



## Arbitration Newsletter Switzerland

### Waiver of Annulment - again

The Swiss Federal Supreme Court ("Supreme Court") made recently available on its Website ([www.bger.ch](http://www.bger.ch) under Nr. 4P.198/2005) a further decision covering again a waiver of annulment in the sense of Art. 192 PILA (c.f. of our previous two postings covering the same topic). The underlying facts of the case are as follows:

Telsim Mobil Telekomunikasyon Hizmetleri AS (Turkey, hereinafter "Telsim") entered in April 1998 into a "Licence Financing Security Agreement" ("LFA") and an "Equipment Financing Security Agreement" ("EFA") with Motorola Cooperation (US, hereinafter "Motorola"). In August 1998, Motorola entered into a Loan Agreement with a limited liability company in Kazakhstan and the performance of this company under such loan-agreement was guaranteed by Telsim in a "Guarantee Agreement" ("KGA").

The LFA and EFA Agreements did both contain the same arbitration clause, whereas the KGA agreement had no such clause:

"Governing Law and Jurisdiction. This Financing Agreement shall be governed by and interpreted in accordance with the internal laws (without regard to the laws of conflicts) of Switzerland. In the event a dispute arises hereunder, or under any document or agreement delivered in connection herewith, the parties will attempt to resolve such dispute through negotiation, mediation or another form of ADR in the first instance. Any dispute which cannot be resolved between the parties through negotiation, mediation or other form of ADR within four (4) months of the date of the initial demand for ADR by one of the parties, shall then be resolved, to the exclusion of the ordinary courts, by a three-person Arbitral Tribunal in accordance with the International Arbitration Rules of the Zurich Chamber of Commerce ("the COC Rules"). The decision of the Arbitral Tribunal shall be final, and the parties waive all challenge of the award in accordance with Article 192 Private International Law

Statute. The award shall be recognised and enforced by all applicable jurisdictions pursuant to the Uniform Rules of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Each of Motorola Corporation and Company shall be entitled to nominate one member of the three-person Arbitral Tribunal, provided that the COC Rules allow for such a procedure, and the parties agree that the costs of the arbitration shall be allocated in accordance with the COC Rules. The arbitration shall be held in Zurich, Switzerland, and shall be conducted in the English language."

On February 5, 2002, Telsim filed a request for arbitration at the Zurich Chamber of Commerce asking for a declaratory judgement stating that Telsim would not be in default with payments due under the LFA, EFA and KGA. Motorola requested dismissal of Telsim's request and filed a counterclaim for USD 1'814'527'610.

The arbitral tribunal was chaired by Dr. Daniel Wehrli with Dr. Hans-Rudolf Steiner and Dr. Marc Blessing acting as co-arbitrators. In two partial awards the arbitral tribunal awarded Motorola in January respectively November 2004 USD 85'000'000 respectively USD 40'000'000 and in its final award the request of Telsim for a declaratory judgement was dismissed and the counterclaim of Motorola admitted with US 1'678'089'316.57.

In its action for annulment at the Supreme Court, Telsim argued that the waiver of annulment in the LFA and EFA should be invalid and that the KGA would not contain such a waiver of annulment.

The Supreme Court rejected the action for annulment with the following arguments:

In initiating the arbitration proceedings, Telsim did not only base its claim on the LFA and the EFA but also on the KGA and did, in particular, make reference to the part of the arbitration clause which does include



further documents exchanged in the course of the transaction ("in the event a dispute arises hereunder, or under any document or agreement delivered in connection herewith..."). Motorola did not object to this. Therefore, the Supreme Court concluded that there was unanimous consent by the parties having the terms of the KGA Agreement included in the arbitration proceedings established under the terms of the LFA and EFA. Consequently, the waiver of annulment provided for in the arbitration clause of the LFA and EFA (c.f. above) was also applicable to the interpretation of the terms of the KGA.

Furthermore, the Supreme Court declined the argument of Telsim that Art. 19 PILA has any impact on the application of Art. 192 PILA, which covers the waiver of annulment. Telsim argued that a waiver of annulment, as provided for in Art. 192 PILA, would be against Turkish public policy. The Supreme Court concluded that the provisions of Art. 192 PILA do not leave any room for application of provisions of a third state as provided for in Art. 19 PILA, which reads as follows:

*"If, pursuant to Swiss legal concepts, the legitimate and manifestly preponderant interests of a party sole require, a mandatory provision of a law other than the designated by this Code may be taken in to account if the circumstances of the case are closely connected with that law.*

*In deciding whether such a provision must be taken in to account, its purpose is to be considered as well as whether its application would result in an adequate decision under Swiss concepts of law."*

A waiver of annulment in accordance with Art. 192 PILA does also preclude the Supreme Court from reviewing a decision rendered by an arbitral tribunal in Switzerland under the perspectives of public policy. This does, however, not lead to the enforcement of an arbitral award which would be in contradiction to terms of public policy since, in accordance with Art. 192 (2) PILA, the terms of the New York Convention 1958 for the recognition and enforcement of arbitral awards remain reserved.

In rejecting the action for annulment, the Supreme Court did also consider the amount in dispute in assessing the costs and the remuneration to be paid by Telsim to Motorola for the proceedings at the

Supreme Court with the exchange of one set of briefs. In doing so, it charged a fee of CHF 100'000 for court costs and awarded CHF 300'000 as party remuneration to Motorola.

April 4, 2006

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