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WAIVER IN ARBITRAL PROCEEDINGS AND LIMITATIONS ON WAIVER

Focusing on waiver and on the limitations on waiver, the article starts with the principle itself, which has several articulations, including waiver. The question is raised whether it is necessary to give legislative expression to this principle, and it is noted that a growing number of legislative acts and arbitration rules devoted specific provisions to waiver (and these were typically guided by formulations adopted in UNCITRAL enactments). Attention has been devoted to the specific scope of legislative and institutional rules dealing with waiver.

The main part of the article deals with limitations on waiver, and considers this question in juxtaposition with the impact of waiver on the existence and weight of the impairment which is at issue. The (un)fairness of a stipulation or (un)fairness of disregard of a proper stipulation is influenced by waiver. The impact of an unfair stipulation may change if it is followed by waiver. What needs to be assessed is the character of a situation ensuing after waiver (or after revocation of waiver).

Key words: *Waiver – Estoppel – Preclusion – Objection – Objectionable stipulation.*

1. THE PRINCIPLE AND RELATED CONCEPTS

In its Judgment of November 18, 1960 in the Case concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)[1], the International Court of Justice scrutinized the validity of an arbitral award made by King Alfonso XIII in a border dispute, more than 50 years before. Nicaragua argued i.a. that the award cannot be valid, because King Alfonso never possessed the capacity of a

[1] I.C.J. Reports, 1960, 192.

sole arbitrator, and he did not observe the rules laid down by the parties to the dispute. The I.C.J. rejected objections against the award, relying first and foremost on the principle of waiver. The Court stated:

> *"No question was at any time raised in the arbitral proceedings before the King with regard either to the validity of his designation as arbitrator or his jurisdiction as such. Before him, the Parties followed the procedure that had been agreed upon for submitting their respective cases. Indeed, the very first occasion when the validity of the designation of the King of Spain as arbitrator was challenged was in the Note of the Foreign Minister of Nicaragua of 19 March 1912. In these circumstances the Court is unable to hold that the designation of the King of Spain as arbitrator to decide the boundary dispute between the two Parties was invalid."*[2]

In his Separate Opinion, Judge Sir Percy Spender added:

> "*Although I incline strongly to the view that the appointment was irregular, this contention of Nicaragua fails because that State is precluded by its conduct prior to and during the course of the arbitration from relying upon any irregularity in the appointment of the King as a ground to invalidate the Award.*
>
> *Having failed to challenge the competency of the King as sole arbitrator before or during the course of arbitration but, on the contrary, having invited him to make an award on the merits, Nicaragua was thereafter precluded from contesting the regularity of the appointment.*"[3]

The principle which gave (added) unassailability to the King and to his actions, has been generally recognized, and has received ample support in court practice, legislation, and scholarly writings. Let us cite just one well-known scholarly characterization by Hersch Lauterpacht: "*The absence of protest may [...] in itself become a source of legal right inasmuch as it is related to – or forms a constituent element of – estoppel or prescription. Like these two generally recognized legal principles, the far-reaching effect of the failure to protest is not a mere artificiality of the law. It is an essential requirement of stability – a requirement even more important in the international than in other spheres; it is a precept of fair dealing...*"[4]

Waiver is one of the expressions of a broadly accepted principle. Other variants are concepts like "estoppel", "preclusion", "foreclusion", or "acquiescence". The origin of these concepts is outside the realm of international commercial arbitration, and this is why details and controversies have also been shaped in a broader arena – particularly in the arena of public international law. It has been questioned how important it

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[2] *Ibid.*, 207.

[3] *Ibid.*, 219.

[4] H. Lauterpacht, "Sovereignty over Submarine Areas", *British Yearbook of International Law* 27/1950, 395–396.

is (and whether it is important at all) to make distinction between these notions. In his separate opinion in the Temple of Preah Vihear case, speaking of the principle (or doctrine) referred to by the terms of "estoppel", "preclusion", "foreclusion", or "acquiescence", Judge Alfaro stated: "*Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (allegans contraria non audiendus est).*"[5] The same attitude was adopted in the field of international commercial arbitration. The *Travaux préparatoires* of the UNCITRAL Model Law on International Commercial Arbitration demonstrate that while they opted for the concept of waiver, the drafters of Article 4 were aware of the fact that waiver is one of the variants of the same general concept. It is stated in the Seventh Secretariat Note that "*Where a procedural requirement, whether laid down in the model law or in the arbitration agreement, is not complied with, any party has a right to object with a view of getting the procedural defect cured. Article 4 implies a waiver of this right under certain conditions based on general principles such as "estoppel"* or *"venire contra factum proprium".*[6]

Today it is quite clear that the principle of waiver has become well established in the realm of international commercial arbitration as well. This is evidenced by legislative acts, by arbitration rules, and by ample practice. Let me cite just one persuasive example from court practice. In an American case in which recognition of an ICC award was sought before a U.S. court under the New York Convention,[7] recognition was granted with reliance on the concept of waiver. In most simple terms, the bone of contention was an expert report. Bridas (the party who later sought enforcement) strongly opposed the appointment of the expert, but ISEC (the party who later opposed enforcement) did not. During recognition proceedings, it was ISEC who raised objections on the grounds of alleged improprieties in the appointment of the expert. The court held that ISEC cannot do this, and offered a quite spirited explanation. It held that:

> *"[I]SEC cannot now seek the refuge of its adversary's arguments when, during the heat of that engagement, it stood utterly silent on the merits of the matter, lent no voice or encouragement, and by tactics and tone sought to thereby ingratiate itself with the panel.... Such cleverness is the bane of*

[5] Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits Judgment I.C.J. Reports 1962, 40.

[6] Seventh Secretariat Note, Analytical Commentary on Draft Text A/CN.9/264 (25 March 1985) – in Holtzmann, Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, Kluwer 1989, 208–209.

[7] International Standard Electric Corporation (ISEC) v. Bridas, 745 F. Supp. 172, judgment of August 24, 1990.

judges the world over. This is what led Hamlet as he reflected on the skull of Yorick to mock the profession so cruelly. We understand our obligation not to allow a party to impeach on later review a decision of a trial judge, or as here, an arbitral panel, where that party had full opportunity to contest it, and full notice of the vigorous argument of an adversary contesting it, and chose instead not to associate himself with the argument, and not to contest the matter.... Accordingly, we hold that no objection to the appointment procedure used in the selection and consultation of the expert on New York law was made, that any objections ISEC in fact had were waived, and ISEC will not now be heard to complain about it."[8]

Recognition of waiver reminds us that rights are actually opportunities; one may make use of them – and one may also forfeit them.

2. RECOGNITION OF WAIVER IN ARBITRATION ACTS AND INSTITUTIONAL RULES

One may raise the question whether it is, indeed, necessary to frame explicit rules that would articulate the principle of waiver (or one of its related variants). Decisions have often been based on the concept of waiver without reliance on any specific statutory norm or institutional rule. The New York Convention has no provision on waiver, yet there is an abundance of decisions under the New York Convention which are – like the ISEC v. Bridas decision cited above – relying on the principle of waiver. In the opinion of Van den Berg, a foothold for such a practice may be found in the "may" language of Article V, and this "*[p]ermissive language can be taken as a basis for those cases where a party asserts a ground for refusal contrary to good faith.*"[9] It is also clear that reliance on the "may" language is facilitated and justified by the fact that the principle of waiver is a broadly recognized epitome of the idea of good faith.

Even though an argument based on waiver can be made (and has often be made) without reliance on any specific statutory provision, there is a growing trend of regulation of waiver in both statutes and institutional rules. Such norms may clarify and specify the focus, they add to predictability, and they bring about a broader awareness. It is also clear that the argument is facilitated and endorsed by a foothold in legislative acts or institutional norms. The advantages of reliance on legislative norms are particularly manifest in set aside proceedings, if such a norm is a part of the lex arbitri. Norms on waiver in institutional rules are an effective point of reliance with regard to a challenge to the award (in either annulment or in recognition proceedings) on the ground that the procedure was not in accordance with the agreement of the parties. If the agree-

[8] 745 F. Supp. 172, 180.

[9] A. J. Van den Berg, 185.

ment of the parties (by way of choosing institutional rules) contains a rule on waiver, then a disregard of a party stipulation combined with waiver would still yield proceedings in accordance with the procedural framework set by the parties.[10]

Most contemporary formulations of the concept of waiver in international commercial arbitration have their anchor in Article 4 of the 1985 UNCITRAL Model Law, or in Article 30 of the 1976 UNCITRAL Arbitration Rules.

Article 4 of the Model Law states:

"*Waiver of right to object*

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object."

According to Article 30 of the UNCITRAL Rules:

"*Waiver of Rules*

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object."

Article 4 of the Model Law has found wide acceptance in legislation[11] just as Article 30 of the UNCITRAL Rules influenced many arbitration rules.[12]

[10] To cite an example in which this logic was followed, I shall refer to MINMETALS GERMANY GmbH v. FERCO STEEL Ltd. (Queen's Bench Division /Commercial Court/ 19 January 1999, 1 All ER (Comm) 315, 1999). In this case, the English court rejected the objections against recognition of a Chinese award relying on waiver, and positing Article 45 of the CIETAC Rules (which speaks of waiver) as a foothold of their decision. The court stated:

"There can be no doubt that Ferco's representatives were fully aware of the arbitrators' failure to act in accordance with the Rules when they embarked upon their application to the court to revoke the award and when they participated in the resumed hearing. However, they proceeded without explicitly raising with the arbitrators their objection as to such non-compliance. By Article 45 [of the CIETAC Rules] they therefore waived their right to object to the continuing omission of the arbitrators to disclose the award. Indeed, it is difficult to envisage a more glaringly obvious waiver of procedural irregularity than that found in this case. I therefore accept the submission on behalf of Minmetals that it is no longer open to Ferco to rely on non-compliance with the Rules for the purposes of resisting enforcement of the award."

[11] Let me just cite examples from enactments in this new century. Provisions identical or comparable to that of Article 4 of the Model Law, have been adopted in Article 579 of the 2006 version of the Austrian Arbitration Act (Section IV of the Code of Civil Procedure), in Article 5 of the Bulgarian Arbitration Act as amended in 2001, in Article 5

3. ON THE SCOPE OF WAIVER IN STATUTES AND INSTITUTIONAL RULES

The wording adopted in the UNCITRAL enactments – as well as the formulations adopted in most contemporary statutory norms and institutional rules – are clearly in line with the general principle of waiver and like concepts which have been broadly adopted. It also has to be mentioned, however, that the scope of the rule in the UNCITRAL enactments is narrower and more specific. It appears to be reduced to objections – or rather to lack of objections – *within* ongoing arbitral proceedings. Hence it does not extend to waiver prior to, or after the arbitral proceedings. It follows that it does not extend, for example, to a waiver of the right to arbitrate (which is left to other explicit or implicit norms, or to general principles). An example of another explicit norm can be found in the 1999 Swedish Arbitration Act, which devotes a special section (Section 5) to waiver of the right to invoke the arbitration agreement; and at the same time, in a separate section (Section 34), it adopts a formulation similar to that of Article 4 of the Model Law devoted to waiver by failure of objecting during the arbitration proceedings. For the same reason, the wording adopted in Article 4 does not extend to post-award proceedings. This means, for example, that waiver in connection with the requirements of Article IV of the New York Convention is not within the scope of the rule of Article 4 of the Model Law. Article IV of the New York Convention obliges the party seeking recognition to submit a duly authenticated original of the award (or a duly certified copy thereof), and also to submit a certified translation of the award, if the original was not made in an official language of the country in which recognition is being sought. The party seeking recognition may fail to submit the original (or may fail to submit a proper translation) – and the party against whom recognition is being sought may fail to object. This is, indeed, a situation which may be equated with waiver – although the question arises whether this is within the domain of

of the 2001 Croatian Arbitration Act, in Article 27 of the 2003 Japan Arbitration Act, in Article 4 of the 2006 Act on International Commercial Arbitration of the Republic of Macedonia, in Articled 43 of the 2000 Arbitration Act of the Islamic Republic of Mauritania, in paragraph 1(4) of the 2005 Norwegian Arbitration Act, in Article 1193 of the 2005 version of the Polish Arbitration Act, in Article 43 of the 2006 Serbian Arbitration Act, in Article 5 of the 2003 Spanish Arbitration Act, and in Section 8 of the 2002 Thailand Arbitration Act, Article 7 of the 2008 Slovenian arbitration Act.

[12] E.g. Article 25 of the 2008 American Arbitration Association International Rules, Article 8 of the 2005 CIETAC Rules, Article 33 of the 1998 ICC Rules of Arbitration, Articles 23.2 and 32.1 of the 1998 LCIA Rules, Article 30 of the 2004 Swiss Rules, Article 58 of the 2002 WIPO Rules, Article 35 of the 2007 Mexico City National Chamber of Commerce Arbitration Rules, Article 43 of the 2007 International Arbitration Rules of the Korean Commercial Arbitration Board, Article 16 of the 2008 Rules of the Court of Arbitration at the Hungarian Chamber of Commerce and Industry.

permissible waiver, since the authenticity of the documents submitted is a matter of public interest as well.[13] It is submitted, however, that a possible waiver with regard to the requirements of Article IV of the New York Convention is not within the scope of Article 4 of the UNCITRAL Model Law, because the contemplated lack of objection is outside the context of "proceeding with arbitration" (without stating the objection).

Speaking of the scope and purpose of Article 4 of the Model Law and of like enactments, it appears to be clear that the main focus (and main purpose) is the forging of an added chance for the survival of the award. The contemplated objection is an objection which could (and should) have been made during the arbitration proceedings, but the consequences which are in focus are consequences in post-arbitral proceedings. Objections should be made while corrections are still possible, and procedural errors should not be kept as hidden weapons, to be dragged in and brandished if the award turns out to be an unfavorable one.

The concept of waiver embodied in the UNCITRAL enactments and in norms which are in line with those enactments, contains a critically important limitation. A distinction is suggested between permissible and impermissible waivers, and only permissible waivers are effective. Waiver is only possible with regard to norms "from which the parties may derogate". This means that there are values which are protected notwithstanding party behavior, or – seen from another angle – there are infractions which cannot be healed by consent. In other words, there are limitations on waiver, and I would like to devote the following pages to those limitations.

4. LIMITATIONS ON WAIVER – IN THE LIGHT OF THE IMPACT OF WAIVER ON THE IMPAIRMENT PROPER

The essence of the institution of waiver is the loss of the right to challenge the award on the grounds of some procedural deficiency because of inconsistent behavior and/or lack of timely objection. It is common ground that the institution of waiver may indeed neutralize some deficiencies of the award, and may counteract a challenge to the award. The question is whether waiver can neutralize **any** deficiency. One could say that there is a basic understanding that waiver has limits. It is much more difficult to agree where those limits exactly lie. Article 4 of the Model Law which sets a standard says that waiver applies to provisions of the lex arbitri "from which the parties may derogate". But it is not a simple matter to identify the norms from which the parties may derogate

[13] See on this issue and on other questions related to Article IV of the New York Convention, T. Várady, *Language and Translation in International Commercial Arbitration*, T.M.C. Asser Press 2006, 162–190.

as opposed to norms from which they may not derogate. The French practice – relying on general principles rather than on the standard set by the Model Law – does not restrict waiver (*renonciation)* to procedural shortcomings within the domain of norms "*from which the parties may derogate*".[14] Nevertheless, Fouchard suggests some limitations by stating that norms belonging to the realm of international public policy (and only these norms) are beyond reach – and violations of international public policy cannot be ratified in any way.[15] (Which suggests that there are indeed exceptions, there are some violations that cannot be remedied by waiver.) Swiss practice has also confirmed a rather broad understanding of waiver, making it clear that it nevertheless has some limits. In a *dictum* the Swiss Federal Tribunal stated that waiver cannot extend to particularly severe violations (*vices particulièrement graves)* which are considered *ex officio* and which may be invoked until the end of the case. The question is, of course, when a violation is or is not "particularly severe". The Federal Tribunal cites one example of issues falling into the category of "particularly severe": the capacity of being a party to arbitration.[16]

An interesting contribution to the definition of the possible domain of waiver was offered by the European Court of Human Rights ("ECHR"). In Suovaniemi v. Finland,[17] the ECHR faced the issue whether it is possible to waive rights granted under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 6(1) of the Convention is generally considered as a formulation of basic due process. The question arose whether these rights may be waived in the arbitration process. The specific issue which reached the ECHR was whether the waiver of the right to challenge an arbitrator was acceptable (on the understanding that the circumstances which raised doubts about the impartiality of the arbitrator were known to the parties). The ECHR made a distinction between "permissible" and "not permissible" waivers, stating that "*Waiver may be permissible with regard to certain rights but not with regard to certain others*." It held in the Suovaniemi case that it was permissible to waive the right to challenge an arbitrator. The distinction made between permissible and non-permissible waivers is a conse-

[14] See a survey of French practice by L. Cadiet, "La renonciation à se prévaloir des irregularités de la procédure arbitrale", *Revue de l'arbitrage* 1/1996, 3. On page 35 Cadiet states explicitly that the French approach is broader, and it is not restricted to norms from which the parties may derogate.

[15] "Seul le grief de violation de l'ordre public international n'est, par nature, susceptible d'aucune ratification." Ph. Fouchard, E. Gaillard, B. Goldman, Traité de l'arbitrage commercial international, Paris 1996, 942.

[16] Judgment of the Federal tribunal of April 3, 2002, 4P 282/2001.

[17] Osmo Suovaniemi v. Finland, ECHR Fourth Section, Decision as to Admissibility, Application No. 31737/96, February 23, 1999.

quential one, but the guidelines offered are scarce.[18] Speaking of the contributions of the ECHR, it should be mentioned that the ECHR stated in a number of its decisions that a waiver of a right guaranteed by the Convention – insofar as it is permissible – must be established in an unequivocal manner.[19]

Dealing with the question of limitations on waiver, I would like to draw a distinction between two types of situations in which waiver might emerge. Waiver might take place by way of lack of objection against *non-application* of a proper rule, and it might also take place by way of lack of objection against *application* of an objectionable stipulation. A third situation – that of revocation of waiver – also deserves some added attention.

4.1. Lack of objection against disregard of a proper rule

The distinction between permissible and impermissible waivers remains a delicate issue. The primary purpose of court scrutiny of arbitral awards is to protect legitimate rights of the parties, which rights may have been impaired by some imperfection in the arbitral proceedings. Considering waiver as a balancing argument is not only in the interest of efficiency. The argument can be made that waiver actually has an impact on the gravity of the situation itself; it has a bearing on the weight of the actual infraction. In other words, when we are trying to establish whether the violation does or does not amount to an infringement of public policy or of "norms from which the parties may not derogate", we should not only contemplate the infringement as such. *Instead, we should consider the infringement "modified" by waiver.* The weight and character of the infringement itself may change as a consequence of waiver (which is, as a matter of fact, the key justification for the observance of waiver).

Let me try to demonstrate this on an example. If one party is invited to comment on an expert opinion and the other party is not, this may very well be qualified as a violation of due process, and the award may be set aside or refused recognition. Could waiver neutralize such a violation? It probably could. If the party who was not invited to submit his comments knows that the other party had this opportunity and receives the comments of the other party, yet raises no objection and continues to proceed, he may be deemed to have waived his right to equal treatment regarding this specific occurrence. There may be several reasons for not

[18] The ECHR mentioned some examples, saying e.g. that the right to public hearing can be waived, but it stopped short from formulating a criterion for the distinction between permissible and non-permissible waivers.

[19] See Oberschlick v. Austria, Judgment of 23 May 1991, Series A No. 204, p. 23, § 51, Pfeifer and Plankl v. Austria, Judgment of 25 February 1992, Series A, No. 227, p. 16, § 37.

raising the objection. The party who was not offered an opportunity to comment may be satisfied with the export report and has nothing to add. Or, he/she may think that the expert report is irrelevant and it is not worth commenting. Another possible hypothesis is that the party is not handling its case with proper diligence. In all of these hypotheses one may submit that some unequal treatment exists; but can we also say that the party is a victim of unequal treatment? Can a party just take note of a procedural error (and store it for use in case of emergency) instead of taking steps to protect his/her rights? It is important to note that it follows from the wording of Article 4 of the Model Law that lack of objection may only amount to waiver if the party *knew* that a violation took place. This means that in our hypo waiver could only be effective if the party who was not invited to comment on the expert opinion knew that the other party was invited (and that unequal treatment took place), but nevertheless failed to object. This concept of waiver is in line with the wording of Article V(1)(b) of the New York Convention which allows refusal of recognition if a party was "unable to present his case". One may very well argue that one cannot speak of inability to present one's case if the party concerned failed to object to impairment at a point when it was still possible to remedy such impairment – when the party still had a chance to get an appropriate opportunity to present its case.

An irregularity which would amount to a violation of due process without waiver certainly does not have to amount to a violation of due process if the party failed to object and acquiesced. The impairment is not the same, the violation is not the same. The question still remains whether there are cases in which the party knew that a violation took place and failed to object, but such waiver cannot be heeded due to public policy considerations. The range of such fact-patterns is certainly quite narrow. For example, waiver might not work with regard to the requirements of Article IV of the New York Convention. Requirements regarding the authenticity of the award and of the translation do not only pertain to the equities of the parties, but also to the rights and duties of the court. For this reason courts may – and often do – insist on the observance of the requirements of Article IV notwithstanding the behavior of the parties.[20] Could waiver also be thwarted with regard to those procedural irregularities which are identified in Article V of the New York Convention? Within the setting of the New York Convention, both observance of waiver and disregard of waiver are guided by general principles. Among the grounds set in Article V (and in national legislative acts following the same logic) those which are typically relevant from the point of view of waiver are grounds pertaining to jurisdiction, to due process, and to the

[20] In international court practice we have decisions which declined, but we have also decisions which observed the principle of waiver in connection with Article IV of the New York Convention. See T. Várady, 162–190.

observance of the applicable rules. Let me stress again, that waiver may not just "hide" an imperfection, it may change its weight, or even eliminate it. In areas covered by Article V(1) waiver will typically sanction a situation which could have been created by party agreement as well. The parties can agree on jurisdiction in an arbitration agreement, and by the same token, a party will waive its right to contest jurisdiction in post award proceedings if it accepted to arbitrate without objection in the absence of a valid arbitration agreement. Waiver will thus supersede grounds for challenge under Article V(1)(a) of the New York Convention. Likewise, the parties may agree to conduct the proceedings in any language. If the proceedings are conducted in a different language other than the one agreed upon, and both parties proceed without objection, this may very well be qualified as a functional equivalent to party agreement to conduct the proceedings in that different language – and waiver will trounce grounds for challenge under Article V(1)(b), or maybe under Article V(1)(d).

4.2. Lack of objection upon observance of objectionable stipulations

Another context in which waiver might emerge is the following: There are stipulations which are contrary to rules "from which the parties may not derogate". It happens that after a party did sign an agreement containing such a stipulation, it raises an objection against it at the time when its implementation is on the agenda. In such cases, mandatory norms may protect the parties against the consequences of their own stipulation. It is clear that such protection should be restricted to situations which would otherwise yield serious unfairness. Does waiver have an impact on the gravity of such situations?

There are limits to what parties can agree upon. The question arises whether these limits remain the same when unfair party stipulations are confirmed by lack of objection. The motives behind limitations on party stipulations certainly have an impact on the question whether lack of objection can or cannot modify such limitations. If the limitation is inspired by the vulnerable situation of a special category of parties to contracts, the basic rationale behind the restriction will in most cases continue to exist even in the absence of timely objection by the protected party. This is exactly the type of situation which was faced in a 2006 decision of the European Court of Justice (hereinafter: "ECJ"). In Claro v. Centro Móvil Milenium, reference was made to the ECJ by a Spanish court for a preliminary ruling. The question referred for preliminary ruling was the following:

> "*May the protection of consumers under Council Directive 93/13/EC... require the court hearing an action for annulment of an arbitration award to determine whether the arbitration agreement is void and to annul the award if it finds that that arbitration agreement contains an unfair term*

> *to the consumer's detriment, when that issue is raised in the action for annulment but was not raised by the consumer in the arbitration proceedings?*"[21]

Thus, the relevance of waiver became the key issue in a most direct manner. The Spanish court held that the arbitration clause in a mobile telephone contract was contrary to the applicable mandatory norms on consumer protection. The question remained whether the limits imposed on possible party stipulations will remain the same after the protected party enters into arbitration, and does not raise any objection until the award was rendered. The mobile telephone company argued that allowing annulment on the grounds of the alleged illegality of the arbitration clause, even if no plea to that effect was entered within the prescribed time-limit, would be highly prejudicial to the requirement of efficiency and certainty in arbitration decisions. The ECJ did not accept this argument, and did not recognize the impact of waiver on the limitation imposed on party stipulations. The European Court ruled:

> "*Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court seised of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment."*[22]

The decision of the ECJ is quite clear. The question remains whether the position of the European Court will become persuasive outside its scope of authority – and whether it also applies to situations other than those in which the limitation aims to protect a vulnerable category of parties (like consumers).

There are cases which do not imply consumer protection (or protection of some other identified category of parties), in which the court nevertheless opted to disregard waiver which would have remedied an imperfect stipulation. The argument was made that the observance of such waiver would sanction a situation which is contrary to public policy or mandatory norms. For example, in an earlier (1976) case decided by the Court of Appeal in Cologne (*Oberlandesgericht Köln*),[23] the agreement of the parties provided for arbitration in Denmark under the Rules of the Copenhagen Arbitration Committee for Grain and Feed Stuff Trade. These Rules had some rather peculiar and atypical provisions. The arbitrators were to decide without an oral hearing, and no informa-

[21] Elisa Maria Mostaza Claro v. Centro Móvil Milenium, European Court of Justice, First Chamber, Case No. C–168/05, Judgment of October 26, 2006, para. 20.

[22] Case C–168/05, para 40.

[23] Oberlandesgericht Köln 1976 – Reported in IV YCA, 258 (1979).

tion was given to the parties regarding the identity of the arbitrators. The parties did receive a list of potential arbitrators, and were allowed to protest against one or more arbitrators on the list, but these protests were considered by the President of the Arbitration Committee, and the parties were not informed whether their protests were heeded or not, nor did they learn who ended up being arbitrators. An award was rendered in favor of the Danish buyer against the German seller. The Danish buyer sought recognition in Germany, and the German seller raised a number of objections under the New York Convention. One of these objections was that the procedure of appointment of the arbitrators lacked guarantees of impartiality, and this amounted to a violation of public policy. This argument was accepted by the German court. The Cologne Court of Appeal held that the procedural means for the implementation of impartiality is the institution of challenge, and this institution can only be effective if the parties know the names of the arbitrators. In this case the mechanism of appointment was one agreed upon by the parties. Furthermore, both parties participated in the constitution of the arbitral tribunal in accordance with the rules agreed upon, and without objection. Hence, waiver represented an added argument in favor of recognition, but the court held that the arrangement effected by both contractual stipulation and conduct was contrary to mandatory principles, and recognition was denied.

I would like to refer to another decision in which the question arose whether a stipulation of the parties which yields unequal positions regarding the appointment of arbitrators, does or does not amount to waiver. The French Supreme Court held that it does not, yet it opened to door towards effective waiver at a later stage. According to the *Cour the Cassation*: "*Attendu que le principe de l'égalité des parties dans la désignation des arbitres est d'ordre public; qu'on ne peut y renoncer qu'après la naissance du litige.*"[24] In other words, if the matter at issue (like equality of the parties with respect to the designation of the arbitrators) has a public policy character, waiver may be possible, but only after the dispute already arose.

In an interesting case decided in 2005 by the Supreme Court of Austria,[25] the court investigated an arbitration agreement in the setting of Article 583(2) of the Austrian Code of Civil Procedure,[26] which allowed

[24] See Soc. BKMI et Siemens c. Soc. Dutco, Cour de Cassation (1re Ch. Civile) Jan. 7, 1992, *Revue de l'arbitrage* 1992, 470.

[25] OGH Case No. Ob41/04z of March 17, 2005, reported in *Juristische Blätter* 12/2005, 801.

[26] Article 582 applied until the adoption of the new Austrian Arbitration Act. The new 2006 Act applies to arbitration agreements concluded on or after July 1, 2006.

rescission of the arbitration agreement under certain circumstances. Among other issues, the Supreme Court of Austria considered the validity of a specific provision in the arbitration agreement. This stipulation provided that the third arbitrator would be chosen by the party-appointed arbitrators, and if they failed to agree, he/she would be appointed by the president of one of the parties. (The dispute arose between an attorney on one side, and the Vienna Bar Association – *Rechtsanwaltskammer Wien* – on the other. According to the arbitration agreement, the third arbitrator had to be appointed by the President of the *Rechtsanwaltskammer Wien* in the absence of an agreement reached between the party-appointed arbitrators.) The Supreme Court of Austria held that this arrangement regarding substitute appointment represented an infringement of the principle of equality of the parties, and amounted to a blatant violation of the principle of fair trial set in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[27] The question I would like to raise is whether we would have the same "blatant violation of the principle of fair trial" if the issue is raised in a different setting and waiver is implicated. The Supreme Court of Austria considered the validity of the stipulation in proceedings regarding the rescission of the arbitration agreement, before arbitration would have started. Let us assume that the mechanism for substitute appointment becomes an issue in setting aside proceedings after arbitration took place, and after an award was rendered... The Austrian Supreme Court held that a stipulation which allows one of the parties to make substitute appointment of the chairman amounts to a violation of Article 6 of the European Convention for the Protection of Human Rights. Suppose the imperfect mechanism yields a choice (the substitute appointment is made), thus the appointee becomes known and other party has an opportunity to submit a challenge, but fails to do so. Does the level of threat to fairness remain the same? Some differences do exist. Unlike in the case between the Danish buyer and the German seller, where the lack of opportunity for challenge persisted after the arbitrators were appointed (because their names were not disclosed), in this hypo the situation changes after the appointment has been made. What is in focus is not the unfair stipulation anymore (or a result which remains secret), but rather the unconcealed result of this stipulation which can be evaluated on its own merits. Furthermore, we do not only have consent which crafted the stipulation, but also consent (lack of objection) regarding the effect of the stipulation. A distinction can plausibly be made between cases in which the stipulation itself and its potentials are at issue (like in the actual Austrian case), and cases in which we are faced with the actual consequences of the stipulation against which no timely objection was raised.

[27] "Die Regelung über die Besetzung des Schiedsgerichtes bei Nichteinigung durch Ernennung eines Vorsitzenden durch ein Organ einer Partei des Schiedsverfahrens verstösst eklatant gegen die Grundsätze des fair trial nach Art. 6 MRK und ist daher nach §879 ABGB nichtig." Juristische Blätter 12/2005, 803.

To take as a further example, I would like to refer to one of the rare legislative provisions regulating the content of possible arbitration agreements. According to Article 1678 of the Belgian Judicial Code:[28] "*An arbitration agreement shall not be valid if it gives one of the parties thereto a privileged position with regard to the appointment of the arbitrator or arbitrators.*" One may argue that if, for example, the parties cannot stipulate that one of them will appoint one arbitrator, and the other will appoint two, then presumably this pattern will remain illegal if it is created or confirmed by conduct, that is by absence of objection. But can the two situations really be equated? The stipulation providing that one party will appoint one arbitrator while the other will appoint two, clearly opens the gate for unfair appointments and an unfair result. Does the situation remain the same after the appointments have been made – and accepted without protest? It is at least conceivable that the party who has the right to appoint two arbitrators will not abuse this entitlement, but will appoint two well-known neutral arbitrators. Waiver becomes relevant at a later point in time (in our case after, rather than before actual appointments), and it is exercised (if it is exercised) on the grounds of more information. When waiver is at issue, what is faced is not the threat of unfairness which was made possible by the stipulation, but a specific choice which may be evaluated, and which may or may not be unfair. The tacit acceptance of this choice by the other party, who opts to proceed without objection, does not yield the same impairment or jeopardy as the unfair stipulation itself. Lack of timely objection has an impact on the balance of (un) fairness, because an informed party who fails to object acts contrary to principles of good faith. Furthermore, in post-arbitral proceedings when waiver becomes an issue, the perspective is different, and one can focus on the actual consequences rather than on the potential implications of a stipulation. The potentials and the actual results of an unfair stipulation need not be the same. The distinction is not an easy one, but one may submit that party stipulations and waiver need not always have the same limitations – particularly not, when the limitation is not prompted by the need to protect a vulnerable category of parties like consumers.

4.3. The impact of revocation of waiver

If waiver has an impact on the gravity – or even on the existence – of an impairment, so does revocation of waiver. Let me explain this through an example I encountered in practice. One of the parties was from a French speaking country, the other was not. The language of arbitration was English. We had to question a number of witnesses who spoke

[28] Belgian Judicial Code, Part VI, Arbitration, adopted in 1972, latest amendments in 1998.

French only. All three members of the arbitration tribunal spoke French. (The chairman actually spoke French better than English.) Thus, looking for an opportunity to make the proceedings more efficient, we asked that non French-speaking party (the respondent) whether he needed interpretation. He stated that he did not need it. It was clear that due process implied a right to have an interpreter – it was also clear that this right was waived. The interrogation of the first witness was short. After this, the respondent addressed the tribunal, said that he apparently misjudged his linguistic abilities, and asked for an interpreter. The arbitrators were not happy with this, yet ordered a break for a couple of hours in order to get in touch with the interpreter whom the chairman had contacted in advance, but who was later informed that she was not needed. We were lucky to find her, and after a couple of hours we continued the interrogation of the witnesses with the assistance of the interpreter. Had the respondent remained silent during the interrogation of all witnesses, and had he only raised the issue in post-arbitration proceedings, we would have had a clear example of an effective waiver. It would have been not only justified, but also fair to reject the challenge to the award on the ground of lack of interpretation. But suppose the arbitrators rejected the belated claim for interpretation, and refused to heed the purported revocation of waiver. Would the situation be the same? I believe not. Waiver did exist, it was uncontroversial, but it was withdrawn at a moment when it was still possible to remedy the problem, incurring some – but not too much – inconvenience. The revocation of waiver put the issue of fairness into a new perspective, and the departure from the rule that interpretation should be provided, regained vigor. Responsibility was pushed back on the shoulders of the arbitrators. Revocation of waiver had an impact on the weight of the impairment; actually, absence of interpretation regained the attribute of an impairment.

5. A CONCLUDING REMARK

Waiver is not just a sanction for lack of diligence, or against abuse of rights. It is, as Lauterpacht says “not mere artificiality of the law”. It is a critically important formant of the fairness of a situation. It is certainly true that, just as party stipulations are subject to some limitations, crafting of effects by conduct or by lack of objection should also have some limits. This is what clearly follows from the wording of Article 4 of the Model Law which recognizes and articulates the institution of waiver, but also limits its impact to norms from which the parties may derogate. The observation of waiver – as well as its limitations – is balancing use and abuse. It is important to stress that both waiver and the limitations on waiver serve the interests of fairness. In order to be able to identify and

to assess situations which deserve unconditional protection by mandatory norms, waiver (or revocation of waiver) should be factored in. What needs to be measured against mandatory norms and principles of fairness is not just the character of a stipulation (or the character of a transgression of a rule), but the character of the situation ensuing after waiver (or revocation of waiver).