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RECENT SWISS DEVELOPMENTS ON EXCLUSION AGREEMENTS

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1. Introduction

During the course of the year 2008, the Swiss Federal Court handed down three decisions concerning exclusion agreement, i.e. an agreement whereby the parties partly or totally exclude the grounds for setting aside an award. Two of these three are the subject matter of this contribution. The third one (decision 4A_224/2008 of 10 October 2008, para. 2.6.2) confirms the same principles. These decisions as well as all the other decisions of the Swiss Federal Court referred to below are available at <*www.bger.ch*>.

Under Swiss law, an exclusion agreement is governed by Article 192 of the Swiss Federal Private International Law Act of 18 December 1987 ("PILA"), which has the following wording:

> 1. *Where neither of the parties has its domicile, its habitual residence, or a place of business in Switzerland, the parties may, by an express statement in the arbitration agreement or by a subsequent agreement in writing, exclude all setting-aside proceedings; the parties may as well only provide for such an exclusion limited to one or several of the grounds listed in Article 190(2).*
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> 2. *Where the parties have excluded all setting-aside proceedings and where an award is to be enforced in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.*

One of the reasons why the Swiss law of international arbitration is generally characterized as "arbitration-friendly" is the wide recognition of the final nature of arbitral awards and an extremely limited review by national judges of international awards rendered in Switzerland. The judicial review of arbitral awards is limited in two respects: First, the Swiss Federal Court (i.e. the Swiss supreme court) has exclusive jurisdiction over appeals against international arbitral awards rendered in Switzerland pursuant to Article 191 PILA. In other words, there is only a "one shot" appeal, avoiding multiplication of degrees of jurisdiction, ensuring a uniform case law and providing the parties with a possibility to expect a final and binding decision from the appellate body within four to six months. Second, the PILA does not allow for full review of awards and limits the grounds on

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which an award may be set aside. Article 190(2) PILA provides that an award is final from the moment of its notification and may not be set aside for grounds other than those limited to the following:

a. where the sole arbitrator has been improperly appointed or where the arbitral tribunal has been improperly constituted;

b. where the arbitral tribunal has wrongly accepted or denied jurisdiction;

c. where the arbitral tribunal has ruled beyond the claims submitted to it, or failed to decide one of the claims;

d. where the principle of equal treatment of the parties or their right to be heard in an adversary procedure has not been observed;

e. where the award is incompatible with public policy.

While it is not permissible for parties to contractually add any annulment grounds, as indicated above, Article 192 PILA allows exclusion agreements. In the years immediately following the enactment of the PILA, the Swiss Federal Court knew of very few proceedings where the respondent would have objected to a motion to set aside an arbitral award based on such an exclusion agreement. Such trend continued over the years with case law setting high standards to secure a valid exclusion agreement. In particular, it has rapidly become an established case law that the parties' declaration must be express and must show with sufficient certainty the parties' mutual intent to exclude all or certain grounds of setting aside. Hence, the parties were discouraged from opposing a setting-aside procedure on the basis of Article 192 PILA without disposing of a clearly expressed agreement to that effect.

On 4 February 2005, the Swiss Federal Court handed down its first judgment admitting the validity of an exclusion agreement as grounds to dismiss an application to set aside an award (ASA Bulletin, 2005, p. 496; S. Besson, in Revue de l'arbitrage (Paris), n° 4/2005, pp. 1076 ff). In other words, the federal judges restated the conditions of validity of an exclusion agreement resulting from their previous decisions and stressed that it was not necessary for the parties to expressly refer to or quote Articles 190 and/or 192 PILA. The only requirement is that the parties' intent to exclude the very recourse to the Federal Court be clear as results from the application of rules and principles applicable to construction of any other agreement.

In the two decisions rendered by the Swiss Federal Court on 6 March 2008 (published in the official collection under DFC 134 III 260) and 21 August 2008 (4A_194/2008) respectively, the judges reaffirmed the importance of the wording chosen by the parties for their exclusion agreement and restated the conditions of validity of such agreement:

- The first of these decisions rules on an appeal against an arbitral award rendered on 31 October 2007 by an *ad hoc* arbitral tribunal sitting in Geneva. On 16 September 2002, a French public company as a shareholder of an Italian holding company executed a "put&call" agreement with an Italian company, also a shareholder of the same Italian holding company, in order to enable the French company to acquire an indirect control over a company, 63% of which capital was owned by the Italian holding company on the one hand, and to enable the Italian company to exit from its participation in the Italian holding company on the other hand. The agreement contained an arbitration clause in its Article 13, the relevant wording of which is as follows: "*(...) tutte le controversie relative all'interpretazione e/o all'esecuzione del Contratto, o comunque derivanti dal Contratto o in relazione allo stesso,* ***saranno devolute alla competenza esclusiva di un collegio arbitrale*** *nominato, e che deciderà, in conformità al Regolamento d'arbitrato della Camera di Commercio e dell'Industria di Ginevra (...) Le Parti rinunciano fin d'ora ad ogni ricorso ordinario e straordinario contro la decisione che sarà resa*" [free translation from Italian: "*(…) All disputes relating to the interpretation and/or performance of the Contract, or in any way arising from the Contract or related to it,* ***will be submitted to the exclusive jurisdiction of an arbitral tribunal****, ruling in accordance with the Rules of the Geneva Chamber of Commerce and Industry (…) The Parties hereby* ***renounce any ordinary and extraordinary appeal*** *against the decision to be taken*]."

  On 26 July 2005, the Italian company transferred its shares in the Italian holding company to the French company pursuant to the terms of the "put&call" agreement. A dispute between the Parties arose in relation to the scope of their agreement. In particular, the French company refused to acquire from the Italian company, upon invitation from the latter dated 20 July 2005, warrants issued by the Italian holding in 2002. Those warrants were reserved for shareholders and gave them the right to subscribe a new share per warrant at a fixed price during the exercise period running from 1 October 2005 to 30 June 2007. On 7 October 2002, the Italian company in its capacity of a shareholder of the Italian holding company acquired about 70 million warrants for a total price of about 20.5 million euros. It is undisputed that the initial scope of the "put&call" agreement was limited to shares and did not extend to warrants. However, after the issue of the warrants in 2002, the Parties discussed the possibility of extending the scope of their agreement and exchanged letters on 5 December 2002, followed by their Counsel's exchange of draft agreements between 6 December 2002 and 30 September 2003.

The French company denied having entered into any agreement extending the initial scope of the "put&call" agreement and having taken any commitment regarding the warrants subscribed by the Italian company. By contrast, the Italian company argued that an oral agreement has been concluded to this effect and confirmed by the Parties' exchange of letters on 5 December 2002.

On 14 April 2006, the Italian company brought a claim against the French company and other respondents before the Tribunal of Milan requesting a compensation payment corresponding to the price of its subscription of the warrants. On 7 November 2006, the French company filed a request for arbitration against the Italian company requesting a declaratory relief that it has not made any commitment regarding the warrants and does not owe any sum of money to the Italian company, and claiming an amount of 25 million euros as compensation for the breach of the arbitration clause by the Italian company. In its answer, the Italian company challenged the jurisdiction *ratione materiae* of the arbitral tribunal and, in the event its challenge were to be denied, requested the arbitrators to dismiss the French company's claims and order the latter to pay the price of the warrants and a compensation for initiating abusive proceedings.

In its award dated 31 October 2007, the arbitral tribunal accepted jurisdiction, declared that the French company did not owe any sum of money to the Italian company regarding the warrants, dismissed all the Parties' financial claims, awarded half of the costs of arbitration to each of the Parties and ordered each Party to bear its own legal costs. On 28 January 2008, the Tribunal of Milan admitted its jurisdiction over the dispute regarding the warrants but fully denied the claims of the Italian company.

Upon receipt of the arbitral award, the Italian company appealed to the Swiss Federal Court requesting the latter, in the first place, to set aside the award of 31 October 2007 and declare that the arbitral tribunal had no jurisdiction over the dispute regarding the warrants, and in the second place, just to set aside the appealed award. The French company requested the Swiss Federal Court, in the first place, to declare the appeal inadmissible, and in the second place, to dismiss the appeal. The Swiss Federal Court declared the appeal inadmissible in its decision dated 6 March 2008.

- The second 2008 decision rules upon an appeal from a company X having its seat in Bosnia-Herzegovina, which entered into a cooperation agreement on 15 January 1986 with an Italian company Y for the construction of a plate punching plant.

Another Italian company Z was mentioned in the preamble of the agreement as a "*garante per la realizzazione del Contratto*" (free translation from Italian: "*guarantor for the performance of the Contract*") and signed the agreement. With the application of an Italian technology, the punched plates had to be sold partly in the EU, partly in Yugoslavia and other countries. Article 12 of the cooperation agreement contained the following arbitration clause: "*Art. 12.1 Le Parti contraenti cercheranno di risolvere amichevolmente tutte le controversie del presente Contratto, in base agli contatti reciproci e tramite l'esame dell'argomento controverso nelle sedute di Comitato di affari. Art. 12.2 Le controversie che non si riescono risolvere in modo amichevole, verranno risolte con la scelta di tre arbitri ad hoc, secondo il Regolamento dell'Arbitrato della Camera di Commercio internazionale di Parigi dove la X. nomina un arbitro, e la Y. nomina un suo arbitro. Il giudice verrà nominato dalla Camera di Commercio internazionale. La corte arbitrale terrà le sue sedute a Berna, e la lingua dell'arbitrato sarà tedesco.* ***Il verdetto dell'arbitrato è definitivo per tutte le Parti contraenti che sono nella controversia***" (emphasis added; free translation from Italian: "*Art. 12.1 The Contracting Parties shall endeavor to resolve amicably all the disputes related to the present Contract, on the basis of their mutual contacts and by examining the disputed arguments in the course of the meetings of the Business Committee. Art. 12.2 Any disputes which cannot be resolved amicably will be resolved by appointment of three arbitrators for this purpose, in accordance with the Rules of Arbitration of the International Chamber of Commerce in Paris, whereby X will designate an arbitrator and Y will designate its arbitrator. The judge (presiding arbitrator) will be appointed by the International Chamber of Commerce. The Arbitral Tribunal will hold its hearings in Bern and the language of the arbitration shall be German.* ***The arbitral decision shall be final for all the Contracting Parties involved in the dispute***").

Relying on this arbitration clause, the company X initiated ICC arbitration proceedings on 10 September 1991 against the companies Y and Z requesting mainly recognition of a breach of the cooperation agreement and a compensation for that breach in the amount of DM 410'000.-, plus interest. The company Y requested the arbitral tribunal to dismiss the claims of the company X and filed counterclaims. By contrast, the company Z argued that it did not enter into any valid arbitration agreement and did not participate in the arbitration proceedings.

In light of the situation in Bosnia-Herzegovina, the arbitration proceedings were suspended from December 1992 until July 1998. On 19 May 2003, the arbitral tribunal issued an interlocutory award ruling on its jurisdiction *ratione personae*, specifically with respect to Z, and defining Swiss law as the *lex causae* governing the

cooperation agreement. In its award of 14 February 2008, the arbitral tribunal expressly acknowledged that the company Z was a party subject to all the effects of the cooperation agreement and thus had a capacity to be a defendant ("*Passivlegitimation*"). Even where under the agreement the company Z acted only as a guarantor, its liability came into consideration to the extent that the cooperation agreement has not been performed by the company Y and could not longer be performed by the latter for cause of insolvency.

On 25 April 2008, the company X appealed against the award to the Swiss Federal Court on the grounds of an alleged violation of public policy within the meaning of Article 190(2)(e) PILA. The companies Y and Z requested dismissal of the appeal to the extent that it was admissible. The Swiss Federal Court dismissed the appeal, to the extent that it was admissible, in its decision of 21 August 2008.

2. The Reasoning of the Swiss Federal Court

In both decisions of 6 March and 21 August 2008, the Federal Court restated the conditions of validity of exclusion agreements provided for in Article 192 PILA (**A.**). Then, the judges went on to apply those conditions to the precise facts of the cases at hand (**B.**).

A. Principles of Construction of an Exclusion Agreement

In paragraph 3.1 of its decision of 6 March 2008, the Swiss Federal Court refers to its established case law ("*arrêt de principe*") where it had already examined in detail the issue of exclusion of setting-aside proceedings in international arbitration (published in the official collection under DFC 131 III 173) and summarized its position in the following terms:

> "*In substance, it results from the [above-mentioned] decision that in practice, exclusion agreements are recognized only restrictively and an indirect exclusion is deemed insufficient. As to the direct exclusion, the Federal Court has specified, for the sake of clarity of its previous case law, that an exclusion agreement does not necessarily need to contain a reference to Article 190 PILA and/or 192 PILA. It is sufficient that an explicit declaration of the parties makes clearly and undoubtedly appear the parties' mutual will to renounce any appeal. The assessment of whether that is the case on the facts is a matter of construction. This case law has been confirmed since then and, in a recent decision, the Federal Court denied any ground to re-examine it, notwithstanding the criticism addressed to it by certain legal scholars*" (translation from the French original).

The recent decision referred to in the preceding paragraph was rendered on 22 March 2007 and published in the official collection under DFC 133 III 235. It is noteworthy that the facts of that case related to international sports arbitration. Taking into account the specificity of this kind of arbitration, the Swiss federal judges held that, as a matter of principle, an exclusion agreement may not be opposed to a sportsman even where the agreement meets the formal conditions of Article 192(1) PILA.

Paragraph 2.1 of the decision of 21 August 2008 contains a formula similar to that quoted above with the following addition:

> "*In view of the scope of the waiver of rights, the will of such waiver must be clearly expressed as the Parties thereby deny themselves any possibility – subject to any admissible objection from the respondent in the enforcement proceedings – to have the award reassessed and annulled by a State court even in the event the award should suffer from severe defects and breach fundamental rights of the parties*" (translation from the German original).

The examined decisions of the Swiss Federal Court confirm the following two principles:

- First, by admitting the validity of an exclusion agreement in the form of an explicit declaration of the parties making clearly and undoubtedly appear the parties' mutual will to renounce any appeal, the judges referred to the general rules on construction of agreements. Put differently, when construing an exclusion agreement, it is necessary to apply general principles of contract interpretation. Under Swiss law, as law defining the conditions of appeal to the Swiss Federal Court, the judges establish the real and mutual intent of the parties when ascertaining the meaning of a contractual clause. The examined case law constructs exclusion agreements by reference to the principle of party autonomy. The principle of party autonomy is derived from the contractual freedom guaranteed as part of the economic freedom by the Constitution. The principle of party autonomy means that each person is free to arrange its legal relations as he deems appropriate. As a matter of principle, the parties are free to exclude or limit the setting-aside proceedings in international arbitration. When examining whether such was the parties' mutual intent, the judges ascertain the parties' actual will by means of analysis of the wording of the exclusion agreement and of all the circumstances surrounding the agreement. As an example of relevant circumstances, one may cite the parties' conduct and the purpose of the agreement, as well as the usages. Even where the wording of an agreement is clear, the surrounding circumstances may also

enter into consideration in the absence of any order of priority as between different means of construction of agreements (DFC 127 III 444). Only if the parties' real will is impossible to identify, will the judges rely on the parties' deemed will, i.e. that corresponding to the meaning that an honest and reasonable person placed in the same circumstances would have given to the agreement at hand in good faith (DFC 133 III 61).

This rule of Swiss law on construction of agreements is in line with Article 4.1 of the 2004 UNIDROIT Principles of International Commercial Contracts, which reads as follows: "*1. A contract shall be interpreted according to the common intention of the parties. 2. If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.*" The 1999 Principles of European Contract Law contain a similar provision in their Article 5:101: "*1. A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words. 2. If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party. 3. If an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances."*

- Second, an exclusion agreement is subject to strict conditions and must be construed restrictively. Considering the importance of the parties' decision to limit or renounce any appeal against an arbitral award, an exclusion agreement must clearly and without any doubt reflect the parties' common intent. In case of doubt as to the parties' actual will, such an agreement may not be inferred. Hence, it is important to accurately choose the wording for an exclusion agreement in order to avoid any potential dispute as to its validity. In this respect, the two 2008 decisions of the Swiss Federal Court are confirming earlier case law and reiterating in particular that general, imprecise or indirect waivers, such as for instance a reference to Article 28(6) ICC Rules, would not suffice.

B. Application to the Facts at Hand

The difference in the outcome of the two examined decisions shows once again the importance of the wording chosen by the parties for their exclusion agreement. Where the validity of such agreement was upheld in the decision of 6 March 2008 (*aa.*), it was denied in that of 21 August 2008 (*bb.*).

aa) Decision of 6 March 2008

Referring to Article 13 of the "put&call" agreement quoted above, the Federal Court considered that:

> "*Such an exclusion agreement meets without doubt the formal conditions of Article 192(1) PILA and of the above-mentioned case law. The quoted contractual clause shows in the most clear terms the common intent of the parties to renounce any setting-aside proceedings against any future award by means of an ordinary or extraordinary appeal, it being specified that the term "decisione" – even where it is more generic than "lodo" (i.e. "arbitral award") – in light of its context clearly means an award to be rendered by the arbitrators. Moreover, this clause corresponds more or less to the sentence recently quoted by the Federal Court as an example of a formally valid exclusion agreement (decision 4P.114/2006 of 7 September 2006, paragraph 5.3 in fine [this decision has stressed the importance of exclusion of any appeal against the award, i.e. including not only ordinary but also extraordinary means of appeal])"* (translation from the French original).

It is noteworthy that the federal judges also mentioned – without admitting its admissibility for lack of substantiation – the claimant's argument about the doubtful validity of the exclusion agreement in light of the case law of the Swiss Federal Court relating to the compatibility of Article 192 PILA with Article 6 of the European Convention on Human Rights (ECHR). The decision relied upon by the claimant (DFC 133 III 325) did not support the claimant's position at any rate since it did not involve a commercial arbitration dispute but a dispute between a professional tennis player and a sport organization having taken disciplinary measures against the player.

As to the scope of an exclusion agreement, the Federal Court expressly rejected the claimant's argument that such agreement cannot cover cases where arbitral tribunals wrongly accept their jurisdiction. More precisely, the claimant argued that the issue of extension of the arbitration clause contained in the "put&call" agreement to a specific agreement concerning the warrants conditions not only the admissibility but also the legitimacy of its appeal. As a consequence thereof, the Federal Court would not be in a position to declare the appeal inadmissible without reaching the conclusion that the arbitral clause in the "put&call" agreement covered the agreement on warrants. This would imply that the federal judges begin by examining the validity of the claimant's argument based on the alleged lack of jurisdiction of the arbitral tribunal. The Federal Court refused to follow such reasoning and explained its position in the following terms:

> "*Such reasoning cannot be followed. It would in fact render ineffective an exclusion agreement where an appeal is based on a ground concerning jurisdiction of the arbitral tribunal (art. 190(2)(b) PILA). It is undeniable that an exclusion of all the setting-aside proceedings within the meaning of Article 192(1) PILA covers also this ground (DFC 131 III 173, paragraph 4.2.3.1, p. 178 i.f./179). Moreover, it has been admitted that the parties have a possibility to exclude from such proceedings only appeals on the ground of the arbitral tribunal's jurisdiction (decision 4P.98/2005 of 10 November 2005, paragraph 4.2) […] where a party claims that the arbitral tribunal has misappropriated a power which it did not have by ruling over an issue not covered by the parties' arbitration agreement, its argument relates to the jurisdiction of the arbitral tribunal*" (translation from the French original).

It must be stressed that the Federal Court draws a line between arguments relating to the arbitral tribunal's jurisdiction as to the subject-matter of the dispute (*ratione materiae*) and those relating to the definition of the circle of persons bound by the arbitration agreement or jurisdiction *ratione personae*. The federal judges acknowledged the criticism by legal scholars of its decision DFC 131 III 173 without taking any position (see in particular François Perret, in Bulletin ASA 2005, pp. 520 ff; 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, pp. 1076 ff; Jean-François Poudret/Sébastien Besson, Comparative law of international arbitration, 2nd ed., n. 839, p. 782; Paolo Michele Patocchi/Cesare Jermini, Basler Kommentar, Internationales Privatrecht, 2nd ed., no. 19 ad art. 192 PILA; Bernhard Berger/Franz Kellerhals, Internationale une interne Schiedsgerichtsbarkeit in der Schweiz, n. 1688 ff and footnote 263). In relation to the case at hand, the Federal Court made the following statement:

> "*It [the claimant] does not take into account that the criticized decision relates to the subjective (ratione personae) scope of an arbitration agreement and, consequently, of an exclusion agreement contained therein. It is precisely on this point that the criticism by legal scholars is concentrated […]. The subjective scope of an arbitration agreement containing an exclusion agreement indeed raises the specific issue relating to the form of the exclusion since Article 192(1) PILA subjects the validity of exclusion of setting-aside proceedings to an explicit declaration by the parties to the arbitration agreement. The case at hand – where both parties to the arbitration agreement have made an explicit declaration required by Article 192 PILA and only the delimitation of the scope as to the subject-matter of that agreement is disputed – does not raise the same issue*" (translation from the French original).

bb) Decision of 21 August 2008

With reference to the last sentence of Article 12 of the cooperation agreement quoted above, the Federal Court decided the following:

> "*The wording at hand according to which an arbitral award shall be final ["definitivo"; "endgültig"] for all the parties to the dispute does not meet the requirements of an explicit renunciation within the meaning of Article 192(1) PILA. Pursuant to the terms commonly used in law of civil proceedings, the description of a decision as "final" does not preclude the parties from bringing an extraordinary appeal, but only excludes a (full) re-examination of the decision by means of an ordinary appeal [references omitted]. Whereas Article 190(1) PILA provides that an award rendered by an arbitral tribunal pursuant to Articles 176 ff PILA is final, the sub-sections 2 and 3 of the same provision describe the possibilities of setting-aside proceedings*"(translation from the German original).

The judges continued by recalling that the parties' choice of the ICC Rules to govern the arbitration proceedings does not meet the requirement of an explicit declaration by the parties for the purposes of an exclusion agreement within the meaning of Article 192 PILA. It is recalled that Article 28(6) ICC Rules provides the following: "*Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made*." The Swiss Federal Court referred to its well-established case law having already declared such an indirect renunciation to be insufficient (in particular DFC 134 III 260 and DFC 133 III 235). On the facts, the disputed renunciation agreement could not be valid in the absence of the wording making it crystal-clear that the parties renounce any appeal ("*jeglicher Rechtmittel*") against the arbitral award.

While this goes without saying, the federal judges nevertheless specified that the fact that the first respondent had accepted the arbitral award based on the arbitration agreement and had not attempted to set it aside did not indicate the parties' mutual will to exclude any possibility of setting aside of the award.

3. The Impact of the Decisions of the Federal Court

The two 2008 decisions of the Swiss Federal Court regarding the scope (**A.**) and validity (**B.**) of exclusion agreements do not make any new contribution into the well-established case law of the Federal Court on this issue, but provide for an occasion to restate and clarify the applicable principles and give some practical advice to the drafters of exclusion agreements.

A. The Scope of an Exclusion Agreement

Before summarizing the conditions of validity of an exclusion agreement, the following two points relating to the scope of an exclusion agreement must be made:

- First, an exclusion agreement does not enable the parties to waive "revision," a remedy which is not rooted in Article 190(2) PILA but in case law. "Revision" enables the parties to seek a review of an award under very strict conditions on the basis of new facts or evidence, especially fraud unbeknown to the aggrieved party, preceding and tainting the award. So far, the Federal Court has left this question undecided, while showing an inclination to deny the possibility of a contractual waiver of revision (decision of 2 July 1997, ASA Bulletin 1997, p. 494 at 497). To a certain extent, an exclusion agreement (as to the five grounds of Article 190(2) PILA) makes it even more necessary to reserve the possibility of a revision: otherwise if a party should deceive the arbitrators into rendering an award, the other party would be left without any remedy.
- Second, an agreement excluding setting-aside proceedings for all or some of the admissible grounds does not preclude the parties from opposing enforcement of the award on the basis of the corresponding ground. The consequences of an exclusion agreement on the enforcement or recognition of an award may vary according to the place of enforcement or recognition, i.e. in Switzerland or abroad. Where enforcement and recognition are sought in Switzerland, it is necessary to differentiate between a total and a partial exclusion agreement. In the presence of the former, Article 192(2) PILA provides that where the parties have excluded all setting-aside proceedings, enforcement of the award in Switzerland will take place according to the New York Convention which shall apply by analogy. In the presence of the latter, neither the PILA, nor case law provide for an established solution. In our view, the most appropriate solution is to reserve to the Federal Court the direct control over arbitral awards according to the non-excluded grounds of Article 190(2) PILA and, conversely, to enable the cantonal courts – competent for enforcement matters – to limit their control to the grounds enumerated in Article V of the New York Convention, which correspond to the excluded grounds of Article 190(2) PILA. It should, however, be pointed out that there is not absolute identity between the grounds under Article V New York Convention and Article 190(2) PILA. Where enforcement and recognition are sought abroad, the situation may vary from one jurisdiction to another. In principle, Articles V(1)(e)

and VI of the New York Convention should not apply to Swiss arbitral awards with respect to the excluded grounds. In other words, there should be no case to refuse enforcement on the grounds that allegedly an award could be set aside if the parties had excluded applications for setting aside based on these very grounds. Practically, if the party opposing enforcement or recognition does raise a defence under those two provisions of the New York Convention, the foreign judge may still decide to adjourn his decision in order to await the Swiss Federal Court's decision as to the admissibility of the setting-aside proceedings.

B. The Conditions of Validity

As to the conditions of validity of an exclusion agreement, they result from Article 192(1) PILA and have been clarified in the well-established case law of the Swiss Federal Court. It goes without saying that it is possible to waive any appeal against a notified award. The requirements of the validity of an exclusion agreement concluded after notification of an award are not as strict as those of the validity of an exclusion agreement examined here and this is not in any way a Swiss peculiarity: it is always possible to waive a mandatory right after it has matured. The question arises only before that maturity. The validity of an exclusion agreement concluded before notification of an award is subject to the following conditions:

- First, neither of the parties may have its domicile, habitual residence or place of business in Switzerland. In other words, all the parties must be foreign to Switzerland. A corporate body is deemed foreign if neither its place of incorporation, nor its place of business are situated in Switzerland. Hence a foreign corporation cannot validly enter into an exclusion agreement if it has a branch (as opposed to a subsidiary) in Switzerland.
- Second, the exclusion agreement may be contained either in the arbitration agreement or in a special agreement concluded subsequently in writing. The latter may be concluded until the day of notification of the arbitral award. The requirement of written form should be interpreted by reference to Article 178(1) PILA defining the conditions of validity of an arbitration agreement. Pursuant to this provision, the arbitration agreement must be concluded in writing, by telegram, telex, telefax or other means of communication which allow proof of the agreement by text. The case law leaves no doubt that the requirement of written form is complied with not only where all the parties sign a document containing an arbitration agreement, but also where a document contains a specific or a general reference to an arbitration agreement contained in another document (DFC 129 III 727, para.

5.3.1 with reference to the decision 4P.126/2001 of 18 December 2001, para. 2e/bb; DFC 110 II 54, 58 s; decision of *Handelsgericht* of Zurich of 30 August 1993, Bul. ASA 1993, 531, p. 535). In relation to a global reference, the case law puts a supplementary condition: the party to an arbitration agreement by reference must be conscious of its existence in light of the business customs or other circumstances (decision of the *Justizkommission* of the Canton of Zug of 11 September 1998, *S.S. c/ Verein M.*, ZG-GVP 1997/98, p. 139 ss, p. 140 s., para. 1d with reference to Andreas Bucher, Die neue internationale Schiedsgerichtsbarkeit, Basle 1989, no. 124 ss; ZR 91/92 1992/1993, No. 23; Gerhard Walter/Wolfgang Bosch/Jürgen Brönnimann, Internationale Schiedsgerichtsbarkeit in der Schweiz, Bern 1991, p. 79; DFC 110 II 59). Applying these principles in conjunction with the requirement for an express exclusion of setting-aside proceedings, it is arguable that a party may enter into an exclusion agreement by making a specific reference to that exclusion agreement, but a global reference would not suffice under any circumstances.

- Third, an express statement showing the parties' mutual will to exclude – fully or in part – setting-aside proceedings is required. As reiterated in the two 2008 decisions examined in detail above, the Federal Court has adopted a restrictive approach requesting an "express statement," clearly and unambiguously showing the parties' mutual intent to exclude setting-aside proceedings. Nevertheless, the federal judges have not identified any single formula which would meet these conditions and preferred to subject exclusion agreements to the general rules and principles of construction. The following examples are drawn from the case law and can be used by practitioners to avoid an invalidity of exclusion agreements: an arbitration clause containing an undertaking by the parties to observe and perform the arbitral award does not meet the condition of an "express declaration"; neither do an arbitration clause providing for the award to be "final" or "*sans appel*" and an investment treaty clause providing for the award to be binding on the parties. *A fortiori*, indirect exclusion agreements made by reference to for instance institutional rules – e.g. Article 28(6) ICC Rules or Article 32(2) Swiss Rules – do not suffice. In the 4 February 2005 decision in which it first admitted the validity of an exclusion agreement (DFC 131 III 173), the following wording was used by the parties: "***All and any awards or other decisions of the Arbitral Tribunal*** *shall be made in accordance with the UNCITRAL Rules and* ***shall be final and binding on the parties who exclude all and any rights of appeal from all and any awards*** *insofar as such*

exclusion can validly be made." An express reference to Articles 190 and/or 192 PILA could be used to remove any doubt as to the parties' mutual intent but is not required as such for the validity of an exclusion agreement.

- Finally, the Federal Court has specified that the conditions of validity of an exclusion agreement are exhaustively enumerated in Article 192(2) PILA. Hence, no supplementary requirements could be added by case law (decision 4P.198/2005 of 5 October 2005, paragraph 2, RJB 2006, pp. 181 ff). It is thus admissible to exclude any setting-aside possibility even if this is contrary to other legal systems having close relationship with the dispute or the parties (like the domicile of one of them). In more general terms, the federal judges refused to have recourse to the "compatibility with public policy" argument in order re-examine the policy choice of the Swiss legislator who – by enactment of Article 192 PILA – aspired to increase the attractiveness and efficiency of international arbitration in Switzerland. The specificity of sports arbitration and impact of Article 6 ECHR in this context have to be reserved (on this subject, see Gabrielle Kaufmann-Kohler/Antonio Rigozzi, Arbitrage international, Droit et pratique à la lumière de la LDIP, Schulthess/Weblaw 2006, n. 766 f.).

A special case of the joinder of the parties in conjunction with the scope of exclusion agreements deserves particular attention. In the presence of a mutually agreed joinder, it is necessary to ascertain the parties' will but we assume that the joined party accepts the original arbitration clause and exclusion agreement. This assumption can of course be reversed by proof of the contrary, in particular if the joinder agreement is drafted in a detailed manner and does not allude to the original arbitration clause. By contrast, where a party is joined to arbitration proceedings against its will, by means of extension of the arbitration agreement, the parties' will is analyzed differently: in the absence of an express declaration to the contrary, the exclusion agreement will not necessarily extend to the joined party.

4. Conclusion

The two decisions rendered by the Federal Court in 2008 relating to the exclusion agreements do not reverse but rather confirm the previously established case law. Despite the absence of any innovation, their analysis gives a good occasion to clarify the scope and conditions of validity of an agreement to limit or exclude any possibility to set aside an international arbitral award rendered in Switzerland.

The difference in the outcome of the two decisions stresses the importance of the wording used in the exclusion agreement for

construction of the parties' mutual will, which must be clearly and unambiguously expressed in an explicit declaration. The approach adopted by the Swiss federal judges is not excessively formalistic since there is no need for an express reference in the exclusion agreement to Articles 190 and/or 192 PILA.

At the end of the day, the practical importance of exclusion agreements in Swiss law of international arbitration appears to be rather limited. On the one hand, excluding setting-aside proceedings does not dispense the arbitrators from carrying out their duties diligently and accurately, in particular applying mandatory law. On the other hand, the potential grounds for setting aside an arbitral award are strictly limited to the five grounds enumerated in Article 190(2) PILA and are construed restrictively. For instance, since the enactment of the PILA, there has been no judicial precedent in Switzerland of setting aside an award on the grounds of a contravention with public policy. In light of this general reluctance of the Federal Court to review arbitral awards, the practical relevance of exclusion agreements is reduced. Even the "time efficiency" argument is not totally convincing to advocate exclusion agreements because the award may be enforced pending the recourse to the Federal Court (which has no staying effect), subject of course to Article V(1)(e) of the New York Convention. Moreover, as case law shows, an exclusion agreement will not always keep a party from moving to the Federal Court an inadmissible recourse arguing the invalidity of the exclusion agreement before the Federal Court. At any rate, the setting-aside proceedings are rather short as there are no further appeals against the Federal Court decisions.

To summarize, the exclusion agreements in Swiss law are subject to strict conditions and are interpreted restrictively. Their practical significance is difficult to assess as they remain basically unknown when they serve their purposes, namely when the parties do not apply to the Federal Court.