



## Arbitration Newsletter Switzerland

### Waiver of Annulment – Revisited

Article 192 (1) PILA<sup>1</sup> allows the parties to waive the action for annulment in the arbitration agreement or in a subsequent written agreement.

It took more than sixteen years after the enactment of the PILA until the Federal Supreme Court did, for the first time, in its landmark decision 131 III 173<sup>2</sup> upheld such a waiver. In a number of earlier cases the wording chosen by the parties did not qualify as "express statement" of a waiver. Its first decision upholding such a waiver was criticised<sup>3</sup> - not because the wording of the arbitration agreement would not qualify for such waiver<sup>4</sup> - the wording of the arbitration agreement in this particular case was indeed clear enough - but because this waiver was also applied against a non-signatory of the arbitration agreement.

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<sup>1</sup> "If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190 (2)."

<sup>2</sup> In French, English translation in ASA Bulletin 2005, pp. 496 et seq.

<sup>3</sup> François Perret, ASA Bulletin 2005, p. 520 et seq.; Sébastien Besson, *Etendue du contrôle par le juge d'une exception d'arbitrage; renonciation aux recours contre la sentence arbitrale: deux questions choisies de droit suisse de l'arbitrage international*, in *Revue de l'arbitrage* 2005, p. 1076 et seq.; Jean-François Poudret/Sébastien Besson, *Comparative law of international arbitration*, 2 ed., n. 839, p. 782 in fine; Paolo Michele Patocchi/Cesare Jermini, *Internationales Privatrecht*, 2 ed., n. 19 ad art. 192 PILA; Bernhard Berger/Franz Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, n. 1688 et seq.

<sup>4</sup> "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 in so far as such exclusion can validly be made..."

The authors criticising this decision were of the view that such extension to non-signatories was not covered by the requirement of a "subsequent written agreement", as set out under Article 192 (1) PILA.

Two years later the Federal Supreme Court ruled in the "Cañas Decision"<sup>5</sup> that the wording chosen in the arbitration agreement<sup>6</sup> would qualify as a formal waiver of the action for annulment but that under the specific circumstances of the case, where Guillermo Cañas as tennis player had actually no alternative than to sign the standard agreement provided by ATP, decided that such waiver could not be held against him.<sup>7</sup>

In its most recent decision, rendered on March 6, 2008<sup>8</sup>, the Federal Supreme Court had again to deal with an unambiguous clause which did, by its wording, clearly qualify as a waiver.<sup>9</sup> The question to be answered by the Federal Supreme Court was whether this clause would also prevent the review of the disputed jurisdiction of the arbitral tribunal.

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<sup>5</sup> Guillermo Cañas v. Association of Tennis Professionals ("ATP"), BGE 133 III 235

<sup>6</sup> "The decisions of CAS shall be final, non-reviewable, non-appealable and enforceable. I agree that I will not bring any claim, arbitration, law suit or litigation in any other court or tribunal."

<sup>7</sup> In its considerations, the Federal Supreme Court stated that Guillermo Cañas signed this waiver only *volens volens*.

<sup>8</sup> 4A\_500/2007, made available on the website of the Federal Supreme Court on April 8, 2008 ([www.bger.ch](http://www.bger.ch)).

<sup>9</sup> "Le Parti rinunciano fin d'ora ad ogni ricorso ordinario e straordinario contro la decisione che sarà resa." (The Parties waive from now on all ordinary and extraordinary remedies against the decision to be rendered.)



In the case at hand the two parties (X and Y) had entered into a put-/call-agreement on the shares of company B. Later, warrants were issued on such shares to which X has subscribed. The parties then discussed in writing the possibility to extend the provisions of the put-/call-agreement to these warrants. Subsequently, a dispute arose as to whether Y had an obligation to buy such warrants which X offered. As the parties could not agree on that issue, X commenced litigation in the Courts of Milan against Y for the purchase price of the warrants. A few months later, Y commenced arbitration proceedings against X in Geneva, as provided for in the put-/call-agreement, requesting, amongst others, that the arbitral tribunal declared Y not to be obligated to purchase those warrants. X contested the jurisdiction of the arbitral tribunal as, in its view, there was never an agreement to expand the arbitration agreement in the put-/call-agreement to the warrants. On October 31, 2007 the arbitral tribunal rendered its decision (by a majority), admitted its jurisdiction and held that Y was not obligated to purchase the warrants. X filed an action for annulment against this award at the Federal Supreme Court, arguing that the arbitral tribunal had no jurisdiction over this case. In the meantime, the Courts of Milan handed down their decision as well and came in substance to the same conclusion, namely that Y had no duty to purchase such warrants.

The main argument raised by X at the Federal Supreme Court was that the waiver of an action for annulment should have no effect where the jurisdiction of the arbitral tribunal is at issue. It seems that X did, for that purpose, also refer to the criticism raised against the landmark decision 131 III 173. In its considerations, the Federal Supreme Court rejected X's arguments; the waiver of the action for annulment provided for in Article 192 (1) PILA does, if not explicitly restricted, include all grounds for an action for annulment as enumerated in Article 190 (2) (a-e) PILA. Hence also actions for annulment based on (b) "[...] *the arbitral tribunal wrongly accept[ing] or declin[ing] jurisdiction.*" Therefore, the Federal Supreme Court held that the waiver clause was clearly excluding actions for annulment and saw no reason to exclude questions of jurisdiction from the application of the waiver, at least as to *ratione materiae*.

With its considerations the Federal Supreme Court might have opened a door in case the jurisdiction of the arbitral tribunal is in question *ratione personae*, as was the case in the landmark decision 131 III 173. It seems that the Federal Supreme Court has realized that, in extending the waiver of the action for annulment to a non-signatory of this waiver, it was not giving due consideration to the prerequisite that such waiver has to be covered by the explicit consent of the parties. Such concern is, however, not relevant, in the view of the Federal Supreme Court, where two parties of the agreement, as was the case with X and Y, had explicitly agreed on this waiver and the jurisdiction is disputed *ratione materiae* only. Consequently, the Federal Supreme Court dismissed the action for annulment.

As to the parallel proceedings in the Courts of Milan and the arbitral tribunal in Geneva, they were fortunately both coming to the same result, namely that Y had no duty to purchase the warrants - but *quid* if not? The arbitral tribunal was rendering its award under the new regime of Article 186 (1bis) PILA,<sup>10</sup> namely irrespective of the fact that a state court was already sitting on the same matter between the same parties. The arbitral tribunal must have concluded that there were no serious reasons to stay its proceedings - but could it really reasonably assume in advance that the Courts of Milan and the arbitral tribunal, in spite of their contradicting decisions as to their respective jurisdiction, would still agree as to the merits of the same case, namely that Y had no duty to purchase the warrants?

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P.s.: Summaries of the earlier Federal Supreme Court decisions referred to above are to be found in the archives of the news section on our website. For further information, please contact: Hansjörg Stutzer [h.stutzer@thouvenin.com](mailto:h.stutzer@thouvenin.com).

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<sup>10</sup> Article 186 (1bis) PILA "*It shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a state court or another arbitral tribunal, unless there are serious reasons to stay the proceedings.*"