and fourth grounds, respectively that the tribunal's decision was *ultra petita* pursuant to article 190(2)(c) PILA,¹¹² and that a number of procedural defects violated procedural public order pursuant to article 190(2)(e) PILA. Lebanon had complained about a violation of the confidentiality of deliberations, as the president of the tribunal had informed the parties of the outcome of the decision before it was served on them. The Court underlined that communicating the outcome of the deliberation is not a violation of the confidentiality of the arbitration, citing a 1991 decision in which it limited confidentiality to the opinions and views exchanged by the arbitrators, and not to the outcome.¹¹³

2.4 Czech Republic v. Saluka (Netherlands) (7 September 2006)¹¹⁴

The most recent published setting aside proceeding involving an investment treaty award is that rendered in the *Czech Republic v. Saluka* case. The arbitration involved a dispute that arose from the privatisation of a Czech bank and its acquisition by a foreign investor, the investment bank Nomura. In March 1998, the Czech privatisation agency sold its 36% stake in a leading Czech bank, IPB, to Nomura Europe Plc, a UK corporation. In October 1998

¹¹⁰ *Ibid.*, consid. 3.2.

¹¹¹ *Ibid.*, consid. 4.

¹¹² *Ibid.*, consid. 5.

¹¹³ *Ibid.*, consid. 6.2, citing DFT 4P.61/1991, 12 November 1991, Bull. ASA 1/1992, p. 264, consid. 1b/bb.

¹¹⁴ DFT 4P.114/2006, 7 September 2006, ASA Bull. 1/2007, p. 123. By way of disclosure, the authors' firm represented the investor in the Supreme Court proceedings.

and February 2000, Nomura transferred its stake in the bank to another entity, Saluka Investments BV, a Dutch company. In July 2001, Saluka initiated arbitration proceedings against the Czech Republic under the Czech-Dutch BIT, governed by the UNCITRAL Rules and with seat in Geneva. Saluka argued that it had been discriminated against by the Czech authorities during a crisis within the Czech banking sector. It claimed that three large Czech banks had received financial assistance pursuant to a government decision announced in May 1998, but that IPB had not received such assistance.

In March 2006, the arbitral tribunal rendered a partial award finding that the Czech Republic was in breach of its obligations under Article 3.1 of the BIT (“fair and equitable treatment”). The decision on quantum was deferred to a subsequent award.

The Czech Republic challenged the award before the Swiss Supreme Court under article 190 PILA, arguing that the tribunal lacked jurisdiction. The Czech Republic contended that the treaty violation admitted by the tribunal had occurred prior to the transfer of the investment (the IPB shares) from Nomura to Saluka. When the transfer from Nomura to Saluka took place in October 1998 and February 2000, the Czech Republic’s refusal to treat IPB in the same manner as the other banks was known to Saluka.

Saluka argued that the tribunal had rightly assumed jurisdiction. As a preliminary matter, Saluka argued that article 8(7) of the BIT (which provided that the tribunal’s decision “shall be final and binding upon the parties to the dispute”) was an agreement to exclude appeals to the Swiss Supreme Court pursuant to article 192 PILA. It argued that the signatories of the arbitration agreement in the BIT (the contracting States) could not possibly have been intended to allow a foreign court to interpret the BIT’s scope of application. In the particular context of a BIT dispute, the words ‘final and binding’ were to be interpreted as equivalent to an exclusion agreement within the meaning of article 192 PILA. The investor who relies on the arbitration option in the BIT could not have more rights than the contracting States. Hence, the waiver should also bind the investor.

Saluka’s arguments were rejected by the Supreme Court. The Court considered that, when choosing Switzerland as the venue of arbitration, the parties were free to take advantage of the possibility afforded by article 192 PILA to exclude challenges to the award, but they did not do so. Moreover, the Court was not persuaded that the contracting States to the BIT had really intended to exclude any challenge to the award. The Court referred by analogy to the ICSID Convention, which provides for its own review mechanism.

On the merits of the challenge, the Supreme Court found (i) that the principle according to which treaty protection had no retroactive effect was not disputed among the parties, and (ii) that the principle had not been violated by the tribunal, contrary to the Czech Republic's allegation. Indeed, the Republic's treaty violation on which the tribunal relied had not been completed before IPB's transfer from Nomura to Saluka. The tribunal considered that although the Government policy had been articulated before Saluka made its investment, its subsequent implementation constituted an ongoing breach of the Czech-Dutch BIT.

The Supreme Court also rejected the Czech Republic's argument that Saluka could not rely on the BIT as it was aware of the Government's discriminatory policy at the time of its investment. The Court recalled that the arbitral tribunal had found that whatever the due diligence undertaken by Saluka at the time of its investment, it could not foresee the Government's future policy and could not be deemed to have accepted future discrimination.

The decision is also relevant for its holdings on applicable procedural rules before the Supreme Court. The plaintiff had requested a second exchange of briefs since the defendant had argued, in its answer to the plaintiff's challenge, that the parties had excluded any challenge by an agreement under article 192 PILA. The Supreme Court denied the request, recalling that a second round of briefs is ordered only exceptionally, and that it was incumbent upon the plaintiff to address all formal requirements for the admissibility of the challenge in its first brief (including the absence of an exclusion agreement under article 192 PILA).

Conclusion

Consistent with the Court's earlier jurisprudence, the Supreme Court has confirmed, in each of decisions on the challenges of treaty arbitration awards that it has dealt with to date, the restrictive approach to setting aside proceedings imposed by the Swiss legislative framework. The decisions also confirm Switzerland's standing as an arbitration-friendly jurisdiction for international investment arbitration.

The Swiss legal framework with respect to challenges allows for efficient and speedy procedures, notably due to the exclusive jurisdiction of the Supreme Court. The limited and narrow grounds for annulment mean that an award will only be set aside in cases in which exceptional circumstances justify such interference in the arbitral process. The possibility for foreign

parties to waive their right to challenge an award is particularly appealing to parties in investment treaty disputes, which may wish to eschew domestic courts. As a result, it can be expected that the number of non-ICSID treaty arbitrations in Switzerland will substantially increase in the future.

Matthias SCHERER, Veijo HEISKANEN & Sam MOSS,
Domestic Review of Investment Treaty Arbitrations: The Swiss Experience

Summary

With the increase of non-ICSID investment treaty arbitrations over the recent years, domestic courts have faced an increasing number of challenges to investment treaty awards. Reflecting Switzerland's emergence as one of the favored seats in investment treaty arbitration, the Swiss Federal Supreme Court has to date rendered decisions in four cases involving challenges of investment treaty awards.

After a brief analysis of the Swiss legal framework governing challenges of arbitral awards, the article summarises the Supreme Court's rulings in each of the four cases. These rulings confirm the Supreme Court's traditional reluctance to interfere with decisions of arbitral tribunals. They also confirm, equally traditionally, the speed and efficiency with which the Court tends to dispose of such challenges. As a result, and taking into account the country's arbitration-friendly regulatory framework, Switzerland is likely to continue to remain among the favored venues for investment treaty arbitration.

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