4A_53/2017[1]

Judgment of October 17, 2017

First Civil Law Court

Federal Judge Kiss, Presiding,
Federal Judge Klett,
Federal Judge Hohl
Clerk of the Court: Carruzzo (Mr.)

X._____ Republic,
Represented by Mr. Bernhard Berger and Mr. Martin Molina,
Appellant,
v.
Z._____ PLC,
Represented by Mrs. Nathalie Voser, Mrs. Anya George and Mrs. Anne-Carole Cremades,
Respondent,

Facts:

A.
In 1990, The X._____ Republic (hereinafter: X._____) privatized A._____, a state energy company founded in 1964, of which it became the main shareholder.

In 2003, at the initiative of X._____, Z._____ PLC (hereinafter: Z._____), the largest oil and gas company in the State of V._____, acquired 25% plus one share of A. _____'s share capital. On July 17 of the same year, it entered into a shareholder agreement (SHA) with X._____. This agreement provided a legal framework for the long-term relationship established by the co-contractors.

On October 10, 2008, Z._____, following public tender offers launched by it for A. _____'s shares, obtained 47.15% of the shares of that company, which made it the largest shareholder of A._____.

On January 30, 2009, X._____ and Z._____ entered into the *GAS Master Agreement* (hereafter GMA) and the *First Amendment to the Shareholder Agreement* (hereinafter: FASHA). According to X._____, the conclusion of these two contracts would have resulted in the transfer to Z._____ of the management control of A._____.

[1] Translator's Note: Quote as X._____ Republic *v.* Z._____ PLC, 4A_53/2017.
The original decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

B.
On January 17, 2014, X._____ initiated arbitration proceedings against Z._____ in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

Alleging that FASHA and GMA had been obtained through a bribe of EUR 10 million offered by Z._____'s CEO to former Prime Minister X._____ [name of country omitted], it requested, among other submissions, the finding of nullity *ab initio* of these two contracts. Z._____ argued that the request should be annulled in its entirety.

A three-member Arbitral Tribunal, including Professor Emeritus N._____ (chosen by X._____), was constituted; its seat being fixed in Geneva, as provided for in the arbitration agreement in the SHA and the GMA.

After hearing the case, the Arbitral Tribunal, by final award of December 23, 2016, dismissed X._____'s case.

C.
On February 1, 2017, X._____ filed a civil appeal together with an application for a stay of enforcement and, in the alternative, a request for revision. It submitted that the Award should be annulled and that Professor N._____ should be ordered to recuse himself as arbitrator.

On this latter submission, based on Art. 190(2)(a) of the Federal Private International Law of 18 December 1987 (PILA,[2] RS 291), it reiterated in its request for revision in the alternative based on Art. 123(2)(a) of the law on the Federal Court of June 17, 2005 (LTF,[3] RS 173.110). The Appellant argued, in particular, that in mid-January 2017, it learned that Professor N._____ had been appointed as arbitrator, around October 3, 2013, by the management of A._____ (under the control of Z._____), in U._____ *v.* A._____, a circumstance which he had been careful not to reveal when it might have raised legitimate doubts as to his independence and impartiality.

According to it, Professor N._____, having accepted his appointment in this other arbitration case, was no longer in a position to decide independently and impartially the question, forming one of the main points to be dealt with in UNCITRAL arbitration between X._____ and Z._____, whether the term of office of A._____'s executive director, to whom he owed his appointment in U._____ *v.* A._____, was legal or not.

The Appellant also claimed that its right to be heard had been breached (Art. 190(2)(d) PILA) and that the Award was incompatible with public policy (Art. 190(2)(e) PILA) because in the Appellant's view, the Arbitral Tribunal had failed to consider decisive evidence. It also argued that the arbitrators had ignored their minimum duty to consider and deal with the relevant matters, as derived from the guarantee of the right to

[2] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987.

[3] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.

be heard because they refrained from answering questions that would have dissuaded them from denying that the main witness, whose statements had confirmed the existence of the bribe in question, was reliable.

Acting through counsel of the Permanent Court of Arbitration, the President of the Arbitral Tribunal and the arbitrator appointed by the Respondent indicated to the Federal Tribunal, on February 20, 2017, that they had never been made aware of the questions raised with regard to Professor N._____ and that, for the rest, they waived the right to comment on the appeal.

On March 20, 2017, the arbitration file was sent to the Federal Tribunal by the same procedure, in the form of three USB keys.

On April 17, 2017, Professor N._____ spontaneously sent observations to the Federal Tribunal, in which he disagreed with the accusations made against him by the Appellant. His observations were communicated to the parties and to the President of the Arbitral Tribunal.

In its answer of March 21, 2017, the Respondent Z._____ principally submitted that the matter was not capable of appeal on the grounds that the parties had validly waived their right to appeal (Art. 192 PILA), and, in the alternative, that it should be dismissed.

The Appellant, in its Reply of April 10, 2017, and its Surrejoinder of May 15, 2017, and the Respondent, in its Rejoinder of May 2, 2017 and its Rebuttal of May 22, 2017, maintained their respective submissions. As for Professor N._____, he made observations on the reply, which he challenged on the merits, in a new document of April 28, 2017, which was also communicated to the parties and to the President of the Arbitral Tribunal.

The request for a stay of enforcement was rejected by order of the Presiding Judge on April 12, 2017.

Reasons:

1.
According to Art.54(1) LTF, the Federal Tribunal issues its judgment in an official language, as a rule, in the language of the award under appeal. When the decision was issued in another language (here English), the Federal Tribunal uses the official language chosen by the parties. Before the Arbitral Tribunal they used English, while, in the appeal briefs sent to the Federal Tribunal, they used French, like Arbitrator N._____, pursuant to the requirements of Art.42(1) LTF in connection with Art.70(1) Cst[4] (ATF 142 III 521[5] at 1). According to its practice, the Federal Tribunal shall consequently issue its judgment in French.

2.
The admissibility of the present appeal presupposes, among other conditions, that the parties have not excluded the possibility of bringing an action within the meaning of Art. 190 PILA.

[4] Translator's Note: CST is the French abbreviation for the Swiss Federal Constitution.
[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network

2.1

In its decisive ruling (ATF 143 III 55[6] at 3.1) Art. 192(1) PILA states that:

> [i]f the two parties have neither domicile, habitual residence nor a place of business in Switzerland, they may, by explicit declaration in the arbitration agreement or a subsequent written agreement, waive the right of appeal against the awards of the arbitral tribunal; they may also waive the right of appeal only for one or other of the reasons listed in Article 190(2) PILA.

2.1.1

Federal case law has progressively developed the principles that result from the provision under review. It follows, in essence, that the practice only admits exclusionary agreements in a restrictive manner and considers that an indirect waiver is insufficient. As for the direct waiver, it does not have to include the reference to Art. 190 PILA and/or Art. 192 PILA. It is sufficient for the express declaration of the parties to show clearly and unequivocally their shared desire to waive their right to any appeal. Whether this is the case is a matter of interpretation. This is the place to reiterate that the waiver of the right to appeal covers all the grounds listed in Art.2 PILA, including the one challenging the composition of the arbitral tribunal (ATF 133 III 235 at 4.3.2.2 p. 243 *in limine*), unless the parties have excluded the appeal only for one or other of these reasons, (ATF 143 III 55 at 3.1, p.58, and the judgments cited).

2.1.2

In a landmark decision of February 4, 2005, published at ATF 131 III 173, the First Civil Law Court, then called the Civil Court, conducted a thorough analysis of the term "appeal" under Art. 192(1) PILA (at 4.2.3.2). Until then, it had merely observed, for the avoidance of doubt, that the indication that the parties consider that the forthcoming award is "without appeal" does not constitute a sufficient waiver of any remedy (ATF 116 II 639 at 2(c), p.640). As a preliminary point, the Court found it objectionable that the Appellant was transposing the term "appeal" into the Swiss legal system to give it the meaning of "*Berufung*"[7] or "ordinary appeal", as opposed to "*Rechtsmittel*",[8] with regard to parties that had no connection with Switzerland and who had chosen English as the language of both the contract and the arbitration. In its opinion, it was logical that the term should be given the meaning that such parties, coming from different legal horizons and foreign to Swiss law, had attributed to it – assuming that their common will could be established – or had been able to reasonably attribute to it in the circumstances and context in which they had used it. Continuing its reasoning, the First Civil Court highlighted the two main meanings that the word "appeal" takes from the point of view of the law: in a broad sense, it is a generic term that includes the most diverse legal remedies and which corresponds to "*recours*"[9] or "*Rechtsmittel*"[10] in the French and German languages (see, in this sense, in addition to the examples cited in the said judgment, *Le Grand Robert de la langue française*, 2nd ed., Volume I, at "*appel*", at 462 i.f., for which a "*décision sans appel*"[11] is "*sans possibilité de recours*"[12]); however, the same word, used in a more restrictive sense, is used to refer to the actual appeal, which is an

---

[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-500-2015

[7] Translator's Note: In German in the original text.

[8] Translator's Note: In German in the original text.

[9] Translator's Note: In French in the original text.

[10] Translator's Note: In German in the original text.

[11] Translator's Note: In French in the original text.

[12] Translator's Note: In French in the original text.

ordinary remedy that is usually suspensive, devolvolutive, and reformatory. And the Court emphasizes that the inadmissibility of this appeal *stricto sensu*, which allows the state court to review the merits of the award appealed, is the rule in international arbitration. Applying these principles to the disputed clause, according to which the parties excluded "all and any rights of appeal from any and all awards insofar as such exclusion can validly be made,"[13] the Federal Judges concluded that there was a valid waiver of any appeal against the awards of the Arbitral Tribunal considering what the arbitration rules chosen by the parties was precluding from the possibility of an internal appeal, the very exceptional character of an appeal strictly speaking before the state judge in matters of international arbitration and, above all, that the use of the plural "rights of appeal"[14] following the redundant phrase "*all* and *any*"[15] made it clear that the parties had in view all means of possible and imaginable remedies which could be the object of future awards.

Two years later, the First Civil Law Court held that an arbitration clause merely stating that the award "[was] final and unenforceable [*sic*] of appeal"[16] did not show the common will of the parties to waive the remedy as clearly as the clause referred to in that judgment did, all the more so since the Arabic expression in the disputed clause could be translated both by "irrevocable"[17] and by "unenforceable of appeal,"[18] which further reduced its effect. However, it did not proceed further with the analysis of this clause since the appeal was in any event unfounded (Judgment 4P.206/2006 of March 20, 2007, at 3.2).

In 2011, the following arbitration clause was submitted for consideration by the Federal Tribunal:

> Neither party shall be entitled to commence or maintain any action in a court of law upon any matter in dispute arising from or concerning this Agreement or a breach thereof except for the enforcement of any award rendered pursuant to arbitration under this Agreement. The decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law.[19]

The First Civil Law Court saw a valid waiver by the parties to appeal against any decision of the arbitral tribunal. According to it, the last sentence of that clause made clear the common will of the parties to exclude any appeal against such a decision, which was further strengthened and indirectly confirmed by the previous sentence, which conferred on the parties the right to bring proceedings in state courts for the sole purpose of obtaining the enforcement of an award made by the arbitral tribunal. Moreover, according to the Court, the word "appeal" clearly had to be understood in that case in its generic meaning as in the one that gave rise to the aforementioned judgment, published in ATF 131 III 173 (Judgment 4A_486/2010[20] of March 21, 2011, at 2.2).

The same clause was submitted for consideration by the Federal Tribunal the following year in an arbitration between the same parties. The First Civil Law Court held an identical outcome for it, after noting that, like Swiss law and unlike English law, none of the laws relied on by the Appellant—Tunisian, French, and New

---

[13] Translator's Note: In English in the original text.
[14] Translator's Note: In English in the original text.
[15] Translator's Note: In English in the original text.
[16] Translator's Note: In English in the original text.
[17] Translator's Note: In French in the original text.
[18] Translator's Note: In French in the original text.
[19] Translator's Note: In English in the original text.
[20] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/valid-clause-waiving-the-appeal-to-the-federal-tribunal

York civil procedural law—allowed an international arbitration award to be appealed by ordinary appeal. Incidentally, it wished to clarify, without definitively deciding the question, that to lay down a general principle that the term "appeal"[21] sufficiently (or insufficiently) showed the will of the parties to waive the appeal in Switzerland against an international arbitral award would certainly have the double merit of simplicity and predictability, but would constitute, however, a legal fiction hardly compatible with the general rules concerning the interpretation of expressions of intent in contractual matters (Judgment 4A_238/2011[22] of January 4, 2012, at 2.2 .4.2 and references).

The First Civil Law Court found, moreover, that the phrase "neither party shall seek recourse to a law court nor other appeals for review of this decision"[23] could not be understood in good faith as anything other than an expression of the will of the parties to exclude any implementation of a state authority for the review of the notified arbitral award ("*...kann nach Treu und Glauben nur so verstanden werden, dass die Parteien jegliche Anrufung einer staatlichen Instanz zu Überprüfung des eröffneten Schiedsentscheids ausschliessen wollten.*")[24]. In its opinion, despite the various differing concepts relating to remedies ("recourse", "appeal", "revision"), such a desire was clearly apparent (Judgment 4A_577/2013[25] of April 3, 2014, at 3.4).

Finally, in the aforementioned judgment, published in ATF 143 III 55, the First Civil Law Court examined an arbitration clause worded as follows:

> The decision of the arbitrator in any such proceeding will be final and binding and not subject to judicial review. Appeals to the Swiss Federal Tribunal from the award of the arbitrator shall be excluded... [26]

It considered that the clause in question undoubtedly satisfied the conditions laid down by Art. 192(1) PILA and related case law for valid waiver of appeal (at 3.2, p.58).

2.2

The relevant arbitration agreements, inserted in the SHA of July 17, 2003, and in the GMA of January 30, 2009, contain the following passage:

> Awards rendered in any arbitration hereunder shall be final and conclusive and judgment thereon may be entered into any court having jurisdiction for enforcement thereof. There shall be no appeal to any court from awards rendered hereunder. (emphasis added)[27]

Considered in the light of the principles of case law recalled above and, more particularly, with regard to waiver clauses which the Federal Tribunal admitted to validity in its above-mentioned judgments of February

---

[21] Translator's Note: In English in the original text.
[22] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/swiss-supreme-court-holds-that-opting-out-agreements-pursuant-to
[23] Translator's Note: In English in the original text.
[24] Translator's Note: In German in the original text.
[25] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/domestic-case-or-appeal-withdrawn-or-manifestly-inadmissible-20
[26] Translator's Note: In English in the original text.
[27] Translator's Note: In English in the original text. There is an annotation of "emphasis added" in the original text, however no such emphasis is seen in the text of this decision as it appears on the website of the Federal Tribunal.

4, 2005, (ATF 131 III 173), of March 21, 2011, (4A_486/2010[28]), of January 4, 2012, (4A_238/2011[29]) and of April 3, 2014 (4A_577/2013[30]), the clause quoted certainly constitutes a valid waiver of the appeal, since it undoubtedly brings out the common will of the parties to waive any right to appeal against any decision of the Arbitral Tribunal before any state court. This will, which clearly results from the very text of the passage reproduced in above, is further reinforced and confirmed indirectly by the sentence which precedes this passage, which not only insists on the finality of the sentences to be rendered by the use of two similar adjectives ("final" and "conclusive"[31]), but also provides that they may be the subject of an exequatur procedure before the state court.

It goes without saying that the link established by the last sentence of the arbitration agreement between the terms "appeal" and "awards" makes it possible, from the outset, to exclude that the parties intended to proscribe only proceedings before the state court in relation to proceedings before the arbitration tribunal for the award of their respective future claims, so much so that the exclusion expressed in the passage at issue may only concern an open remedy against future awards ("from awards rendered"[32]), and not the type of court before which the matter should be brought at first instance. As for the word "appeal"[33], it must clearly be understood, in this case, in its generic meaning. First, the question of a possible internal appeal did not arise since Art.32(2) of the UNCITRAL Arbitration Rules (1976 version), chosen by the parties, excluded this possibility ("[The award] is not subject to appeal to an arbitral tribunal.").[34] Secondly, a proper appeal, submitting to a state court enjoying full authority, was not envisaged insofar as the faculty of challenging an award by such a legal remedy is quite exceptional in international arbitration. Such a faculty is, moreover, alien to the various rights involved *in casu*: Swiss law, *i.e*. the *lex arbitri*, is unaware of it (Article 190(2) PILA *a contrario*); the law of [name of country omitted], which the parties have chosen as *lex causae*, does not know it either (*see* Art. 36 of the Law of [name of country omitted] on Arbitration of October 19, 2001, which is similar to Art 34 of the UNCITRAL Model Law on International Commercial Arbitration of June 21, 1985); the law of [name of country omitted], as the law of the country of the Respondent's seat, says the same thing as the law of [name of country omitted] (Art. 54/55 of the Law of [name of country omitted] on the Arbitration of the November 8, 1994). From the point of view of the practical effect that an objective interpretation is intended to give to any contractual clause, it is not clear what would have been the interest for the parties to specifically exclude, in their arbitration agreement, a remedy that did not exist in any legislation that could be taken into consideration. Thus, the contracting parties, by signing, after having negotiated with the help of lawyers, the contracts including the arbitration clause containing the exclusion clause, could not waive the only legal remedy they would have had to challenge any future award, since they had already established in Switzerland (Geneva) the seat of the Arbitral Tribunal to be constituted, namely the Civil law appeal within the meaning of Art. 77(1) LTF. In this respect, it is possible to imagine, simply as a hypothesis, that the

---

[28] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/valid-clause-waiving-the-appeal-to-the-federal-tribunal

[29] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/swiss-supreme-court-holds-that-opting-out-agreements-pursuant-to

[30] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/domestic-case-or-appeal-withdrawn-or-manifestly-inadmissible-20

[31] Translator's Note: In English in the original text.

[32] Translator's Note: In English in the original text.

[33] Translator's Note: In English in the original text.

[34] Translator's Note: In English in the original text.

Appellant, as a sovereign State, preferred to submit in advance to an award made by an arbitral tribunal of which it could directly appoint one of the members and indirectly the president (see Art. 7 of the UNCITRAL Arbitration Rules, version 1976), rather than run the risk of seeing a court of another sovereign State (in this case, Switzerland) annul, on appeal of its adverse party, a favorable award.

Essentially, the arguments put forward by the Appellant have already been refuted, on the contrary, by the considerations put forward in the context of the legal reasoning to which it has just been subjected. For the rest, it must be stated that the wording of the exclusion clause at issue is incommensurate with the examples of statements cited by the applicant (appeal, n. 9) – "without appeal"[35] (ATF 116 II 639 at 2c pp. 640); the sentences "are final and binding on both parties and applications to state courts are excluded."[36] (Judgment 4P.265/1996 of July 2, 1997, at 1a); the sentence is "final and not subject to appeal"[37] (Judgment 4P.206/2006, cited above) – as the Respondent convincingly demonstrates under nn. 20 to 22 of his answer. It would indeed be hazardous to extrapolate from the two words "without appeal,"[38] which the Federal Tribunal mentioned in a theoretical recital of the aforementioned judgment without indicating the content of the arbitration agreement examined by it, or on the face of the expression "definitive and unenforceable of appeal,"[39] of which it did not make an exhaustive analysis. As for the second phrase above, it does not include the term "appeal"[40] and cannot be used as a point of comparison. It is also not clear how the absence of the word "right"[41] (in the singular or plural) might be affected by the term "appeal"[42] (see ATF 131 III 173 at 4.2.3.2 p. 181) in the clause envisaged (see appeal, n. 10 ss). Finally, as it is clear from this clause that the parties intended to exclude any appeal against possible future awards, the Appellant's discussion of the restrictive practice of jurisprudence in this area is not necessary, unlike what would have been the case if the interpretation of the clause in question had revealed the ambiguity of the exclusion clause.

2.3
It follows from this examination that the parties validly excluded any appeal against the awards of the Arbitral Tribunal, in accordance with Art. 192(1) PILA. The present appeal is thus declared inadmissible, as it disregards that common desire, manifested by an express declaration, to not submit such awards to the examination of the relevant State court of the country of the seat of the arbitration.

This concordant will of the parties, which was not restricted to one or the other of the reasons enumerated in Art. 190(2) PILA therefore concerns all of them, including the complaint alleging irregular membership of the Arbitral Tribunal (Art. 190(2)(a) PILA). Therefore, it is not possible to examine the merits of the matter.

3.
In the alternative, the Appellant submits that, notwithstanding any valid waiver by the parties to bring an action within the meaning of Art. 190(2) PILA against the final award issued by the Arbitral Tribunal, it would

[35] Translator's Note: In French in the original text
[36] Translator's Note: In French in the original text
[37] Translator's Note: In French in the original text
[38] Translator's Note: In French in the original text.
[39] Translator's Note: In French in the original text.
[40] Translator's Note: In English in the original text
[41] Translator's Note: In English in the original text
[42] Translator's Note: In English in the original text

be entitled to invoke, through the revision provided for in Art. 123(2)(a) LTF (ATF 134 III 286[43] at 2.1 and the judgments cited), grounds for challenging Professor N._____. In its opinion, apart from the fact that part of the legal opinion argues in favor of the inapplicability of Art. 192 PILA at review, the terms used in the waiver clause at issue would preclude its extension to the extraordinary remedy of the appeal in the alternative brought by it.

3.1
In a recent judgment, the First Civil Law Court, after a thorough examination of the question, considered that it may be necessary to admit that the discovery, after the expiry of the time limit for appealing an international arbitral award, of a ground that would have required challenging the sole arbitrator or of one of the members of the arbitral tribunal, may result in the submission, to the Federal Tribunal, of a request for a revision of the said award, on the condition that the petitioning party could not discover the ground of challenge during the arbitral proceedings by paying careful attention as required under the circumstances. However, it left the question open, not only because the request for revision was in any event to be dismissed, but also to consider that a tidying-up, if not an overhaul, of Chapter 12 of the PILA was in progress (ATF 142 III 521 at 2.3.5).

There is no need here to decide this question. Indeed, for the reason given below, even if it were answered in the affirmative, it would not be possible to enter into the merits of the Appellant's request for revision anyway.

3.2
The Award under appeal was notified to the Appellant on December 23, 2016, during the judicial year-end, which runs from December 18 to January 2 inclusive (Art. 46(1)(c) LTF). In such a case, the appeal period, which is 30 days according to Art. 100(1) LTF, starts running on the first day following the recess, *i.e*. January 3, (5A_109/2016 February 5, 2016, and references). In this case, the *dies a quo* being January 3, 2017, the appeal period expired on February 1, 2017. However, the Appellant states that it learned in mid-January 2017 of the existence of the grounds for challenging Professor N._____ and which, in its opinion, renders the composition of the Arbitral Tribunal irregular. In other words, it discovered, before the end of the appeal period, the alleged case of challenge under the provisions of both Art. 190(2)(a) PILA, as a ground of appeal, and Art. 121(a) LTF or Art. 123(2)(a) LTF, as a reason – if any (see 3.1 above) – for revision.

According to the case law, as the revision is in principle in the alternative to the civil law appeal, it seems difficult to accept that a party having expressly waived the right to appeal, and thus to rely on the ground provided for in Art. 190(2)(a) LDIP,[44] may nevertheless apply indirectly to the Federal Tribunal on the same ground, discovered before the expiry of the period of appeal, as part of a request for revision, failing which Art. 192 PILA would become a dead letter (Judgment 4A_234/2008[45], cited above, at 2.1, penultimate paragraph i.f.).

---

[43] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/request-for-revision-of-an-arbitral-award

[44] Translator's Note: LDIP is the French acronym for the Federal Private International Law Act FPILA

[45] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/renunciation-to-appeal-revision-of-award-within-time-limit-to-ap

This is exactly the situation that characterizes the case at issue. The Appellant objects that the principle laid down in the judgment in question was *obiter dictum*. No doubt it is, but it does not detract from its relevance. That a litigant, having waived from the outset, jointly with its adverse party, the right to mount an eventual appeal to denounce the irregular composition of the future arbitral tribunal on the grounds of any reason likely to serve this purpose, including a case of challenge, might overcome this obstacle by filing a request for revision is inordinately against the rules of good faith. The First Civil Law Court has, moreover, reiterated that principle, more affirmatively, at least twice (see judgments 4A_570/2011[46] of July 23, 2012, at 4.1, last §, 4A_247/2014[47] of September 23, 2014, at 2.3, last paragraph) and several authors have followed suit (Pascal Ruch, *Zum Rechtsmittelverzicht in der internationalen Schiedsgerichtsbarkeit,* 2013, p.54, last paragraph, Andreas Bucher, in *Comment romand*, Law on Private International Law - Lugano Convention, 2011, No. 5 Art. 192 PILA, Marco Stacher, *Einführung in die international Schiedsgerichtsbarkeit der Schweiz*, 2015, No. 414 and Footnote 969, Kaufmann-Kohler/Rigozzi, *International Arbitration-Law and Practice in Switzerland*, 2015, 511, footnote 562, the same, International Arbitration - Law and Practice in Light of the PILA, 2nd ed., 2010, p.545 s, footnote 681, Matthias Leemann, *Challenging International Arbitration Awards in Switzerland on the ground of lack of in Dependence and impartiality of an arbitrator*, in ASA Bulletin 2011 p. 10 ss, 26 i.f., 29/30 and footnote 76; Nora Krausz, *Waiver of Appeal to the Swiss Federal Tribunal: Recent Evolution of the Case Law and Compatibility with ECHR, Article 6*, in Journal of International Arbitration, 2011, p. 137 ss, 152). It is therefore justified in endorsing this principle and in applying it in this case.

Accordingly, the Court will not examine the request for revision either.

4.
The Appellant, who is unsuccessful, shall pay the costs of the present proceedings (Art. 66) and shall pay costs to the Respondent (Art. 68(1) and (2) LTF).

For these reasons, the Federal Tribunal pronounces:

1.
The appeal and the request for revision are inadmissible.

2.
The judicial costs, set at CHF 200'000, shall be borne by the Appellant.

3.
The Appellant shall pay the Respondent compensation of CHF 250'000 as costs.

4.

---

[46] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-rejects-request-for-revision-facts-that-were-kn

[47] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/alleged-new-facts-must-be-pertinent-justify-revision

This judgment shall be notified to the parties' representatives and to the President of the Arbitral Tribunal with an additional copy intended to be transmitted by the Tribunal to the arbitrator N._____.

Lausanne, October 17, 2017

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:
Kiss

The Clerk of the Court:
Carruzzo