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Volume 4

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Note from the Editors

The current edition of the SAA-Series on International Arbitration continues to contain the best graduation papers of all participants who successfully completed the post graduate studies in international arbitration and who have been awarded the "Certificate of Advanced Studies" in International Arbitration. This CAS is awarded by the Universities of Lucerne and Neuchâtel, in co-operation with the SAA Swiss Arbitration Academy. Besides stern academic standards, the papers must meet a high benchmark of topicality and relevance for international arbitration practitioners. The SAA-Series is edited by the two members of the academic supervisory board of the SAA's Academic Council.

In the current volume, you will find five research papers that touch upon different aspects of international arbitration and domestic Swiss arbitration. Caspar Feest examines whether arbitral awards that have been set aside at the seat of arbitration can still be enforced in other jurisdictions. Andreas Lienhard analyses the consequences of Swiss Supreme Court decision 136 III 467 on the arbitrability of domestic employment law disputes in Switzerland. Nicolas Pellaton elaborates on the procedural aspects of revision of arbitral awards in Swiss domestic and international arbitration. Barbara Schroeder de Castro Lopes discusses selected issues on alternative dispute resolution involving cross-border technology licencing agreements. Finally, Claudia Walz examines the circumstances under which interim measures before arbitral tribunals or national courts can be sought.

The Swiss Arbitration Academy (SAA) is a private institution founded and directed by members of its Academic Council. The CAS Arbitration is offered each year and is designed for lawyers, in-house counsel, and other professionals interested in cutting edge international dispute resolution education. During four modules of five days each, the program comprehensively examines all fundamental aspects of international commercial arbitration, including the practice and proceedings of the major arbitration institutions, such as the Swiss Chambers of Commerce, ICC, LCIA, SCC, DIS, VIAC, ICDR (AAA), CAS, WIPO as well as the SCAI. In addition, the program reviews the features of ad hoc arbitration. The rigorous program requires from each participant in-depth preparation and active participation during the training. All participants who successfully complete the course, which includes the submission of the final paper, are awarded the CAS Certificate. For further details, please visit www.swiss-arbitration-academy.ch.

The editors would like to thank the authors for their valuable contributions contained herein and are delighted to present their papers to the arbitration community. The editors further thank Stämpfli Verlag for its continued support in publishing these highly interesting and promising articles.

Lucerne/Neuchâtel, May 2018

Daniel Girsberger Christoph Müller

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List of Abbreviations

ADR	Alternative Dispute Resolution
Art./Arts	Article/s
BaslerKomm	Basler Kommentar: Legal commentary fromBasel
BernerKomm	Berner Kommentar: Legal commentary from Bern
BIT	Bilateral Investment Treaty
BGE	Leading decisions of the Swiss Supreme Court published in the official collection
BGG	Swiss Supreme Court Act of 17 June 2005 (SR 173.110)
CA	Cantonal Arbitration Convention of 27 March 1969 (SR 279)
CHF	Swiss Franc(s)
CO	Swiss Code of Obligations of 30 March 1911 (SR 220)
DEBA	Swiss Debt Enforcement Act of 11 April 1889 (SR 281.1)
ed./eds.	editor/s
et al.	et alii (and others)
European Convention	European Convention on International Commercial Arbitration of 21 April 1961
f./ff.	and the following page/s
Geneva Convention	Geneva Convention on the Executionof Foreign Arbitral Awards of 26 September 1927
ICC	International Chamber of Commerce
ICC Court	International Court of Arbitration of the ICC
ICC Rules	Rules of Arbitration of the ICC, amended and effective as of 1 March 2017
ICCA	International Council for Commercial Arbitration

ICDR	International Centre for Dispute Resolution, international division of the American Arbitration Association
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965
New York Convention	New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards
Panama Convention	Inter-American Convention on International Commercial Arbitration of 30 January 1975
para./paras.	paragraph/s
RSDIE	Swiss Review of International an European Law
RSPC/RZZP	Swiss Review of Civil Procedure
SCCP	Swiss Code of Civil Procedure of 19 December 2008 (SR 272)
SLA	Swiss Labour Act of 13 March 1964 (SR 822.11)
SPILA	Swiss Private International Law Act of 18 December 1987 (SR 291)
Swiss Rules	Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution, amended and effective as of 1 June 2012
TFEU	Treaty on the Functioning of the European Union of 13 December 2007
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 25 June 1985, with amendments as adopted in 2006
Vienna Convention	Vienna Convention on the Law of Treaties of 23 May 1969
WIPO	World Intellectual Property Organization

WIPO Rules	WIPO Arbitration Rules, amended and effective as of 1 June 2014
YCA	Yearbook Commercial Arbitration, Deventer
Zürcher-Komm	Zürcher Kommentar (legal commentary)
ZGB	Swiss Civil Code of 10 December 1907 (SR 210)
ZPO	Schweizerische Zivilprozessordnung (Zivilprozessordnung) vom 19. Dezember 2008 (SR 272), also referred to as Swiss Code of Civil Procedure (SCCP)
ZZZ	Swiss Review of Civil Procedure and Enforcement Law

Enforcement of Awards Set Aside at the Seat of the Arbitration

Caspar Feest

Table of Contents

I. Introduction

1 *'The truly unusual procedural history of this case requires us to reconcile two settled principles that militate in favour of opposite results: a district court's discretion to confirm an arbitral award, and the comity owed to a foreign court's ruling on the validity of an arbitral award rendered in that country, here, Mexico.'*

2 These are the introductory words in a court decision rendered in August 2016 by the U.S Court of Appeals for the Second Circuit in the case *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex Exploración y Producción.*[1] In this decision, the Court of Appeals confirmed a decision issued by the District Court of the Southern District of New York which had decided to enforce an ICC award rendered in Mexico despite the fact that the award had been set aside previously by the Mexican Eleventh Collegiate Court for the Federal District. It was the first decision rendered by an American appellate court confirming a foreign arbitral award that had been set aside at the seat of arbitration.[2]

3 The question whether, or, respectively, under which circumstances national state courts are allowed or even obliged to enforce foreign arbitral awards notwithstanding their annulment[3] at the seat of arbitration is one of the most controversial issues with regard to the enforcement of foreign arbitral awards. There are several different approaches concerning this matter, which can roughly be divided in the following two approaches[4]:

- The *territorial approach,* according to which the decision of the court at the seat of arbitration to set aside an award binds the courts of the countries where recognition and enforcement is sought.
- The *delocalized approach*, according to which international arbitration is detached from any particular national forum and, therefore, the previous annulment decision does not bind the enforcement courts.

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1 *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex Exploración y Producción* (United States Court of Appeals, Second Circuit), in: YCA XXXXII 2017, p. 1 ff.

2 The precedent, the *Chromolloy* decision from 1996 in which an award that had previously been set aside by an Egyptian court was enforced, was issued by the U.S. District Court of Columbia. For more details see Section IV.B. of this paper.

3 The term "setting aside", which is used in the New York Convention, has the same meaning as the term "annulment".

4 Cf. DARWAZEH, Article V(1)(e), in: KRONKE/NACIMIENTO/OTTO/PORT (Eds.), Recognition and Enforcement of Foreign Arbitral Awards – A Global Commentary on the New York Convention, The Hague 2010, p. 324 f., with a detailed overview of the respective arguments.

There are, however, no absolute dividing lines between the two approaches, because even proponents of the territorial approach accept that under exceptional circumstances enforcement courts may recognize and enforce awards despite their previous annulment at the seat of arbitration.[5] 4

The debate was at its peak in the 1990s, when French and United States' courts recognized and enforced arbitral awards that had been previously set aside in the awarding jurisdiction, the most famous cases being the *Hilmarton* case in France[6] and the *Chromalloy* case in the United States.[7] 5

Besides the court decision in the *Pemex* case referred to at the outset of this paper, the actual relevance of this debate can be shown by recent decisions of the Amsterdam Court of Appeal, e.g. in the *Yukos* case from April 2009.[8] 6

This paper will outline the legal framework for the setting aside of international arbitral awards and their enforcement (section II), discuss the discretionary power of Enforcement Courts[9] (section III) as well as the limits of discretion (section IV) and analyse selected case law concerning the enforcement of foreign arbitral awards in the light of the conclusion drawn in sections III and IV (section V). 7

II. The New York Convention

The question whether a judgement or an arbitral award that has been rendered in one country can be enforced in another country is a fundamental issue in international enforcement. While the procedures for the enforcement of foreign *judgements* differ from country to country,[10] the New York Convention 8

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5 Cf. PAULSSON, MARIKE, The 1958 New York Convention in Action, The Hague 2016, p. 211; DARWAZEH (see footnote 4), p. 324 f.

6 See below, section III.A.

7 See below, section III.B.

8 See below, section III. C.

9 In the following text, the competent national courts for setting aside procedures at the seat of arbitration will be referred to as "*Arbitration Seat Courts*" and the competent national courts of the countries where recognition and enforcement of the awards is sought will be referred to as "*Enforcement Courts*".

10 There is no unifying global convention for the enforcement of foreign judgements. Thus, the enforcement of foreign judgements is governed by (bilateral or multilateral) treaties or unilaterally. E.g., the United States are not party to any treaty for the reciprocal enforcement of foreign judgements. In the United States this is generally a matter of state law. Some states apply the rule of reciprocity, others apply general principles of comity.

on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("**New York Convention**") provides a uniform proceeding for the enforcement of foreign *arbitral awards*. Up to this date, the treaty has been signed by 157 states worldwide.[11] The broad acceptance of the New York Convention and, as a consequence, the worldwide uniformity of enforcement procedures of arbitral awards is considered to be one of the significant advantages of arbitration as opposed to state court litigation.[12; 13]

9 The New York Convention contains a framework for the recognition and enforcement of foreign arbitral awards with a straightforward procedure: The prevailing party must supply the award and the arbitration agreement (both translated if necessary) to the Enforcement Court (see Article IV of the New York Convention). The Enforcement Court is then obligated to recognize and enforce the award unless a ground for refusal according to Article V of the New York Convention exists.

A. Grounds for Refusing Recognition or Enforcement

10 The grounds for refusing the recognition or the enforcement of a foreign award are:

- Incapacity and invalidity of the arbitration agreement (Art. V(1)(a);
- No proper notice of appointment of the arbitrator or of the proceeding; lack of due process (Art. V(1)(b));
- The award deals with a difference not contemplated or not within the scope of the arbitration agreement (Art. V(1)(c));
- The composition of the tribunal or the procedure was not in accordance with the arbitration agreement or the relevant law (Art. V(1)(d));
- The award is not yet binding, suspended or set aside (Art. V(1)(e)):
- The subject matter of the dispute is not capable of settlement by arbitration under the law of the country where recognition or enforcement is sought (Art. V(2)(a));

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11 For the current updated status see: <http://www.uncitral.org> (accessed on 17.05.2018).

12 Cf. GIRSBERGER / VOSER, International Arbitration, 3rd Edition, Zurich, Basel, Geneva 2016, p. 433.

13 Besides the New York Convention there are other international treaties that apply to the recognition and enforcement of international awards, e.g. the ICSID Convention, regarding treaty-based investment arbitration, the "Moscow Convention", the "Panama Convention", the "Riyadh Convention" etc. For an overview cf. BLACKABY / PARTASIDES / REDFERN / HUNTER, Redfern and Hunter on International Arbitration, 6th Edition, Oxford 2015, para. 11.131 FF.

– The recognition or enforcement would be contrary to the public policy of that country Art. V(2)(b)).[14]

The grounds for refusing the enforcement of an arbitral award laid down in Article V of the Convention are exclusive. Thus, the award debtor can invoke no other reason for the refusal of recognition and enforcement than these grounds. The award creditor, on the other hand, according to Art. VII of the New York Convention may base its enforcement request on another treaty or domestic law applicable in the enforcing state if and to the extent that said provisions contain more favourable rules regarding the enforcement of foreign awards ("more-favourable-law rule").[15] 11

If enforcement is denied by the Enforcement Court this has only territorial effect. Thus, the decision is limited to the country in which the enforcement is refused. A court in another country can grant enforcement of the same award in that country.[16] 12

B. Grounds for Setting Aside Arbitral Awards

The entitlement of the Arbitration Seat Court to set aside arbitral awards is mentioned in Article V(1)(e) and Article VI of the New York Convention.[17] 13

However, the New York Convention does not contain any provisions as to the procedure, the grounds or limits for the annulment of arbitral awards. Thus, the grounds and the procedures are subject to national law at the arbitral seat and not limited by the New York Convention.[18] 14

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14 For a detailed description of the grounds for refusal under Article V of the New York Convention, see BLACKABY / PARTASIDES / REDFERN / HUNTER (see footnote 13), para. 11.63 FF.; BORN, International Commercial Arbitration, Vol. I and II, 2nd Edition, The Hague 2014, p. 3443 f.; GIRSBERGER / VOSER (see footnote 12), P. 437 ff.

15 Art. VII of the New York Convention reads: *'The provisions of the present Convention shall not (...) deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.'*

16 Cf. VAN DEN BERG, Enforcement of Arbitral Awards Annulled in Russia – Case Comment on Court of Appeal of Amsterdam, April 28, 2009, in: J. Int. Arb. 2010, p. 179, 182.

17 Both provisions refer to the setting aside of awards by the "*competent authority*" of the county in which or under the law of which the award was made.

18 Cf. BLACKABY / PARTASIDES / REDFERN / HUNTER (see footnote 13), para. 10.34; BORN (see footnote 14), p. 3163 f.; PAULSSON, JAN, Awards set aside at the place of arbitration, in: Enforcing Arbitration Awards under the New York Convention, Experience and Prospects, United Nations Publication, New York 1999, p. 24.

15 Virtually in all countries that are party to the New York Convention the Arbitration Seat Court does not conduct a review on the merits of the case but examines only if exclusive statutory grounds for annulment exist.[19] In most jurisdictions, the exclusive grounds for the annulment of awards are nearly identical to the grounds for the non-recognition of awards describes above in section II.A.[20]

III. Discretion of Enforcement Courts

16 The fact that an arbitral award has been set aside by the court at the seat of arbitration is a ground for the refusal of the award's enforcement according to Article (1)(e) of the New York Convention. It is disputed, however, if the Enforcement Court has discretion to enforce an award notwithstanding its local annulment.

17 In the following, Article V(1)(e) of the Convention will be interpreted in light of its wording, its context, purpose and its drafting history.[21] In the first step, the general discretion of Enforcement Courts to enforce awards despite the existence of non-enforcement grounds will be analysed (section III.A). Subsequently, the discretion of Enforcement Courts with regard to annulled awards will be examined (section III.B).

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19 Cf. BORN (see footnote 14), p. 3185; GIRSBERGER / VOSER (see footnote 12), p. 395.

20 Cf. BORN (see footnote 14), p. 3163; GIRSBERGER / VOSER (see footnote 12), p. 396.

21 According to the Vienna Convention on the law of Treaties from 23.05.1969 ("Vienna Convention") treaties shall be interpreted '*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*' (Article 31 Para.1 of the Vienna Convention) and, supplementary, by way of recourse to the preparatory work of the treaty (Art. 32 of the Vienna Convention). Up to this day, the Vienna Convention has been signed by 114 states (see <http://www.uncitral.org> (accessed on 17.05.2018)). However, the rules regarding the interpretation of international treaties are applicable also with regard to countries that have not signed the Vienna Convention on the law of Treaties, because said rules are considered as a codification of existing customary international law. Cf. PAULSSON, MARIKE (see footnote 5), p. 44; see also ICCA's Guide to the Interpretation of the 1958 New York Convention, The Hague 2011.

A. Interpretation of Article V(1)

1. Wording, Context and Purpose of Article V(1)

Article V (1) New York Convention reads: 18

'*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:* (…)'

followed by the grounds for non-enforcement mentioned above in section II.A.

Article V(1) of the New York Convention contains a general rule regrading all grounds for refusal under Article V(1). The award debtor must provide proof that a ground for refusal exists and, if he does, the Enforcement Court may refuse recognition and enforcement of the award. At the very first sight the usage of the word "may" suggests that the Enforcement Court has discretion to enforce an award despite the existence of a ground for refusal.[22] 19

It may be argued, though, that the combination of the words "may" and "only" merely indicates that the grounds for non-enforcement stipulated in Article V(1) are exclusive and does not mean that the provision is permissive. According to this interpretation the Enforcement Court is prohibited from enforcing an award if one of the grounds for refusal has been proved.[23] 20

However, the drafters of the New York Convention used the word "shall" in several other provisions that are indubitable supposed to be mandatory.[24] This 21

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22 Cf. PAULSSON, JAN, Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA), ICC Bull., 1998, p. 14, 17: "*The conditional 'may' leaps out to any lawyer since it necessarily contemplates 'or may not*'". See also FREYER, The Enforcement of Awards Affected by Judicial Orders of Annulment at the Place of Arbitration, in: GAILLARD / PIETRO (Eds.), Enforcement of Arbitration Agreements and Arbitral Awards: The New York Convention in Practice, London 2008, p. 757, 758 f.

23 Cf. DAVIS, Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in: Tex. Int. L. J. 2002, p. 43, 59, who points out that most of the grounds of the Article V (1) involve issues of fundamental fairness and, therefore, no one could reasonably argue that a party, having been denied a fair hearing, should never be burdened with an adverse award.

24 See e.g. Article II (1): *'Each Contracting State shall recognize arbitration agreements (...)'; Article II (3): 'The court of each Contracting State (...) shall (...) refer the parties to arbitration';* Art. III: *'Each Contracting State shall recognize arbitration awards (...).'*

suggests that the same word would have been used if the drafters had meant to make the non-enforcement under Article V (1) of the New York Convention mandatory. By using the term "may" instead, according to this interpretation, the drafters clearly expressed that the non-enforcement was not supposed to be mandatory.[25]

22 It has further been argued that in the authentic French text[26] of the New York Convention the drafters did not use the word "may" but a wording equivalent to "shall".[27] The precise meaning of the French wording, however, is ambiguous. As Emanuel Gaillard, a leading French speaking authority on international commercial arbitration, put it: '*For a French reader it is not impossible to view Article V(1) as permissive, the "only if" serving rather to limit the possible grounds for refusing recognition*'.[28] Furthermore, as set forth below, the French Supreme Court does not regard the non-enforcement grounds as an impediment to enforce awards. The linguistic argument, therefore, is not convincing.[29]

23 Moreover, the four other authentic languages of the New York Convention use a word equivalent to "may".[30] Article 33 (4) of the Vienna Convention on the Law of Treaties stipulates that '*when a comparison of the authentic texts discloses a difference of meaning (…) the meaning which best reconciles the texts, having regard to the object and the purpose of the treaty, shall be adopted*'. In this context, the purpose of the New York Convention to facilitate the enforcement of foreign arbitral awards must be considered. As a consequence, even if the French text of Article V(1) were considered to be mandatory, the four authentic texts that grant the Enforcement Court discretion under Article V(1) to enforce awards would prevail over the French text. This interpretation of Article V is also supported by Article VII of the New York Convention, which expresses the fundamental objective of the Convention to facilitate recognition and enforcement of foreign awards instead of limiting it.[31]

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25 Cf. DARWAZEH (see footnote 4), p. 309; DAVIS (see footnote 23), Tex. Int. L. J. 2002, p. 43, 60.

26 The New York Convention has 5 authentic languages: English, Chinese, French, Russian and Spanish.

27 Art. V (1) of the French version reads: *'La reconnaissance et l'execution de la sentence ne seront refusées (…) que (…)', which in English corresponds to 'The recognition and the enforcement will not be refused (….) unless (…).'*

28 GAILLARD, The Enforcement of Awards Set Aside in the Country of Origin, in: ICSID Review 1999, p. 16, 32.

29 Cf. BORN (see footnote 14), p. 3428; DAVIS (see footnote 23), Tex. Int. L. J. 2002, p. 43, 59.

30 Cf. BORN (see footnote 14), p. 3427; PAULSSON, MARIKE (see footnote 5), p. 158.

31 Cf. BORN (see footnote 14), p. 3428; DAVIS (see footnote 23), Tex. Int. L. J. 2002, p. 43, 60.

2. Drafting History of Article V(1)

The drafting history of Article V(1) of the New York Convention supports the conclusion that the provision is generally discretionary. 24

Under the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 ("**Geneva Convention**"), the predecessor of the New York Convention, the word "shall" was used instead of the word "may". The word "shall" was also used in the first draft by the ICC and was changed into "may" during the negotiations of the draft.[32] This change suggests that the drafters of the New York Convention intended to amend the provision to the extent that the grounds for non-enforcement would no longer be mandatory.[33] The Federal Republic of Germany attempted to amend the draft by reverting to "shall be refused" instead of "may be refused". However, this proposed amendment was not adopted in the final version of the New York Convention. This fact, too, suggests that the drafters consciously used the permissive term "may" instead of the mandatory "shall".[34] 25

3. Conclusion

Taking into account the wording, the context and the legislative history of Article V(1) of the New York Convention, the provision can only be interpreted as granting discretion to enforce awards, even though a ground for refusal according to Article V(1) exists. 26

B. Interpretation of Article V(1)(e)

1. Wording, Context and Purpose of Article V(1)(e)

The fact that Enforcement Courts have discretion to enforce foreign awards notwithstanding the existence of a ground for refusal does not necessarily mean that Enforcement Courts also have discretion regarding the enforcement 27

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32 Cf. DARWAZEH (see footnote 4), p. 308; DAVIS (see footnote 23), Tex. Int. L. J. 2002, p. 43, 60; PAULSSON, MARIKE (see footnote 5), p. 158.

33 Cf. DARWAZEH (see footnote 4), p. 309; DAVIS (see footnote 23), Tex. Int. L. J. 2002, p. 43, 61; OSTROWSKI / SHANY, Chromalloy: United States Law and International Arbitration at the Crossroads, in: New York University Law Review, November 1998, p. 1650, 1683.

34 Cf. DAVIS (see footnote 23), Tex. Int. L. J. 2002 p. 43, 61; PAULSSON, MARIKE (see footnote 5), p. 158.

of annulled awards. If an award ceases to exist as a consequence of its annulment there simply is no more award to enforce.[35] Therefore, the legal effect of the annulment decision by the Arbitration Seat Court must be analysed.

28 According to Article V(1)(e) of the New York Convention, the Enforcement Court may refuse enforcement if:

'The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.'

29 The provision does not give a clear answer as to the legal effect of the setting aside decision. Is this decision effective and binding only at the seat of arbitration or does the decision bind Enforcement Courts in other countries too?

30 The just established discretion of the Enforcement Courts in conjunction with the fact that awards that have been set aside are explicitly mentioned in Article V(1)(e) of the New York Convention suggests that the Enforcement Courts have discretion to disregard the annulment decision by the Arbitration Seat Court. After all, if the drafters of the New York Convention did not want to grant the Enforcement Court discretion regarding annulled awards, they could have included a differentiated rule regarding this non-enforcement ground.

31 On the other hand, the fact that the New York Convention explicitly vests the Arbitration Seat Court with the exclusive power to set aside arbitral awards speaks in favour of an *erga omnes* effect of the annulment decision of the Arbitral Seat Court.[36] Otherwise the setting aside power of the Arbitration Seat Court would have no separate effect as opposed to enforcement-refusal decisions of Enforcement Courts.

32 This view is supported by the fact that the parties, by choosing to arbitrate in a particular country, subject themselves to the rules and the laws of that country. The annulment decisions of the Arbitration Seat Court, therefore, should be respected elsewhere too.

33 Furthermore, it can be argued that the enforcement of an award that has been set aside by the Arbitration Seat Court constitutes an infringement of the principle of international comity and that the ignorance of the annulment decision can lead to inconstant and contradicting judgements.[37]

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35 GHARAVI, The International Effectiveness of the Annulment of an Arbitral Award, The Hague 2002, p. 114; VAN DEN BERG (see footnote 16), J. Int. Arb. 2010, p. 179, 189; VAN DEN BERG, Should the Setting Aside of the Arbitral Award be Abolished?, in: ICSID Review 2014, p. 263 266.

36 Cf. VAN DEN BERG (see footnote 16), J. Int. Arb. 2010, p. 179, 182.

37 Cf. DARWAZEH (see footnote 4), p. 326 with further references.

However, neither the wording nor the purpose of Article V(1)(e) of the New York Convention provide an unambiguous answer as to the effects of a set aside decision. While the wording ("may") suggests that Enforcement courts can enforce annulled awards, there are very strong reasons why the enforcement of annulled awards should not be possible. 34

Because the text and purpose give no clear answer to this question, the supplementary means of interpretation, the drafting history, will be taking into account in the following. 35

2. Drafting History of Article V(1)(e)

Article V(1)(e) of the New York Convention was a copy of the provision in the Geneva Convention. Apparently, the debate during the negotiations was focused on the situation when annulment proceedings were still pending and not so much on the question, whether or not an annulled arbitral award could be enforced in general.[38] However, the preparatory documents of the New York Convention seem to suggest that the delegates accepted the principle *ex nihilo nil fit* (nothing follows out of nothing) as a thumb rule, yet acknowledging exceptions to this principle.[39] 36

Hence, the non-enforcement of annulled awards was not intended to be absolutely mandatory. The drafters of the New York Convention rather accepted a very limited discretion of the Annulment Court to enforce annulled awards.[40]

3. Conclusion

The wording of Article V(1) of the New York Convention as well as its legislative history indicate that Enforcement Courts have discretion to enforce awards even if grounds for refusal exist. 37

With regard to the enforcement of annulled awards the rule of thumb should be that the awards cannot be enforced because they have ceased to exist. Only 38

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38 Cf. PAULSSON, MARIKE (see footnote 5), p. 202.

39 Cf. DAVIS (see footnote 23), Tex. Int. L. J. 2002, p. 43, 61, footnote 141; PAULSSON, MARIKE (see footnote 5), p. 202 et seq., both citing the preparatory documents from the United Nations.

40 PAULSON, JAN (see footnote 22), ICC Bull. 1998, p. 17; contra: VAN DEN BERG (see footnote 16), J. Int. Arb. 2010, p. 186: 'The traveaux préparatoires do not mention any discussion regarding the choice between and 'may' and 'shall' in relation to Article V(1)(e).'

under exceptional circumstances Enforcement Courts have a very limited discretion to enforce awards that have been annulled at the seat of arbitration.

IV. Limits of Discretion

39 Among the scholars who principally accept the discretion of Enforcement Courts to enforce annulled awards there are various approaches regarding the preconditions under which Enforcement Courts are allowed to enforce annulled awards.

40 In the following, two approaches will be discussed. The first, the "Local Standard Approach" has been endorsed by many arbitration practitioners, but has apparently not been applied by state courts under the New York Convention. The second approach, which in the following will be referred to as "Foreign Judgement Approach", can be found *inter alia* in U.S. and recent Dutch case law.[41]

A. Local Standard Annulment

41 Proponents of the Local Standard Approach hold that the Enforcement Court should determine whether the basis of the annulment decision by the Arbitration Seat Court was in accordance with international standards, in which case the award should not be enforced. If the Arbitration Seat Court based its annulment decision on local grounds that are not recognized in international practice (Local Standard Annulment), the Enforcement Court should disregard the annulment decision and enforce the award.[42] In other words, if the Arbitration Seat Court based its decision on other grounds than the non-enforcement grounds in Article V(1) of the New York Convention, the Enforcement Court should enforce the award.[43]

42 This approach is similar to the approach in the European Convention on International Commercial Arbitration from 1961 ("**European Convention**"). According to Article IX(1) of the European Convention, the setting aside of an award by the Arbitration Seat Court constitutes a ground for non-enforcement if the award has been set aside because of one of the specific

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41 For an overview of these two approaches and other approaches, cf. SILBERMANN / SCHERER, Forum Shopping and Post-Award Judgements, in: New York University Public Law and Legal Theory Papers 2013, p. 313, 321 f.

42 Cf. PAULSSON, JAN (see footnote 18), United Nations Publication 1999, p. 24, 26.

43 Cf. PAULSSON, JAN (see footnote 22), ICC Bull. 1998, p. 14 f.

grounds stipulated in Article IX(1) of the European Convention, which correspond to the non-enforcement grounds of the New York Convention.

The fundamental difference between the European Convention and the New York Convention, however, is that the latter does not contain any grounds for setting aside arbitral awards. As outlined above in section II.2, the grounds for setting aside arbitral awards are subject to national legislation. Therefore, the disregard of a setting aside decision based on the mere fact that the ground for setting aside is not contained in Article V(1) of the New York Convention lacks the necessary legal basis. The non-recognition of national annulment grounds would thwart the primary jurisdiction of the Arbitration Seat Courts under the New York Convention.[44] 43

B. Foreign Judgement Approach

Another approach is to apply principles of private international law, thus the rules under which national courts recognize foreign judgements. The point of reference is the decision of the Arbitration Seat Court to set aside the award. This decision is a *foreign judgement*. The Enforcement Court, when asked to enforce the annulled judgement, has to assess whether to recognize the foreign annulment decision or not. If the Enforcement Court recognizes the annulment decision, the award cannot be enforced. In other words, the Enforcement Court can only recognize or enforce the award if it refuses to recognize the annulment judgement.[45] 44

This approach has been adopted in the current draft of the U.S. Restatement on International Commercial Arbitration.[46] 45

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44 Cf. SILBERMANN / SCHERER (see footnote 41), New York University Public Law and Legal Theory Papers 2013, p. 322; VAN DEN BERG (see footnote 16), J. Int. Arb. 2010, p. 179,189.

45 Cf. OSTROWSKI / SHANY (see footnote 33), New York University Law Review, November 1998, p. 1686, stating that '*Ultimately, for a United States Court, the question should be which judgment merits recognition under United States law*.' See also: SCHERER, Effects of Foreign Judgements Relating to International Arbitral Awards: Is the "Judgement Route" the Wrong Road?, in: J Int. Disp.Settlement 2013, p. 588; SILBERMANN, The New York Convention After Fifty Years: Some Reflections on the Role of National Law, in: 38 *Georgia Journal of International and Comparative Law 2009, p. 25*,.32. f.; SILBERMANN / SCHERER (see footnote 41), New York University Public Law and Legal Theory Papers 2013, p. 323.

46 Section 4-16 (b) of the Draft Restatement reads '*Even if (the) award has been set aside by a competent authority, a court of the United States may confirm, recognize, or enforce the award if the judgement setting it aside is not entitled to recognition*

46 The Foreign Judgement Approach is convincing, first of all for systematic reasons because the annulment decision after all is a foreign judgement and there are no evident reasons *not* to apply the respective national rules regarding its recognition. On the contrary, the Enforcement Court being confronted with an application to enforce an annulled award cannot ignore the fact that the award has been set aside by judgement of another state court.

47 Second, the approach has the advantage that – although the conditions for recognizing or enforcing foreign awards vary from jurisdiction to jurisdiction – the basic framework is similar in most countries. The recognition of foreign awards is based on comity and requires that the judgement has been rendered in fair proceedings by a regular court and that it does not violate the public policy of the country where recognition is sought.[47]

48 It is argued that this approach ignores the distinctive, ancillary nature of annulment judgements, as opposed to judgements on the merits.[48] However, it remains unclear why principles like comity, fairness etc. should not be the benchmark when it comes to deciding whether to ignore an annulment judgement or not.

49 The argument that the Foreign Judgement Approach lacks uniformity because Enforcement Courts in different countries may reach different conclusions by applying their national foreign judgement rules is not convincing either. It is a fact that an Enforcement Court may reach different conclusions than the Arbitration Seat Court or Enforcement Courts in other countries also when an award has *not* been set aside, because the non-enforcement grounds in Article V(2) of the New York Convention (arbitrability and public policy) also refer to national specifics. Against this background, different decisions by Enforcement courts seem to be acceptable.

C. Conclusion

50 The New York Convention provides that the Arbitration Seat Court can set aside awards. However, it does not give any guidance as to the grounds of annulment. Thus, the reasons are subject to national legislation.

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under the principles governing the recognition under the principles governing the recognition of judgements in the court where such relief is sought, or in other extraordinary circumstances.' cited by SILBERMANN / SCHERER (see footnote 41), New York University Public Law and Legal Theory Papers 2013, p. 323.

47 SCHERER (see footnote 45), J Int. Disp.Settlement 2013, p. 588; SILBERMANN (see footnote 45), 38 *Georgia Journal of International and Comparative Law 2009, p.* 32 f.

48 SCHERER (see footnote 45), J Int. Disp. Settlement 2013, p. 627; VAN DEN BERG, (see footnote 16), J. Int. Arb. 2010, p. 179, 191.

Parties to an arbitration agreement mostly specify a geographical venue and, in doing so, imply the judicial control at the arbitral seat. Therefore, in principal, the annulment decision of the Arbitration Seat Court has to be accepted by the Enforcement Court even if it was based on specific national law at the seat of arbitration. 51

An exception to this principle may be made only if under the national rules of international private law regarding the recognition of foreign judgements the annulment judgement of the Arbitration Seat Court cannot be recognized. 52

The Foreign Judgement Approach is in line with the New York Convention and the principles of international civil law, in particular with the principle of international comity. 53

V. Case law

National courts have taken different approaches with regard to the enforcement of annulled foreign arbitral awards. In the majority of jurisdictions that are signatories to the New York Convention, annulled awards have not been enforced so far. In a minority of countries, awards have been enforced despite their annulment by the Arbitration Seat Court, albeit with different rationales.[49] 54

In this section, some decisions of Enforcement Courts in France, the United States and the Netherlands will be examined. 55

A. France *(Hilmarton et al.)*

In *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation-OVT* Hilmarton, an English consulting company, had initiated arbitration proceedings in Geneva, Switzerland, against OTV, a French concern, claiming the payment of a brokerage fee. The claim was denied by the arbitrator. Hilmarton challenged the award before the Court of Appeal of Geneva and the Swiss Su- 56

[49] For summaries of case law regarding the enforcement of annulled awards see DARWAZEH (see footnote 4), p. 333 f.; DAVIS, (see footnote 23), Tex. Int. L. J. 2002, p. 43, 63 f.; FREYER (see footnote 22), p. 767 f.; KOCH, The Enforcement of Awards Annulled in their Place of Origin, 26 J. Int. Arb. 2009, p. 267, 269 f.; PAULSSON, MARIKE (see footnote 5), p. 204 ff.

preme Court (*Tribunal Fédéral*), which annulled the award on the grounds that it found the award to be arbitrary.[50]

57 Notwithstanding its annulment in Switzerland, OVT successfully applied for recognition of the award in France. The Court of First Instance of Paris as well as the Court of Appeal granted recognition.[51] This decision was confirmed by the French Supreme Court (*Cour de Cassation*) on 23 March 1994.[52]

58 The French courts based their decisions on the more-favourable-law rule in Article VII of New York Convention in conjunction with Article 1502 of the French New Code of Civil Procedure. Article 1502 of the French New Code of Civil Procedure contains an exclusive list of grounds under which enforcement of an award can be denied. The annulment of an award at the seat of arbitration is not among these grounds. The French courts, therefore, held that in light of this provision and the more-favourable-law rule of Article VII of the New York Convention they could not deny the enforcement but, on the contrary, were obliged to recognize and enforce the award.

59 With regard to the legal effect of the set aside decision by the Swiss Supreme Court, the French Supreme Court in the *Hilmarton* decision stated that:

'*the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy.* '[53]

60 This *Hilmarton* decision of the Supreme Court is in line with previous decisions of the French Supreme Court in the *Norsolor* and the *Polish Ocean Line* case, as well as subsequent French court decisions.[54]

61 The delocalized approach of the French courts has been rightly criticized because it completely ignores the fact that the courts at the seat of arbitration are vested with various competences during the arbitral procedure and in

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50 *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation (OTV)* (Swiss Supreme Court) in: YCA XIX 1994, p. 221 ff.

51 *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation OTV* (French Court of Appeal), in: YCA XIX 1994, p. 655 ff.

52 *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation OTV* (French Supreme Court), in: YCA XX 1995, p. 663 ff.

53 Ibid., p. 664.

54 For a summary of these decisions and subsequent decisions of the French Supreme Court regarding the enforcement of annulled awards, cf. DARZAWEH (footnote 4), p. 333 ff.; DAVIS, (see footnote 23), Tex. Int. L. J. 2002, p. 43, 63 f.; KOCH (see footnote 49), J. Int. Arb. 2009, p. 267, 269 f.

connection with the challenge of arbitral awards. The legal framework of the respective Arbitration Seat Court is the national arbitration law of the awarding jurisdiction (*lex arbitri*). This clearly contradicts the French Supreme Court's approach to classify the award as not being integrated in the legal system of a state. Furthermore, the disregard of annulment judgements is an infringement of the principles of international comity, which cannot be justified even if awards were considered to be merely of international nature and not connected to a state law.

The further development in the *Hilmarton* case illustrates another fundamental problem with regard to the enforcement of annulled awards, namely the existence of two contradictory awards: After the annulment decision by the Swiss Supreme Court the dispute was resubmitted to arbitration. The new arbitrator granted *Hilmarton's* claim. Hilmarton sought enforcement of this new award in France which was granted by the court of first instance and the Versailles Court of Appeal. On further appeal, the French Supreme Court denied the enforcement stating that the principle of *res judicata* created an obstacle to any recognition in France of court decisions or arbitral awards rendered abroad which are incompatible with it.[55] The fact that in the end the annulled award prevailed over the effective award shows the inconsistency of the French approach. 62

The inconsistency of the French Supreme Court's decision in the *Hilmarton* case would have been avoided, if the court had applied the Foreign Judgement Approach or the Local Standard Annulment Approach: There was no indication of reasons that would have prevented French courts from recognizing the annulment decision of the Swiss Supreme Court under international private law; furthermore, the decision of the Swiss Supreme Court was based on international standards. 63

B. United States (*Chromalloy et al.*)

In *Chromalloy Aeroservices Inc. v. Egypt,* the District Court of District of Colombia enforced an award that had been set aside by the Cairo Court of Appeal.[56] The award was rendered in August 1994 in Cairo by an arbitral tribunal. The Cairo Court of Appeal annulled the award in December 1994.[57] 64

55 Cf. DAVIS (see footnote 23), Tex. Int. L. J. 2002, p. 43, 65; KOCH (see footnote 49), J. Int. Arb. 2009, p. 273 f.

56 *Chromalloy Aeroservices Inc.v. Egypt* (United States District Court, District of Columbia), in YCA XXII 1996, p. 1001 ff.

57 *Chromalloy Aeroservices Inc.v. Egypt* (Cairo Court of Appeal), in YCA XXIV 1999, p. 265 ff.

According to the Cairo Court of Appeal, the fact that the arbitral tribunal applied Egyptian civil law instead of Egyptian administrative law constituted a ground for annulment. The decision was based on Article 53 of the Egyptian Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, which allows the parties to challenge an arbitral award if the arbitral tribunal failed to apply the law agreed upon by the parties to govern the subject matter in dispute.

65 The District Court disregarded the annulment decision on the grounds that under the U.S. *Federal Arbitration Act* the mere misapplication of the law does not constitute a ground for setting aside an award. The District Court based its decision on the assumption that Article VII of the New York Convention requires to protect all rights which the enforcing award creditor has under the domestic laws of the United States and that the recognition of the annulment decision would violate public policy:

'A decision by this Court to recognize the decision of the Egyptian court would violate this clear US public policy.'[58]

66 The fundamental difference between this decision and the *Hilmarton* decision in France was the fact that the *Federal Arbitration Act* does not contain a list of non-enforcement grounds as in Article 1502 of the *French New Code of Civil Procedure*.[59] Hence, there was no more-favourable-law with regard to the enforcement of the annulled award.

67 The application of domestic setting aside grounds in order to enforce annulled awards is obviously not covered by Article VII of the New York Convention. As outlined above in section II.B., the grounds for setting aside arbitral awards are exclusively subject to the laws at the seat of arbitration. Furthermore, the mere fact that the Arbitration Court Seat applies set aside grounds that are not provided for in the country of enforcement does not constitute a violation of public policy.

68 By applying the Foreign Judgement Approach instead, the annulment decision by the Cairo Court of Appeal would most likely have been recognized.

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58 *Chromalloy Aeroservices Inc.v. Egypt* (United States District Court, District of Columbia), in: YCA XXII 1996, p. 1009.

59 Section 201 of the Federal Arbitration Act reads: *'The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.'* The chapter of the Federal Arbitration Act does not contain provisions regarding the refusal of the enforcement of awards.

In subsequent U.S. court decisions, the approach of the *Chromalloy* decision was discarded. The courts in the cases *Alghanim*, *Baker Marine*, *Spier* and *TermoRio* did not apply the *Federal Arbitration Act* and refused the enforcement of the annulled awards referring inter alia to the principles of comity.[60] 69

In its *TermoRio* decision the U.S. Court of Appeals, District of Columbia Circuit, explicitly stated that the annulment decision cannot simply be examined on the basis of the setting aside rules of the country where enforcement is sought: 70

'In applying Art. V(1)(e) of the New York Convention, we must be very careful in weighing notions of 'public policy' in determining whether to credit the judgment of a court in the primary State vacating an arbitration award. The test of public policy cannot be simply whether the courts of a secondary State would set aside an arbitration award if the award had been made and enforcement had been sought within its jurisdiction. As noted above, the Convention contemplates at different Contracting States may have different grounds for setting aside arbitration awards. Therefore, it is unsurprising that the courts have carefully limited the occasions when a foreign judgment is ignored on grounds of public policy.'[61] 71

The *Pemex* decision[62] cited to at the outset of this paper was no step back to the *Chromalloy* approach. The Court of Appeals for the Second Circuit did not apply the *Federal Arbitration Act* but applied international private law regarding the recognition of the annulment decision of the Mexican Court.

The background of the *Pemex* litigation can be summarized as follows: 72

In 1997 and 2003, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V.* ("*Commisa*"), a subsidiary of a US company, concluded two related contracts for the supply and installation of offshore natural gas platforms in the Gulf of Mexico with *Exploración y Producción* ("*PEP*"), a subsidiary of *Petróleos Mexicanos* ("*Pemex*"), an entity of the Mexican state. According to both contracts, *PEP* was entitled to rescind the contracts in the event of partial or total breach of contract by *Commisa*. Both contracts in- 73

60 For a summary of subsequent decisions of United States courts regarding the enforcement of annulled awards, see DARWAZEH (see footnote 4), p. 335 f.; DAVIS (see footnote 23), Tex. Int. L. J. 2002, p. 48 f.; KOCH (see footnote 49), J. Int. Arb. 2009, p. 276 ff.

61 *TermoRio S.A. E.S.P. (Colombia), LeaseCo Group and others v. Electranta S.P. (Colombia), et al.*, (United States Court of Appeals, District of Columbia Circuit), in: YCA XXXIII 2008, p. 964.

62 *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex Exploración y Producción* (United States Court of Appeals, Second Circuit), in: YCA XXXXII 2017, p. 1 ff.

cluded an arbitration clause. *PEP's* authority to bind itself to arbitration was based on the Mexican PEMEX and Affiliates Organic Law.[63]

74 In December 2004, Commisa initiated arbitration proceedings because of the administrative rescission of both contracts by PEP. In 2007, while arbitration proceedings were still pending, Mexico passed a new law according to which a special court, the Tax and Administrative Court, had the exclusive competence for administrative rescissions related to public contracts. Furthermore, the statute of limitations was reduced from 10 years to 45 days for claims in the Tax and Administrative Court. In May 2009, another law, the Law of Public Works and Related Services, came into force, of which Sect. 98 provided that disputes concerning administrative rescission could not be settled by arbitration.

75 In December 2009, the arbitral tribunal rendered a final award in favour of *Commisa*. The award was annulled by the Mexican Eleventh Collegiate Court in September 2011. Though the Court did not apply the new Law of Public Works and Related Services directly, it referred to it as a guideline and concluded that the dispute was not arbitrable.

76 In August 2013, the Southern District of New York granted the enforcement of the award notwithstanding the annulment judgement by the Mexican Court. This decision was confirmed by the United States Court of Appeals, Second Circuit.

77 With respect to the recognition and enforcement of the award, the Second Circuit noted that the proceedings in this case were governed by both the Inter-American Convention on International Commercial Arbitration of 1975 ("**Panama Convention**") and the New York Convention. The Second Circuit began its analysis by noting that there 'is no substantive difference between the two'[64] and that both exhibit a 'pro-enforcement bias'[65]. The Panama Convention contains an Article V nearly identical to Article V of the New York Convention. The court held that Article V of the Panama Convention gives Enforcement Courts discretion to enforce an award despite an annulment decision. According to the court, this discretion is limited by the concern of

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63 The provision in the PEMEX and Affiliates Organic Law reads: *'In the event of international legal acts, Petróleos Mexicanos or its Affiliates may agree upon the application of foreign law, the jurisdiction of foreign courts in trade matters, and execute arbitration agreements whenever deemed appropriate in furtherance of their purpose.' Cf. Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex Exploración y Producción* (United States Court of Appeals, Second Circuit), in: YCA XXXXII 2017, p. 9.

64 *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex Exploración y Producción* (United States Court of Appeals, Second Circuit), in: YCA XXXXII 2017, p. 19.

65 Ibid., p. 19.

international comity, however, if that decision violates basic notions of justice.[66] The court stated that, according to this principle, a final judgment obtained in a foreign country is generally conclusive unless its enforcement would offend the public policy of the state in which enforcement is sought.

Applying this standard, the court concluded that the public policy exception applied. This was mainly based on the consideration that (i) arbitration was explicitly provided for in the PEMEX and Affiliates Organic Law, (ii) the retroactive legislation made the arbitration unlawful, (iii) a new claim by *Commisa* before the Tax and Administrative Court would now be dismissed because of the statute of limitations and (iv) the enforcement of such Mexican law amounted to a taking of private property for the benefit of the government without compensation (government expropriation). 78

In conclusion the Court of Appeals held that: 79

'*the Southern District did not abuse its discretion by confirming the arbitral award at issue because to do otherwise would undermine public confidence in laws and diminish rights of personal liberty and property.*'[67]

Although the court granted enforcement of an annulled award, its reasoning can be fully endorsed. In its decision, the Court of Appeals made it very clear that the principles of international comity limit the discretion of Enforcement Courts to enforce annulled awards and that the Enforcement Court can disregard the annulment decision only if the standards for the non-recognition of foreign judgements are met. This understanding of Article V(1)(e) of the New York Convention is in line with the interpretation outlined in sections III and IV of this paper. 80

C. The Netherlands (*Yukos*)

In April 2009, the Amsterdam Court of Appeal granted enforcement to an annulled arbitral award in the case *Yukos Capital s.a.r.l. v. OAO Rosneft*.[68] 81

The Dispute between the Parties arose in connection with two loan agreements concluded between Yukos and OAO Yuganskneftegaz in July and August 2004. Both loan agreements contained arbitration clauses providing for arbitration of disputes at the International Commercial Arbitration Court (ICAC) at the Chamber of Trade and Industry of the Russian Federation. 82

66 Ibid., p. 20.
67 Ibid., p. 26.
68 *Yukos Capital s.a.r.l. (Luxembourg) v. OAO Rosneft (Russian Federation)* (Amsterdam Court of Appeal), in: YCA XXXIV 2009, p. 703 ff.

83 At the time of the conclusion of said loan agreements, both companies were part of the Yukos Group. On 19 December 2004, all shares of OAO Yuganskneftegaz were sold for about $ 7 billion at an enforcement action following the tax assessments imposed on Yukos Oil Company by the Russian State. The buyer was the Baikal Finance Group, a Russian Company that had been incorporated only a few weeks before the auction. On 23 December of the same year, the Baikal Finance Group sold the shares to Rosnet, an oil and gas company owned by the Russian federation. Yuganskneftegaz later merged with Rosnet and ceased to exist.

84 About a year later, Yukos Capital initiated arbitration proceedings because of alleged breach of the loan agreements. On 19 December 2006, the arbitral tribunal decided in Yukos' favour, ordering Yuganskneftegaz to pay about 13 billion rubles to Yukos Capital.

85 The awards were annulled by the Commercial Court of Moscow, whose decision was subsequently affirmed by the Federal Commercial Court for the Moscow District on 13 August 2007 and the Supreme Commercial Court of the Russian Federation on 10 December 2007. Among other grounds, the Russian Courts based their decisions on the fact that the managing director of the law firm representing Yukos has organized conferences in which the arbitrators had participated.[69]

86 In parallel, Yukos sought enforcement of the awards in the Netherlands. While the Amsterdam Court of First Instance denied enforcement of the awards because of their being set aside, the Amsterdam Court of Appeal granted enforcement.[70] It examined whether the decision of the Russian court annulling the arbitral awards could be recognized pursuant to the rules of general private international law and came to the conclusion that the annulment decision could not be recognized. The decision was based on the fundamental distrust of the Court of Appeal in the impartiality of Russian courts. Based on findings of international organizations, press articles, expert opinions and court decisions,[71] the court concluded that:

87 '*it is to such extent likely that the Russian civil court decisions annulling the arbitral awards are the outcome of a judicial process that must be deemed partial and dependent, that those decisions cannot be recognized in the Netherlands. This implies that the annulment of the arbitral awards by the Russian*

69 Cf. SILBERMANN (see footnote 45), 38 *Georgia Journal of International and Comparative Law 2009*, p. 34.

70 *Yukos Capital s.a.r.l. (Luxembourg) v. OAO Rosneft (Russian Federation), (Amsterdam Court of Appeal), in:* YCA XXXIV 2009, p. 703 ff.

71 Ibid, p. 712.

court must be ignored when deciding on Yukos Capital's request for enforcement of those awards.'[72]

Although the general approach of the Amsterdam Court of Appeal is consistent with the interpretation of Article V(1)(e) of the New York Convention as outlined in sections III and IV of this paper, the reasons for the non-recognition of the annulment decisions in the concrete case are questionable. The Court of Appeal did not elaborate on the reason why the particular annulment decisions by the Russian courts where biased or rendered in unfair proceedings, but based its decision on the general distrust in Russian courts. This might be understandable from a practical point of view because the bias of the Russian court decisions might be difficult to prove. However, this approach itself constitutes a violation of due process, because it is based on general facts and assumptions but apparently not on the concrete circumstances that have led to the annulment decision. 88

VI. Conclusion

The New York Convention provides that the competent courts at the seat of the arbitration can set aside arbitral awards. The reasons for setting aside arbitral awards are not stipulated in the New York Convention. Hence, they are subject to the national laws of the seat of arbitration. 89

Considering the authority of the Arbitration Seat Court to set aside arbitral awards and taking into account the wording and the drafting history of Article V(1)(e) of the New York Convention, it can be concluded that the setting aside decision of the Arbitration Seat Court generally binds the courts of other countries where the enforcement of the award is sought. 90

Only under very exceptional circumstances, namely when the conditions for the non-recognition of the annulment decision under international private law are fulfilled, the Enforcement Courts are entitled to recognize and enforce annulled awards. 91

The U.S. case law after the *Chromalloy* decision shows that this approach – other than the delocalized approach of the French Supreme Court – leads to results that, on the one hand, respect the decisions of Arbitration Seat Courts and thus the principles of international comity and, on the other hand, provides for an appropriate solution if the annulment decision was rendered in unfair proceedings or would violate the public policy of the country where recognition is sought. 92

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72 Ibid, p. 712.

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Arbitrability of Domestic Employment Law Disputes in Switzerland – An Analysis of the Swiss Supreme Court's Decision 136 III 467

Andreas Lienhard

Foreword by the Author

After the submission of this article, but prior to its publication, the Swiss Supreme Court issued its new leading decision, BGE 4A_7/2018 of 18 April 2018, regarding the topic of this article.

In BGE 4A_7/2018, the former coach of a soccer club, playing in the first national league, brought a claim against his former employer before the state courts of the canton of Basel City. Claimant and defendant were both domiciled/based in Switzerland. The defendant soccer club objected to the state court's jurisdiction due to the arbitration clause included in the employment agreement. The state court confirmed its jurisdiction, which was eventually brought before the Swiss Supreme Court. The latter essentially confirmed that is prior case law, as established in BGE 136 III 467, also applies under the new Swiss Code of Civil Proceedings ("**SCCP**").

In this article, I will refer to the new BGE 4A_7/2018 in the footnotes, but will not focus on it. However, if one compares BGE 136 III 467 and BGE 4A_7/2018, the following three points are worth mentioning in a separate foreword.

First, it is always essential to distinguish between (i) the arbitrability of domestic employment law disputes *per se* and (ii) the potential invalidity of the arbitration clause *as a result of* the in-arbitrability of domestic employment law disputes. In almost every case, the delicate issue is the second one. The first one, on the other hand, can usually be disposed of rather easily, namely because the great majority of employment law disputes are brought before a state court or arbitral tribunal later than one month following the termination of the employment relationship. By that time, the claims have become arbitrable in any event (however, the arbitration clause may still be invalid because of the claims' prior in-arbitrability). In BGE 136 III 467, the Swiss Supreme Court succinctly applied this distinction in rec. 4.6 (cf. below, para. 14). In the new BGE 4A_7/2018, however, the distinction is made less clear (cf. Rec. 2.1).

Second, in both BGEs, the state court did not have to deal with employment law claims that are difficult to qualify as being optional or mandatory (e.g. a bonus claim). If the state court or arbitral tribunal had to decide on the optional or mandatory nature of such a claim in the entry phase of the proceedings with full cognition, it may very well be that the parties would first have to litigate up to the Swiss Supreme Court in order to know whether the bonus is optional or mandatory and, consequently, whether the state court or arbitral tribunal has jurisdiction to decide on the bonus claim. This, however, seems to be the interpretation of art. 61 CCP preferred by the Swiss Supreme Court

(cf. BGE 4A_7/2018, Rc. 2.1). As will be argued in this article, this risk can be somewhat reduced by a slightly different application of art. 61 CCP (see below, section V I).

Third, in both BGEs, the employees did not earn very high salaries. Hence, if one prefers the employee's protection (and not the party's autonomy) as the underlying general principle, the two decisions seem justified. However, if the employees in question had earned very high salaries (e.g. salaries above the thresholds established in BGE 139 III 155 and 141 III 407), the in-arbitrability of the employment disputes could no longer be justified with the employee's protection. However, due to the mechanical nature of the "Art. 341(1) CO"-test established by the Swiss Supreme Court in BGE 136 III 467 and BGE 4A_7/2018, the outcome would still be the same; the arbitration clause would be invalid, irrespective of the employees' high salaries. As will be argued in this article, this inappropriate result is avoided if one applies the more flexible "reasonable interest"-test instead of the mechanical "Art. 341(1) CO"-test (see below, section VI).

Andreas Lienhard

Table of Contents

I. Introduction

1 In its leading decision BGE 136 III 467, the Swiss Supreme Court decided that an employee's claims against his/her employer are not arbitrable in terms of Art. 5 of the Cantonal Arbitration Convention ("**CA**"; now: Art. 354 SCCP) if they are covered by Art. 341 Swiss Code of Obligations ("**CO**").[1]

2 This essay focuses on BGE 136 III 467 and, especially, the follow-up questions resulting from it:

- In a first step, the basic ideas at the heart of Swiss domestic arbitration and Swiss employment law are briefly discussed (see below, Part II and paras. 3 ff.).
- Next, BGE 136 III 467 is briefly described (see below, Part III and paras. 9 ff.).
- Then, a short overview of the doctrine's criticism about BGE 136 III 467 is given (see below, Part IV and paras. 14 ff.).
- In the main part, the various follow-up questions that result from BGE 136 III 467 are discussed in depth (see below, Part V and paras. 23 ff.).
- Finally, the approach applied in BGE 136 III 467 is assessed and an alternative solution is suggested (see below, Part VI and paras. 61 ff.).

[1] Confirmed, in the meantime, in BGE 4A_7/2018, Rec. 2.3.5.

II. Basic Ideas of Swiss Domestic Arbitration and Swiss Employment Law

Swiss domestic arbitration law is based on the idea that two (more or less) *equal* parties agree to settle a future dispute in connection with a particular legal relationship by arbitration, i.e., outside of state court litigation.[2] Since the basic idea is an agreement between equals, Swiss domestic arbitration law is highly flexible.[3] In general, the parties are free to agree on: 3

- where,[4]
- by whom,[5]
- under which procedural rules[6], and
- according to which substantive rules[7] their future disputes will be settled.[8]

Swiss employment law, on the other hand, is based on the idea that the employee is generally *weaker* than his contractual counterpart (i.e., the employer) and thus needs to be protected from the latter's power and influence.[9] As a result of this generalized conception, the applicable private international, substantive and procedural rules are rather inflexible: 4

According to Art. 121(3) SPILA, the employer and the employee may agree only on the applicability of the foreign laws of the state (i) where the employee has his habitual place of residence or (ii) where the employer has his branch, his domicile or his habitual place of residence. For Art. 121(3) SPILA to apply in the first place, however, the employment dispute needs to be international in terms of Art. 1(1) SPILA. Hence, the employer and the employ- 5

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2 MÖHLER, Konsumentenverträge im schweizerischen Schiedsverfahren mit rechtsvergleichenden Aspekten, Zurich 2014, p. 2; GIRSBERGER /VOSER, International Arbitration, Comparative and Swiss Perspectives, 3rd edition, Zurich 2016, p. 3.

3 Cf., for example, PLANINIC /ERK, in: Orell Füssli ZPO Kommentar, para. 3 on Art. 353 ZPO.

4 Art. 355(1) and (4) SCCP.

5 Art. 360 ff. SCCP.

6 Art. 373(1)(a) and (4) SCCP.

7 Art. 381(1) SCCP, including a decision "*ex aequo et bono*".

8 In addition, arbitration tends to be faster than state court litigations, mainly because of the limited possibilities to appeal arbitral awards (cf. Art. 389 ff. SCCP). Additional important particularities are the confidentiality of the arbitration proceedings and the arbitrator's expert knowledge in certain fields. Finally, the costs of arbitration proceedings are generally higher than those of state court litigation and are entirely funded by the parties (GIRSBERGER /VOSER (see footnote 2), p. 29 ff.).

9 STREIFF /VON KAENEL /RUDOLPH, Arbeitsvertrag, Praxiskommentar zu Art. 319 – 362 OR, 7th edition, Zurich 2012, p. 1 f.; GEISER /MÜLLER, Arbeitsrecht in der Schweiz, 3rd edition, Bern 2015, p. 22.

ee may not validly agree on a foreign law's applicability in *domestic* employment law disputes before state courts.[10]

6 If Swiss substantive law applies to the employment relationship, the various mandatory employment law rules of the CO (listed in Art. 361 and Art. 362 CO), as well as those of the Swiss Labour Act ("**SLA**"), if applicable, must be considered. Some of these rules may even apply if the applicable substantive law is that of a foreign state (cf. Art. 18 SPILA). Furthermore, the mandatory rules of a foreign state may apply based on Art. 19 SPILA, even if the applicable substantive law is that of Switzerland.[11]

7 Finally, in Swiss litigation proceedings about employment law disputes, several rules apply that are designed to protect the employee, for example, cost-free proceedings if the amount in controversy is below CHF 30'000,[12] or increased intervention of the judge in the fact-finding process.[13]

8 Simply put, Swiss domestic arbitration law and Swiss employment law are two fields of law that are based on two different ideas: The former is based on the equality of the parties, the latter on the strength of the employer and the weakness of the employee. Because of these different elemental ideas, the two fields of law are often seen as conflicting (and sometimes even as irreconcilable). In its leading decision 136 III 467, the Swiss Supreme Court "resolved" this conflict by restricting the options for arbitration about domestic employment law disputes in the first place, as will be shown in the following.

III. The Decision 136 III 467, Dated 28 June 2010, of the Swiss Supreme Court

9 The facts of case 136 III 467 are essentially as follows: Y was domiciled in Switzerland and had been working for X SA, seated in Bern, since 1967. Since 2001, he was employed as director of X SA's branches in Neuchâtel and Fribourg. As of 14 August 2004, Y went into early partial retirement and was employed 30 percent in X SA's general management and 20 percent by a

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10 In addition, even if the employment dispute is international in terms of Art. 1(1) SPILA, Art. 121(3) SPILA only applies if chapter 12 SPILA does not apply, i.e. if the parties have not validly agreed on arbitration in Switzerland, cf. GIRSBERGER/VOSER (see footnote 2), p. 349.

11 The applicability of Art. 18 and 19 SPILA to international arbitration proceedings in terms of chapter 12 SPILA is contentious in legal doctrine, c.f. GIRSBERGER /VOSER (see footnote 2), p. 351 f.

12 Art. 113(2)(d) and Art. 114(c) SCCP.

13 Art. 247(2)(b) No. 2 SCCP.

third party. On 26 October 2005, X SA terminated the employment relationship with effect on 31 January 2006. Between 14 December 2005 and 27 June 2006, Y was unable to work due to illness. Y's employment contract included an arbitration clause according to which any future disputes arising out of the employment relationship with X SA shall be resolved by arbitration with seat in Bern.

On 10 June 2008, Y brought a claim against X SA before the district court of Lausanne for the payment of CHF 50'000, including 5% interest as of 31 January 2006, as compensation for overtime work and accumulated vacation entitlements. X SA objected to the jurisdiction of the district court by relying on the arbitration clause. The district court, as well as the upper cantonal court, both rejected X SA's objection and confirmed the district court's jurisdiction. X SA brought the case to the Swiss Supreme Court. 10

The Swiss Supreme Court pointed out that, according to Art. 341(1) CO, an employee may not validly waive his claims resulting from mandatory provisions or from a collective employment agreement during the duration of the employment relationship and one month following its termination. Art. 341(1) CO intends to protect the employee from pressure exercised by his employer to waive his entitlements. Art. 341(1) CO thus prevents unilateral waivers of such mandatory entitlements, but allows for proper mutual settlements in which the employee is compensated for his waivers and both parties make concessions.[14] 11

According to Art. 5 CA[15], a claim was only arbitrable if the parties could "freely dispose" over it. Art. 341(1) CO restricts the employee's freedom to dispose over his claims. This restriction is also decisive for the "free disposability" in terms of Art. 5 CA (now: Art. 354 SCCP). Hence, an employee may not "freely dispose" over a claim in terms of Art. 5 CA (now: Art. 354 SCCP) if he may only waive this claim under the conditions of Art. 341(1) CO.[16] 12

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14 BGE 136 III 467, Rec. 4.5, p. 472 f.

15 As of 1 January 2011, the CA was replaced by Art. 353 ff. SCCP. For domestic arbitration, the arbitrability is now stipulated in Art. 354 SCCP. Art. 354 SCCP requires the claims to be "freely disposable" and, insofar, uses the same wording as the former Art. 5 CA. For this reason, the prevailing doctrine is of the view that decision BGE 136 III 467 also applies to Art. 354 SCCP, cf. WYLER, Droit du travail: chronique, in: Journal des tribunaux – Poursuite II, 2011, p 203 ff., p. 225; FRÖHLICH, Individuelle Arbeitsstreitigkeiten in der neuen Schweizerischen Zivilprozessordnung, Bern, 2014, p. 43; HAAS /HOSSFELD, Die (neue) ZPO und die Sportsschiedsgerichtsbarkeit, in: ASA Bulletin 2012, p. 312 ff., p. 329 f., with further references.

16 Confirmed in BGE 4A_7/2018, Rec. 2.3.2.

13 The Swiss Supreme Court then concluded that an arbitration clause is *invalid* if it is included in an employment contract and relates to future disputes about claims covered by Art. 341(1) CO.[17] The Swiss Supreme Court did not explicitly state the reason why the arbitration clause was invalid. However, the court's previous elaborations in Rec. 4.5 and 4.6 focused on the arbitrability in terms of Art. 5 CA (now: Art. 354 SCCP). Since the arbitrability is a condition for the arbitration clause's validity (see below, para. 39), the court qualified the arbitration clause as invalid because Y's claims were not arbitrable. For the topics discussed in this essay (especially follow-up questions 7 to 9), it is important to always *distinguish* between (i) the *claims' arbitrability per se* and (ii) the *arbitration clause's invalidity* as a result of the claims' inarbitrability.

14 Finally, the Swiss Supreme Court pointed out that Y claimed accumulated overtime entitlements. For this reason, the higher cantonal court duly rejected the validity of the arbitration clause.[18]

IV. The Criticism of BGE 136 III 467 by Legal Doctrine

15 While the Swiss Supreme Court's decision was approved by some authors and at least one cantonal court[19], it was heavily criticized by others. In the subsequent BGE 4A_515/2012, the Swiss Supreme Court summarized this criticism as follows.

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17 '*Une clause compromissoire n'est donc pas valable si elle est insérée dans le contrat de travail pour s'appliquer aux contestations futures qui s'élèveront, le cas échéant, au sujet de telles créances*.', BGE 136 III 467, Rec. 4.6.

18 *'En l'espèce, la contestation porte sur la rétribution d'heures de travail supplémentaires, de sorte que la Chambre des recours rejette à bon droit la validité de la clause compromissoire',* BGE 136 III 467, Rec. 4.6. The employee's compensation for overtime is stipulated in Art. 321c(3) CO. Art. 321c(3) CO, however, is not listed as mandatory in Art. 361 or 362 CO and, consequently, is not covered by Art. 341 CO (STREIFF /VON KAENEL /RUDOLPH (see footnote 9), p. 236). Hence, one may argue that the Swiss Supreme Court did not correctly apply its new rule to the case at hand.

19 PIETRUSZAK, Schiedsfähigkeit arbeitsrechtlicher Streitigkeiten gemäss Art. 5 Konkordat über die Schiedsgerichtsbarkeit, in: dRSK, published on 15 September 2010, para. 6; FRÖHLICH (see footnote 15), para. 107; decision (by the High Court of the Canton of Zurich) of 5 July 2016, LA160017-O/U, Rec. 4.2.

A. The Agreement to an Arbitration Clause Is not a Waiver of the Employee's Claims

According to some authors, the employee's agreement to settle future disputes in arbitration does not constitute a waiver of his claims resulting from mandatory laws or from a collective employment agreement. Since there is no waiver, Art. 341(1) CO does not apply, which is why the employee's claims remain fully arbitrable.[20] 16

B. There Are Other Contractual Claims That Result from Mandatory Laws and That Are Arbitrable

Others point out that, under various contracts of duration other than employment contracts, there are entitlements resulting from mandatory laws that the respective party may not waive during the duration of the contract either, for example, Art. 404 CO or Art. 418u CO. Neither could these entitlements be the subject of domestic arbitration if the "free disposability" were interpreted as done by the Swiss Supreme Court. This would go against the liberal spirit of Art. 354 SCCP.[21] 17

This criticism is not entirely accurate. Because of Art. 341(1) CO, the employee may not waive a claim resulting from mandatory law *even if that claim has already come into existence*.[22] For example, if an employee has been 18

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20 WILDHABER/WILCKE, Die Schiedsfähigkeit von individualarbeitsrechtlichen Streitigkeiten in der Binnenschiedsgerichtsbarkeit, in: ARV 2010, p. 160 ff., p. 165; BEFFA, Arbitrabilité des conflits individuels de travail: critique de l'arrêt 4A_71/2010 du 28 juin 2010 et questions ouvertes, in: AJP 2010, p. 1433 ff., p. 1441; SCHWEIZER, Arbitrabilité et droit du travail en matière interne, état des lieux provisoire, in: RSPC/SZZP 2010, p. 362 ff., p. 365; SCHWANDER, Arbeitsrechtliche Streitigkeiten in Zivilverfahren, in: ZZZ 2007, p. 195 ff., p. 208 f.; RITSCHARD, Schiedsklauseln in Einzelarbeitsverträgen, in: iusfocus 2011, No. 16; CASEY-OBRIST, Individualarbeitsrechtliche Streitigkeiten im Schiedsverfahren, Basel 2016, p. 111 f., with further references.

21 COURVOISIER /WENGER, ZürcherKomm ZPO, para. 6 on Art. 354 ZPO; BEFFA (see footnote 20), p. 1441; BERGER, Die Rechtsprechung des Bundesgerichts zum Zivilprozessrecht im Jahre 2010, in: ZBJV 2012, p. 169 ff., p. 170; OETIKER/HOSTANSKY, Die neue Binnenschiedsgerichtsbarkeit – Gerichtspraxis zu Art. 353 – 399 ZPO, in: AJP 2013, p. 203 ff., p. 204; CASEY-OBRIST (see footnote 20), p. 112, with further references.

22 Confirmed in by BGE 4A_7/2018, Rec. 2.3.2. However, the Swiss Supreme Court focused on the requirements of a settlement agreement regarding an employment law dispute, which it – incorrectly – based on art. 341 CO (cf. below, paras. 64 et seqq.).

unable to work due to illness for three months, Art. 341(1) CO prevents the employee from waiving his salary entitlements for these three months. The CO's provisions on mandate and agency contracts (to which Art. 404 CO and Art. 418u CO belong) lack a provision analogous to Art. 341(1) CO. For this reason, the agent is free to waive his claim for a customer-compensation (Art. 418u CO) once that claim has come into existence. In other words, because the Swiss Supreme Court based its decision on Art. 341(1) CO (see above, paras. 11 ff.), and because the other contracts stipulated in the CO do not include such a provision, BGE 136 III 467 does not automatically apply to these other contracts.[23]

C. BGE 136 III 467 Does not Apply to Art. 354 SCCP

19 Some authors point out that BGE 136 III 467 relates to Art. 5 CA. Hence, it is highly questionable whether it also applies to the new Art. 354 SCCP that is more liberal in nature and that replaced Art. 5 CA.[24]

D. BGE 136 III 467 Leads to a Split of Jurisdiction

20 Finally, some authors argue that, as a consequence of the Swiss Supreme Court's decision, some of the employee's claims are not arbitrable (i.e., those resulting from mandatory laws or from a collective employment agreement), while others are (i.e., those resulting from non-mandatory laws). In case of a dispute, the employee may be forced to bring some of his claims before a state court and others before an arbitral tribunal. This split of jurisdiction, however, would heavily disadvantage the employee.[25]

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23 See also AMBAUEN, 3. Teil ZPO versus 12. Kapitel IPRG – Eine Gegenüberstellung im Kontext der Opting-Out-Möglichkeiten – Unter besonderer Berücksichtigung der zwingenden Bestimmungen, der Schiedsfähigkeit und der Anfechtbarkeit von Schiedssprüchen, Zürich 2016, p. 155 f.; as will be shown in Part VI, however, the Swiss Supreme Court was wrong to apply Art. 341(1) CO to arbitration clauses agreed upon at the beginning of the employment relationship in the first place.

24 DASSER, in: KUKO ZPO, para. 15 on Art. 354 ZPO.

25 PORTMANN /RUDOLPH, in: BaslerKomm OR I, para. 96 on introduction before Art. 319 OR; PIETRUSZAK (see footnote 19), para. 9; BERGER (see footnote 21), p. 170 f.; OETIKER /HOSTANSKY (see footnote 21), p. 204 f.; FRÖHLICH (see footnote 15), p. 45; RITSCHARD (see footnote 20); CASEY-OBRIST (see footnote 20), paras. 259 ff. with further references.

This criticism is only partially accurate. While it is accurate regarding the distinction between arbitrable and not arbitrable claims (see below, para. 38), it is not entirely accurate regarding the resulting split of jurisdiction. The arbitral tribunal has jurisdiction to hear the employee's *arbitrable* claims only if the parties are bound by a valid arbitration clause. Whether the arbitration clause is valid with respect to the employee's arbitrable claims is assessed based on Art. 20(2) CO (see below, para. 39).[26] 21

Even though the Swiss Supreme Court summarized the above criticism in BGE 4A_515/2012, Rec. 4.2, it stated in the following paragraph that there was no need for its further assessment or a re-evaluation of BGE 136 III 467 because, in the end, this question was not relevant due to the particularities of BGE 4A_515/2012.[27] 22

In addition to the above criticism, BGE 136 III 467 generates several follow-up questions, which will be discussed in depth in the following. 23

V. Discussion of BGE 136 III 467 and Follow-Up Questions

A. *Follow-Up Question 1:* When Is an Employment Law Dispute Considered "Domestic" and, Hence, Art. 354 SCCP and BGE 136 III 467 Apply?

Art. 354 SCCP and BGE 136 III 467 only apply if the arbitration is considered "domestic". One first follow-up question considers when this is the case. 24

Under Swiss law, an arbitration is "domestic" if it is not "international" in terms of Art. 176(1) SPILA. Art. 176(1) SPILA applies a formal test: The only relevant criterion is whether, at the time of the arbitration clause's conclusion, one of the parties (to the arbitration proceedings[28]) had its domicile/seat outside of Switzerland. If all of the parties had their domicile/seat within Switzerland, the dispute is "domestic".[29] This distinction between 25

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26 Confirmed in BGE 4A_7/2018, Rec. 2.3.4.

27 See CASEY-OBRIST, Individualarbeitsrechtliche Streitigkeiten in Schiedsverfahren, in: ASA Bulletin 2017, p. 266 ff., p. 272 f., for an in-depth discussion of that decision; in the later BGE 4A_292/2013, Rec. 1.2, the Swiss Supreme Court confirmed its ruling in BGE 136 III 467. However, it only did so in an obiter dictum and without discussing or assessing the criticism raised by legal doctrine.

28 BGE 4P.54/2002, Rec. 3.

29 PFISTERER, in: BernerKomm ZPO, para. 11 on Art. 353 ZPO; STACHER, in: DIKE ZPO, para. 14 on Art. 353 ZPO; DASSER (see footnote 24), para. 4 on Art. 353 ZPO;

"domestic" and "international" arbitration is rather clear. It may, however, lead to inappropriate results. Depending on the parties' domiciles/seats, the same dispute may either be arbitral (in international cases) or not (in domestic cases).[30] The parties may try to remedy this situation by opting out of Art. 353 ff. SCCP and agreeing on the applicability of chapter 12 SPILA instead.[31] As will be shown in the following, the consequences of this opt-out are unclear.

B. *Follow-Up Question 2:* What Consequences, if any, Does an Opt-Out of Art. 353 ff. SCCP Have on the Arbitrability in Terms of Art. 354 SCCP and BGE 136 III 467?

26 According to Art. 353(2) SCCP, parties may exclude the applicability of Art. 353 ff. SCCP in an explicit declaration included in the arbitration agreement or in a later agreement and, instead, agree on the applicability of chapter 12 SPILA (so called "opt-out").[32] Within chapter 12 SPILA, the arbitrability is stipulated in Art. 177(1) SPILA. Unlike Art. 354 SCCP, Art. 177(1) SPILA only requires that the claim be of "economic nature". Art. 177(1) SPILA is a norm of the substantive law (*Sachnorm*). Hence, it is irrelevant whether the respective claims are "freely disposable" according to the applicable law.[33] As a result, both the prevailing legal doctrine[34] and the Swiss Supreme Court[35]

WILDHABER/WILCKE (see footnote 20), p. 162; SCHWEIZER, in: CR ZPO, paras. 13 ff. on Art. 353 ZPO; PLANINIC /ERK (see footnote 3), paras. 6 ff. on Art. 353 ZPO; CASEY-OBRIST (see footnote 20), para. 299 with further references.

30 FRICK, in: SHK ZPO, para. 17 on Art. 353 ZPO; WILDHABER /WILCKE (see footnote 20), p. 162.

31 VOSER, New Rules on Domestic Arbitration in Switzerland: Overview of Most Important Changes to the Concordat and Comparison with Chapter 12 SPILA, in: ASA Bulletin 2010, p. 753 ff., p. 756. Vice versa, the parties may opt out of chapter 12 SPILA and agree on the applicability of Art. 353 ff. SCCP based on Art. 176(2) SPILA.

32 This declaration needs to be made in the form stipulated in Art. 358 SCCP, cf. Art. 353(2) SCCP and CASEY-OBRIST (see footnote 20), p. 159 f., with further references.

33 GIRSBERGER /VOSER (see footnote 2), p. 104 f.

34 In general: GIRSBERGER /VOSER (see footnote 2), p. 104; PFISTERER (see footnote 29), paras. 32 f. on Art. 354 ZPO; FRICK (see footnote 30), para. 1 on Art. 354 ZPO; MABILLARD/BRINER, in: BaslerKomm IPRG, para. 8 on Art. 177 IPRG; ORELLI, Commentary on Art. 177 SPILA, in: ARROYO (Ed.), Arbitration in Switzerland, The Practitioner's Guide, 2013, para. 4 on Art. 177 IPRG; Specifically regarding employment law claims: GIRSBERGER/VOSER (see footnote 2), p. 109; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015, p. 80; KAUFMANN-KOHLER /RIGOZZI, International Arbitration – Law and Practice in Swit-

view employee's claims as being of an "economic nature" in terms of Art. 177(1) SPILA and thus fully arbitrable.

Since the parties may agree on the applicability of chapter 12 SPILA, and since the arbitrability of chapter 12 SPILA is more liberal than that of Art. 353 ff. SCCP, an additional follow-up question is what consequences, if any, such an opt-out has on the arbitrability in terms of Art. 354 SCCP. 27

The answer to this question is contentious. The majority doctrine is of the view that the employee's claims become fully arbitrable as a result of the opt-out. The respective authors provide different reasoning. (i) Some emphasize the different definitions of arbitrability in Art. 177(1) SPILA and Art. 354 SCCP (see above, para. 25).[36] (ii) Others point to the legislative materials and the objective of the opt-out. According to the legislative materials, Art. 353(2) SCCP is not subject to any substantive law restrictions. In addition, the opt-out's objective is to provide the Swiss-based party with the opportunity to agree with its counterpart on the applicability of chapter 12 SPILA, irrespective of whether this counterpart is domiciled in Switzerland or abroad.[37] In addition to these reasons, (iii) some authors argue that the applicability of either Art. 353 ff. SCCP or chapter 12 SPILA is a pre-condition to the question of arbitrability. Hence, the selection of the former must be decisive for the latter.[38] (iv) Yet others point out that chapter 12 SPILA includes equivalent provisions to all of the mandatory provisions of Art. 353 ff. SCCP, which is why there is no reason to insist on the applicability of the 28

zerland, Oxford 2015, p. 102; STREIFF /VON KAENEL /RUDOLPH (see footnote 9), p. 68; SCHWEIZER (see footnote 29), para. 3 on Art. 354 ZPO; COURVOISIER /WENGER (see footnote 21), para. 21 on Art. 354 ZPO; OETIKER /HOSTANSKY (see footnote 21), p. 204; CASEY-OBRIST (see footnote 20), p. 132, for an in depth discussion of employment claims that are arbitrable in terms of Art. 177(1) SPILA.

35 BGE 136 III 467, Rec. 4.2.; cf. CASEY-OBRIST (see footnote 27), p. 278 Fn 63, for an overview of various decisions of the Swiss Supreme Court relating to international arbitration about employment law issues.

36 PORTMANN/RUDOLPH (see footnote 25), para. 99 on introduction to Art. 319 ff. OR; WILDHABER/WILCKE (see footnote 20), p. 169; BERGER (see footnote 21), p. 171; MÖHLER (see footnote 2), p. 69 f.; RITSCHARD (see footnote 20).

37 COURVOISIER/WENGER (see footnote 21), para. 21 on Art. 354 ZPO; CASEY-OBRIST (see footnote 20), p. 166 f.; FRÖHLICH (see footnote 15), p. 48; STÖCKLI /CASEY-OBRIST, Die Optierung gemäss Artikel 353 Absatz 2 ZPO und ihre Auswirkungen auf die Schiedsfähigkeit von arbeitsrechtlichen Streitigkeiten, in: FANKHAUSER/ WIDMER LÜCHINGER /KLINGLER/SEILER, Liber amicorum Sutter-Somm, Das Zivilrecht und seine Durchsetzung, Zürich 2016, p. 644 ff., p. 655; probably also VOSER (see footnote 31), p. 755.

38 PFISTERER (see footnote 29), para. 37 on Art. 353 ZPO.

mandatory provisions of Art. 353 ff. SCCP.[39] Finally, some argue that this result is appropriate for reasons of legal certainty.[40]

29 Some authors generally follow the majority doctrine, but argue that there are limits to an opt-out. According to some, these limitations do not go very far and only include the "ordre public" and the prohibition of a circumvention of the law. Hence, if the employer includes opt-out clauses without any reasonable interest, but merely to circumvent the applicability of substantive employment law, the opt-out is invalid.[41] According to others, the limits are much stricter; an opt-out is only admissible if its purpose is the equal treatment of all employees.[42]

30 Finally, some authors challenge the view of the majority doctrine and argue that the legislator explicitly decided on different definitions of arbitrability in domestic and international arbitration. This differentiation must prevail even with an opt-out, in which case the arbitrability is assessed according to Art. 354 SCCP.[43]

31 In general, the view of the majority doctrine is to be preferred. Of particular importance are the legislative materials. According to the Swiss Federal Council's message to the SCCP, the opt-out should allow sports organizations seated in Switzerland to make their contracts subject to arbitration under chapter 12 SPILA, irrespective of their counterparties' domicile.[44] This objective would be seriously undermined if the opt-out would not cover the arbitrability, which is an entry-gate criterion to arbitration itself. In addition, the legislator was well aware that Swiss law sometimes protects a party generally considered weaker, for example the tenant in tenancy law or the employee in employment law. For this reason, the legislator explicitly limited the parties' abilities to arbitrate tenancy contracts in Art. 361(4) SCCP. Even though the legislator knew of this issue, it did not make the opt-out in terms of Art. 353(2) SCCP subject to any limitations. Finally, at least some of the contracts between sports organizations and their counterparts are employment

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39 WEBER-STECHER, in: BaslerKomm ZPO, para. 17b on Art. 353 ZPO.

40 DASSER (see footnote 24), para. 15 on Art. 353 ZPO; SCHWEIZER (see footnote 29), para. 23 on Art. 353 ZPO.

41 STREIFF /VON KAENEL /RUDOLPH (see footnote 9), p. 67 f.; AMBAUEN (see footnote 23), p. 169 f.

42 HAAS /HOSSFELD (see footnote 15), p. 332 f. and p. 344 f.

43 STACHER (see footnote 29), para. 21 on Art. 353 ZPO; KOLLER /SENNHAUSER, Die arbeitsrechtliche Rechtsprechung des Bundesgerichts im Jahr 2010, in: ZBJV 148/2012, p. 448 ff., p. 452; LEUENBERGER, Die Rechtsprechung des Bundesgerichts zum Zivilprozessrecht im Jahr 2010, in: ZBJV 148/2012, p. 123 ff., p. 129. Confirmed in BGE 4A_7/2018, cons. 2.3.3 (obiter dictum).

44 Message to the SCCP, p. 7393.

contracts, especially in team sports.[45] Hence, when the legislator decided to provide Swiss-based sports organizations with the opportunity to opt-out of Art. 353 ff. SCCP, it must have thought about the admissibility of an opt-out in an employment contract, in particular, and decided that it was admissible. This recent decision of the legislator is to be respected. However, as in every field of law, the opt-out is invalid and ineffective if it constitutes a mere circumvention of the law.

C. *Follow-Up Question 3:* If the Employer and the Employee Agreed on the Applicability of a Foreign Law Based on Art. 381(1)(a) SCCP, Is the "Free Disposability" in Terms of Art. 354 SCCP to Be Assessed According to the Law Chosen by the Parties?

Pursuant to Art. 381(1)(a) SCCP, the arbitral tribunal decides the dispute primarily based on the rules of law chosen by the parties. If the parties have agreed on the applicability of a foreign law based on Art. 381(1)(a) SCCP, another follow-up question is whether the "free disposability" in terms of Art. 354 SCCP is to be assessed (i) according to the foreign law chosen by the parties or (ii) according to Swiss law. 32

The answer to this question is particularly contentious in legal doctrine. Some authors assess the "free disposability" under the law chosen by the parties, without any restrictions.[46] Others require that there is a certain connection to said law and that the parties did not choose the foreign law simply to circumvent mandatory Swiss employment law.[47] 33

Various authors challenge this view and argue that the "free disposability" is not to be assessed according to the law chosen by the parties. They have different views, however, regarding the decisive law instead. Some argue that the "free disposability" is to be assessed according to the substantive law that would be applicable based on SPILA if the parties had not chosen the appli- 34

45 SCHERRER/MURESAN /LUDWIG, Sportrecht – Eine Begriffserläuterung, 3rd edition, Zürich 2014, p. 41 ff.; HAAS /HOSSFELD (see footnote 15), p. 322.

46 PFISTERER (see footnote 29), para. 10 on Art. 354 ZPO; WEBER-STECHER (see footnote 39), para. 20 on Art. 354 ZPO; BERGER /KELLERHALS (see footnote 34), p. 85; KAUFMANN-KOHLER /RIGOZZI (see footnote 34), p. 100; MÖHLER (see footnote 2), p. 69.

47 COURVOISIER/WENGER (see footnote 21), para. 7 and 20b on Art. 354 ZPO; GIRSBERGER, in: BaslerKomm ZPO, para. 10b on Art. 354 ZPO; PLANINIC/ERK (see footnote 3), paras. 5 f. on Art. 354 ZPO and para. 2b on Art. 381 ZPO.

cable law.[48] Others argue that the "free disposability" is to be decided according to the *lex arbitri*, i.e., Swiss law, mainly because each state, as guarantor of both the recognition and enforcement of arbitral awards, intends to define the arbitrability according to its own social, political, and economic preferences.[49] Finally, AMBAUEN argues that the "free disposability" is to be assessed according to the basic values of Swiss law, as discerned from the substantial and procedural Swiss laws.[50]

35 As has been shown, the parties to an employment contract are free to opt-out altogether of Art. 353 ff. SCCP, provided that this does not constitute a mere circumvention of the law (see above, para. 30). If the parties opt-out, the arbitrability of the employee's claims is assessed under Art. 177(1) SPILA. This provision does not require the employee's claims to be freely disposable at all (see above, para. 25). Since the employer and the employee may altogether opt-out of the "free disposability"-requirement, they must – "*a maiore ad minus*" – also be able to have the "free disposability" in terms of Art. 354 SCCP assessed under the applicable law chosen by them. Again, this freedom is limited by the prohibition of mere circumvention of the law.

D. *Follow-up Question 4:* Does BGE 136 III 467 Apply to All Employees Irrespective of Their Position within the Employer Company?

36 An additional follow-up question is whether BGE 136 III 467 takes into consideration the employee's position within the employer company. In other words, does the decision apply in the same way to the CEO of an international company as it does to a regular "blue-collar worker"?

37 Unlike the SLA[51], Art. 361 and Art. 362 CO do not consider the employee's position within the employer company. If they list a provision of the CO as mandatory, this provision is mandatory for the CEO of an international company in the same way as it is for his subordinates.[52] Hence, BGE 136 III 467 applies to all employees within an employer company, regardless of their

48 STACHER (see footnote 29), para. 11 on Art. 354 ZPO; DASSER (see footnote 24), para. 7 on Art. 354 ZPO; STREIFF/VON KAENEL /RUDOLPH (see footnote 9), p. 67.

49 FRICK (see footnote 30), para. 8 on Art. 354 ZPO; SCHWANDER, in: DIKE ZPO, para. 8 on Art. 381 ZPO.

50 AMBAUEN (see footnote 23), p. 157 f.

51 Cf. Art. 3(d) SLA.

52 GEISER, in: Stämpfli ArG, para. 19 Art. 3 ArG.

position in the hierarchy.[53] Unsurprisingly, the Swiss Supreme Court, in BGE 136 III 467, did not consider Y's position within X SA in any way (see above, paras. 11 ff.).

E. *Follow-Up Question 5:* Are the Employee's Claims That Do Not Result from Mandatory Laws or from a Collective Employment Agreement Arbitrable in Terms of Art. 354 SCCP? And Is an Arbitration Clause Concluded at the Beginning of the Employment Relationship Valid Regarding these Claims?

A further follow-up question considers whether the employee's claims are arbitrable and the arbitration clause valid insofar that those claims do not result from mandatory employment laws or a collective employment agreement. 38

According to the prevailing legal doctrine, the employee's claims that do not result from mandatory employment laws are *arbitrable*.[54] The prevailing doctrine is to be followed. 39

The question of the arbitration clause's *validity* is a bit more complex. Under Swiss law in general, the invalidity of certain terms of a contract does not necessarily lead to the invalidity of the contract as a whole. However, if there is cause to assume that the contract would not have been concluded without the invalid terms, the contract is entirely invalid.[55] If one applies this principle to the problem at hand (i.e., an arbitration clause that is invalid with respect to the employee's claims resulting from mandatory employment laws), the arbitration clause remains valid with respect to the employee's arbitrable claims, *unless* there is cause to assume that the parties would not have agreed on an arbitration clause that turned out to be valid only for some of the employee's 40

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53 This mechanical approach becomes somewhat more flexible if one considers the employee's compensation, if any, for his agreement to the arbitration clause (see below, paras. 40 ff.).

54 COURVOISIER/WENGER (see footnote 21), para. 19a on Art. 354 ZPO; STACHER (see footnote 29), para. 17 on Art. 354 ZPO; DASSER (see footnote 24), para. 15 on Art. 354 ZPO; BEFFA (see footnote 20), p. 1439 and 1442; PIETRUSZAK (see footnote 19), para. 9; WILDHABER /WILCKE (see footnote 20), p. 165; STÖCKLI /CASEY-OBRIST (see footnote 37), p. 645 f.; CASEY-OBRIST (see footnote 20), p. 110.

55 Art. 20(2) CO; cf. GIRSBERGER (see footnote 47), para. 45 on Art. 357 ZPO, for the applicability of Art. 20 CO to arbitration clauses in terms of Art. 357 SCCP.

claims. Whether that is the case depends on the circumstances of the individual case.[56]

F. *Follow-Up Question 6:* Do the Employee's Claims That Are Covered by Art. 341(1) CO Become "Freely Disposable" in Terms of Art. 354 SCCP if the Employee Is Appropriately Compensated for His Agreement to the Arbitration Clause?

41 According to the Swiss Supreme Court, the employer and employee may terminate their employment relationship by a termination agreement. In such an agreement, the employee may even waive claims that are covered by Art. 341(1) CO, if he is appropriately compensated for his waiver.[57] Since BGE 136 III 467 is based on Art. 341(1) CO, another follow-up question is whether the employee's claims that are covered by Art. 341(1) CO become "freely disposable" in terms of Art. 354 SCCP if the employee receives appropriate compensation for his agreement to the arbitration clause.

42 Insofar as Swiss legal doctrine discusses this question, it answers it in the negative. The respective authors provide two reasons for their view: [58]

- First, the *general* disposability over a claim is decisive for the "free disposability" in terms of Art. 354 SCCP. All of the employee's claims that are covered by Art. 341(1) CO lack this general disposability. The *individual* disposability is irrelevant. Hence, if an employee's claim is covered by Art. 341(1) CO, the respective claim is not arbitrable, regardless of any compensation (and regardless of whether, as a result of such compensation, the employee's claim is disposable).
- Second, for reasons of foreseeability and legal certainty, the Swiss Supreme Court's case law regarding termination agreements must not be applied to the arbitrability in terms of Art. 354 SCCP.

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56 Cf. also KOLLER /SENNHAUSER (see footnote 43), p. 452 f. and PIETRUSZAK (see footnote 19), para. 9; In BGE 136 III 467, the Swiss Supreme Court merely stated that the arbitration clause was invalid, without discussing Y's claims that do not result from mandatory employment laws. Confirmed by BGE 4A_7/2018.

57 Cf. STREIFF /VON KAENEL /RUDOLPH (see footnote 9), p. 912 f. with further references.

58 PFISTERER (see footnote 29), para. 26 on Art. 354 ZPO; STACHER (see footnote 29), para. 17 on Art. 354 ZPO.

This view is not convincing. First, to assess whether a termination agreement complies with Art. 341(1) CO, one must consider, among other things, the employee's compensation for his waivers. Hence, the *individual* disposability is decisive for Art. 341(1) CO. Consequently, the individual disposability must also be decisive for Art. 354 SCCP, as well as BGE 136 III 467 that is based on Art. 341(1) CO. Otherwise, Art. 354 SCCP would provide protection that goes beyond that of Art. 341(1) CO. 43

Second, neither foreseeability nor legal certainty speak against the application of the Swiss Supreme Court's case law regarding termination agreements (see above, para. 40) to arbitration clauses. The respective authors argue that, at the time of the conclusion of the arbitration clause, one cannot foresee the employee's future disadvantages (if any) resulting from his agreement to the arbitration clause. The same is also true, however, for termination agreements in general. At the moment in time when a termination agreement is signed[59], it is always uncertain whether the employer's payments to the employee will appropriately compensate the employee or whether the employee will actually be under- or overcompensated. For example, if an employee has a contractual notice period of three months and agrees with his employer in a termination agreement that (i) the employment relationship is terminated with immediate effect; (ii) he is paid his salary for the three months' notice period upfront; and (iii) he is compensated with an additional one month's salary for his waiver of the (mandatory) protection against termination while being unable to work[60], then this termination agreement is valid, and the employment relationship is terminated with immediate effect, *even though – at the time of the agreement's conclusion – it is altogether uncertain* whether (and if so, for how long) the employee will become unable to work during the following three months. In other words, since there is uncertainty about the appropriateness of the employee's compensation in any termination agreement, this does not speak against applying the Swiss Supreme Court's case law regarding termination agreements (see above, para. 40) to the employee's agreement to the arbitration clause. 44

Third, if one considers the employee's compensation for his agreement to the arbitration clause, the mechanic approach of BGE 136 III 467 (see above, paras. 35 f.) becomes a bit more flexible. In particular, this makes room to consider the employee's hierarchical position within the employer company, since the "appropriate compensation", if any, may be different for the CEO of an international company than for a regular "blue-collar worker". 45

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59 Which is the moment in time when the employee's compensation for his waiver must seem to be appropriate, cf. STREIFF/VON KAENEL/RUDOLPH (see footnote 9), p. 1293; BGE 4A_25/2014, Rec. 6.2.

60 Art. 336c CO, which is mandatory according to Art. 362 CO.

G. *Follow-Up Question 7:* At what Moment in Time Must the Employee's Claims Be "Freely Disposable" in Terms of Art. 354 SCCP for the Arbitration Clause to Be Valid?

46 The Swiss Supreme Court, in BGE 136 III 467, essentially decided that Y's claims were not arbitrable in terms of Art. 5 CA (now: Art. 354 SCCP); thus, the arbitration clause was invalid (see above, paras. 11 ff.). Another follow-up question arises: At what moment in time must the employee's claims be "freely disposable" in terms of Art. 354 SCCP for the arbitration clause to be valid.[61]

47 Unfortunately, in BGE 136 III 467, the Swiss Supreme Court did not clearly state the moment in time it was referring to. However, Y filed his claims in June 2008. At that time, the one-month deadline following the end of the employment relationship, stipulated in Art. 341(1) CO, had already passed. Hence, the initiation of legal proceedings does not seem to be the decisive moment in time for the Swiss Supreme Court.[62]

48 In legal doctrine, different answers to this question can be found. WILDHABER/WILCKE argue that the employee must already be able to dispose over his claims when the arbitration clause is signed or when the claim has come into existence, respectively. Otherwise, the arbitration clause is invalid.[63] STACHER and DIETSCHY argue that the arbitration clause is invalid with respect to claims resulting from mandatory employment laws if it is concluded during the employment relationship or within one month following its termination, irrespective of when the legal proceedings are initiated.[64] COURVOISIER/WENGER view that the employee's claims become freely disposable at the moment in time when the dispute with the employer has arisen and the employee has some basic knowledge about the relevant facts. As of this moment, the employee may validly agree to a settlement about claims covered

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61 See Section H, follow-up question No. 8, for the (in-)arbitrability's effects on the question whether the employee may render an appearance before the arbitral tribunal (*Einlassung*).

62 According to the reading of BGE 136 III 467 by STACHER, Rechtsprechung des Bundesgerichts in Schiedssachen (2009 und 2010), in: AJP/PJA 2011, p. 129, the moment in time when the arbitration clause was agreed upon was decisive also for the Swiss Supreme Court.

63 WILDHABER /WILCKE (see footnote 20), p. 165.

64 STACHER (see footnote 29), para. 17 on Art. 354 ZPO; DIETSCHY, Les conflits de travail en procedure civile Suisse, Basel 2011, p. 124.

by Art. 341(1) CO and thus also to the arbitration clause.[65] Finally, BEFFA concludes that the arbitration clause remains fully valid for all of the employee's claims if the legal proceedings are initiated later than one month after the end of the employment relationship. Hence, for BEFFA, the initiation of the legal proceedings is that decisive moment in time.[66]

Art. 354 SCCP stipulates the arbitrability in domestic arbitration. The provision is mandatory.[67] If the parties agree on an arbitration clause regarding an unarbitrable claim, the arbitration clause is (partially) invalid[68] because of its "illegality" (*Widerrechtlichkeit*) as a result of the breach of Art. 354 SCCP.[69] To assess whether an agreement is "illegal" (*widerrechtlich*), the decisive moment in time is the conclusion of the agreement.[70] Consequently, the view of WILDHABER /WILCKE is the logical conclusion of BGE 136 III 467. The employee's claims must be "freely disposable" in terms of Art. 354 SCCP when the arbitration clause is agreed upon or the respective claim has come into existence, respectively. Otherwise, the clause is (partially) invalid with respect to these claims as a result of the claims' inarbitrability.[71] 49

65 COURVOISIER /WENGER (see footnote 21), para. 20 on Art. 354 ZPO.

66 BEFFA (see footnote 20), p. 1443.

67 DASSER (see footnote 24), para. 24 on introductory comments to Art. 353 to 399 ZPO.

68 PLANINIC /ERK (see footnote 3), paras. 1 and 14 on Art. 354 ZPO; GIRSBERGER (see footnote 47), para. 13 on Art. 357 ZPO; BERGER /KELLERHALS (see footnote 34), p. 62.

69 See GIRSBERGER (see footnote 47), para. 45 on Art. 357 ZPO; Pursuant to HUGUENIN/ MEISE, in: BaslerKomm OR I, para. 15 on Art. 19/20 OR, "illegal" (*widerrechtlich*) in terms of Art. 19/20 CO includes, amongst others, a breach of a mandatory norm of public or private law. Hence, a breach of Art. 354 SCCP is an example of "illegality" in terms of Art. 19/20 CO.

70 HUGUENIN /MEISE (see footnote 69), para. 16 on Art. 19/20 OR, with further references.

71 See above, para. 39, for the discussion of the arbitration clause's partial (in-)validity in terms of Art. 20(2) CO.

H. *Follow-Up Question 8:* Does the Arbitral Tribunal Have Jurisdiction to Hear Claims Resulting from Mandatory Employment Laws or a Collective Employment Agreement if the Employee Makes an Appearance (*Einlassung*)?

50 A connected but still different follow-up question is whether the arbitral tribunal has jurisdiction to hear claims resulting from mandatory employment laws or a collective employment agreement if the employee makes an appearance without objecting to the arbitral tribunal's jurisdiction (*Einlassung*).[72]

51 Under Swiss domestic arbitration law, a party's appearance may establish the arbitral tribunal's jurisdiction if the claim in dispute *is arbitrable*, but the *arbitration clause invalid*.[73] If, however, the claim in dispute *is not arbitrable*, the party's appearance is without consequence.[74] Again, the decisive question is when the claim in dispute must be arbitrable. Pursuant to legal doctrine and case law, a party's appearance before the arbitral tribunal may be seen as an implicit conclusion of a new arbitration agreement equal to the (invalid) arbitration clause.[75] As with every arbitration agreement, the claim in dispute must be arbitrable when this new arbitration agreement was implicitly concluded.[76]

52 According to Art. 341(1) CO, the employee may freely waive all his claims after one month following the termination of his employment relationship. As of this moment, he can freely dispose over all his employment law claims, which become "freely disposable" in terms of Art. 354 SCCP and are arbitrable.[77] Hence, if the employee makes an appearance before the arbitral tribunal (*Einlassung*) later than one month following the end of the employment relationship, he implicitly concludes a new arbitration agreement about (now

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72 This question may arise if the employer first initiates the arbitration proceedings and requests declaratory relief, for example, that the employee does not have certain employment related claims against the employer.

73 Art. 359(2) SCCP and DASSER (see footnote 24), para. 14 on Art. 359 ZPO.

74 WEBER-STECHER (see footnote 39), para. 48 on Art. 354 ZPO; DASSER (see footnote 24), para. 15 on Art. 359 ZPO; different opinion BERGER /KELLERHALS (see footnote 34), p. 87.

75 GIRSBERGER (see footnote 47), para. 25 on Art. 359 ZPO.

76 See also above, para. 48, for the corresponding discussion under follow-up question 7; See also HUGUENIN/MEISE (see footnote 69), para. 16 on Art. 19/20 OR, with further references for substantive law contracts.

77 GEISER, Übersicht über die arbeitsrechtliche Rechtsprechung des Bundesgerichts 2010, in: AJP 2011, p. 243 ff., p. 251. This question needs to be distinguished from the (in-) arbitrability's effects on the validity of the arbitration clause.

entirely) arbitrable claims. As a result, the arbitral tribunal has jurisdiction to hear all claims, irrespective of whether they resulted from mandatory employment laws or a collective employment agreement.

The answer given to this follow-up question 8 does not contradict the answer given to follow-up question 7 in Section G (see above, para. 48). In both Sections G and H, the employee's claims must be arbitrable when the (new) arbitration agreement was (implicitly) concluded. In Section G / follow-up question 7, this occurred at the beginning of the employment relationship. In this Section H, the new arbitration agreement was implicitly concluded when the employee rendered his appearance. Thus, even though the decisive moments in time are different in the answers to follow-up questions 7 and 8, they are based on the same principle. 53

I. *Follow-Up Question 9:* At what Stage in the Proceedings and with what Cognition Has a State Court or an Arbitral Tribunal to Decide on the Arbitrability of the Employee's Claims and/or the Validity of the Arbitration Clause?

This final follow-up question is connected to follow-up questions 7 and 8. Here, the decisive question concerns at what stage in the proceedings and with what cognition the state court or the arbitral tribunal, respectively, must decide about the arbitrability of the employee's claims and/or the validity of the arbitration clause. 54

Here, a particularity of Swiss employment law may complicate the respective decisions. At the beginning of legal proceedings about employment law disputes, it is often unclear whether or not the employee was able to freely dispose over his claims. For example, Swiss law does not explicitly stipulate the legal nature of a bonus. Hence, if the employee's claim for a bonus is in dispute, the bonus must first legally be qualified depending on the nature of the employee's remuneration. In general, a bonus may either form part of the employee's (variable) salary or constitute a voluntary payment of the employer.[78] If it constitutes salary, it is – according to one part of the doctrine – covered by Art. 341(1) CO.[79] Otherwise, it is not.[80] In practice, the legal qual- 55

[78] STREIFF/VON KAENEL /RUDOLPH (see footnote 9), p. 331.

[79] The employee's claim for salary is stipulated in Art. 322 CO. While Art. 361 CO and Art. 362 CO do not list Art. 322 CO as mandatory, they do list various other provisions that are strongly connected to the employee's salary, e.g. the employee's salary during his inability to work due to sickness (Art. 324a CO) or his salary during vaca-

ification of a bonus often only becomes clear once the court has issued its final decision on this issue, often after lengthy proceedings over several instances.

56 Moreover, in order to answer follow-up question 9, one must apply different rules depending on whether the claim is brought before (i) a state court or (ii) an arbitral tribunal.[81]

57 *(i) If a party files a claim with a state court* and if the opposing party objects to the state court's jurisdiction because of an arbitration clause, the state court – in domestic situations – decides on its jurisdiction based on Art. 61 SCCP.[82] If, according to this provision, the parties have concluded an arbitration agreement regarding an arbitrable dispute, the state court must deny its jurisdiction, unless it declares the arbitration agreement as obviously invalid or non-performable.[83] The Swiss Supreme Court recently clarified the meaning of Art. 61 SCCP in a leading decision: [84]

- *In a first step*, the state court must decide – with free cognition – whether the parties concluded an arbitration agreement regarding an arbitrable dispute (Art. 61 SCCP, ingress).
- *In a second step*, the state court decides – with limited cognition – whether the arbitration clause is obviously invalid (Art. 61(b) SCCP).

58 Unfortunately, the Swiss Supreme Court did not explicitly state the moment in time when the dispute must be arbitrable in terms of the "first step" (see above, para. 56).[85] Essentially, there are two possibilities: The moment in

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tion (Art. 329b CO). The legal consequences of this are in dispute. According to some authors, the employee's claim for salary is covered by Art. 341(1) CO, cf. STREIFF/VON KAENEL/RUDOLPH (see footnote 9), p. 1290 f.; CASEY-OBRIST (see footnote 20), p. 84 f., with further references.

80 CASEY-OBRIST (see footnote 20), p. 88 f., with further references.

81 Pursuant to Art. 372(2) SCCP, the arbitral tribunal/state court that was called upon second has to stay the proceedings until the first called upon arbitral tribunal or state court, respectively, has rendered its decision on its jurisdiction.

82 DOMEJ in: KUKO ZPO, para. 1 on Art. 61 ZPO; cf. decision (by the High Court of the Canton of Zurich) of 5 July 2016, LA160017-O/U, for a practical example. Confirmed in BGE 4A_7/2018, Rec. 2.1.

83 Art. 61(b) SCCP.

84 BGE 140 III 367 Rec. 2.2; also MÜLLER-CHEN in: ZürcherKomm ZPO, para. 15 on Art. 61 ZPO.

85 Pursuant to BGE 4A_7/2018, Rec. 2.1, the Swiss Supreme Court seems to be of the view that the arbitrability in terms of art. 61 CCP, ingress, relates to the arbitrability at the moment in time when the arbitration clause is concluded. However, this is incorrect and complicates the state court's decision on its jurisdiction (cf. above, Foreword).

time (i) when the arbitration clause was concluded or (ii) when the state court decides on its jurisdiction. It is reasonable to argue that the relevant moment is the latter. The question whether the claims were arbitrable when the arbitration clause was concluded is only relevant for the arbitration clause's validity, which is assessed in the second step.[86]

This case law is to be applied to the main issue in BGE 136 III 467 (i.e., the invalidity of an arbitration agreement concluded at the beginning of an employment relationship with respect to claims resulting from mandatory employment law) as follows: *In a first step*, the state court must decide – with free cognition – whether (i) the employer and the employee concluded an arbitration agreement and whether (ii) the employee's claims are "freely disposable" in terms of Art. 354 SCCP (Art. 61 SCCP, ingress).[87] The decision on these two issues is not very complicated, especially because the claims need to be arbitrable in terms of Art. 61 SCCP, ingress, only when the state court decides on its jurisdiction. This will generally occur later than one month following the termination of the employment relationship, as a result of which all of the employee's claims have become arbitrable in any event (see above, para. 51). *In a second step*, the state court assesses – with limited cognition – whether the arbitration clause is obviously invalid, for example, because the employee's claims where not arbitrable when the arbitration clause was signed (see above, para. 39). Here, the state court may, for example, decide that the arbitration clause is obviously invalid if it is *entirely impossible* that the employee's claims resulted from non-mandatory employment laws.[88] 59

(ii) If the claim is first filed with the arbitral tribunal, a particularity of Swiss arbitration law comes into play.[89] According to the Swiss Supreme Court, the theory of "double relevant facts" (*doppel-relevante Tatsachen*) does not apply to the arbitral tribunal's decision about its jurisdiction. Hence, if a question is important, both for the jurisdiction of the arbitral tribunal as well as for the merits of the case, the arbitral tribunal must decide this question with full 60

86 Cf. MÜLLER-CHEN (see footnote 84), para. 22 on Art. 61 ZPO, according to whom Art. 61(b) SCCP applies, for example, to the arbitration clause's invalidity because of the claims' *lacking arbitrability*.

87 The state court is free in its discretion whether it wants to render this decision in an interim award (Art. 237 SCCP) or only in the final award (Art. 236 SCCP), cf. DOMEJ (see footnote 82), para. 6 on Art. 59 ZPO.

88 In the decision of 5 July 2016, LA160017-O/U, Rec. 4.2, the High Court of the Canton of Zurich did not discuss BGE 140 III 367 nor the two-step approach resulting from that decision.

89 For example, if the employer first filed a claim for declaratory relief, namely that the employee does not have a claim for a bonus.

cognition when it decides on its jurisdiction.[90] As has been shown (see above, para. 54), the legal nature of a bonus is important for the arbitral tribunal's decision on the merits of the bonus claim. In addition, it may be important for the question of whether the employee could freely dispose over his claim in terms of Art. 354 SCCP and, consequently, whether his claim was arbitrable and the arbitration clause is valid (see above, para. 48). Hence, the arbitral tribunal would first have to decide on the legal nature of the employee's claim for a bonus. Only once it has rendered its decision, would the parties know whether the arbitration clause is valid and the arbitral tribunal had jurisdiction to decide on the employee's claim in the first place.

61 In summary, BGE 136 III 467 does not complicate the state court's decision about its jurisdiction because (i) the dispute must be arbitrable in terms of *Art. 61 SCCP, ingress*, only when the state court decides on its jurisdiction (and not when the arbitration clause was signed)[91] and because (ii) the arbitration clause's validity in terms of *Art. 61(1)(b) SCCP* is assessed with limited cognition.[92] However, if the claims were first brought by the employer before the arbitral tribunal and if the employee objected to the arbitral tribunal's jurisdiction, the question whether the employee could freely dispose over his claims in terms of Art. 354 SCCP would be relevant both for the validity of the arbitration clause (and, hence, the arbitral tribunal's jurisdiction) as well as for the merits of the case. As a result, the arbitral tribunal would first have to decide – with free cognition – about its jurisdiction and, in particular, whether the employee could freely dispose over his claims in terms of Art. 354 SCCP. This would render the arbitral tribunal's decision about its jurisdiction considerably more difficult.

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90 BGE 141 III 294, Rec. 5.3.; also GIRSBERGER (see footnote 47), para. 8 on Art. 357 ZPO; Pursuant to Art. 359(1) SCCP, the arbitral tribunal may render the decision on its jurisdiction in an interim award or in the final award.

91 This answer does not contradict the answer given to follow-up question 7 in Part G. Part G relates to the arbitration clause's *(in-)validity* as a result of the claims' (in-) arbitrability, for which the decisive moment is the conclusion of the arbitration agreement (cf. above, para. 48). The above answer given in Section H, on the other hand, relates to the *arbitrability per se* as one of the requirements of Art. 61 SCCP, ingress. Here, the decisive moment is the state court's decision on its jurisdiction.

92 Here, the decisive moment is the conclusion of the arbitration agreement. However, since the state court's cognition is limited, this decision should not be very complicated.

VI. Assessment of BGE 136 III 467 and Conclusion

The Swiss Supreme Court's decision on the arbitrability of domestic employment law disputes is somewhat unfortunate: 62

- First and most importantly, the chosen approach is mechanic. In particular, it does not consider the employee's hierarchical position within the employer company. BGE 136 III 467 appears – on its face – to apply in the same way to a member of the employer company's top management as it does to all of the company's "blue-collar workers" (see above, paras. 35 ff.).[93]
- Second, it may lead to a split of jurisdiction between the state courts and the arbitral tribunal (see above, paras. 37 ff.).
- Third, its application is unclear, as evidenced by the various contentious answers to the follow-up questions discussed above (see above, paras. 23 ff.).
- Fourth, it may be rather difficult to assess, in advance, whether specific claims of the employee were "freely disposable", which complicates the decision of the arbitral tribunal on its jurisdiction (see above, paras. 53 ff.).

The basic cause of the above issues is the view that the employee's agreement to an arbitration clause is some sort of a waiver of his claims, which then comes into conflict with mandatory employment law. This view is incorrect or, at least, overly generalized, as has been correctly pointed out by legal doctrine (see above, para. 15). First, Swiss domestic arbitration law is highly flexible (see above, para. 3). Depending on the procedural rules that the employer and the employee agreed upon, there may be no essential differences between state court litigation and arbitration proceedings. In addition, even if there were such differences (e.g. the costs of the proceedings), their effects may be annulled because of the individual circumstances, especially (i) the amount in controversy[94], (ii) the employee's financial situation, and (iii) his legal insurance that may cover the increased costs of the arbitration proceedings. Simply put, the individuality of each dispute and each employee's circumstances (see above, paras. 35 ff.) also speak against a uniform assessment of the arbitrability for each and every dispute with each and every employee. 63

93 Cf. also FRÖHLICH (see footnote 15), p. 45. This especially applies if one does not consider the employee's compensation, if any, for his agreement to the arbitration clause (see above, paras. 40 ff.).

94 State court litigations about employment law disputes are not cost-free either if the amount in controversy exceeds CHF 30'000, cf. Art. 113(2)(d) and Art. 114(c) SCCP.

64 Even if one followed the view, however, that Swiss mandatory employment law has some kind of effect on the arbitrability of domestic employment law disputes, some of the above issues could be mitigated if one applies a slightly different approach than the one chosen in BGE 136 III 467. As has been shown, BGE 136 III 467 is based on Art. 341(1) CO (see above, paras. 11 ff.).[95] However, Art. 341(1) CO only addresses the waiver of a claim:

- that results from mandatory employment law or a collective employment agreement and
- *that already came into existence.*[96]

65 For example, Art. 341(1) CO only prohibits an employee from validly waiving his entitlements to salary payment for those times during which *he already was* unable to work due to illness.[97] However, Art. 341(1) CO does not apply if the employee agrees, on the first day of his inability to work, to waive his *future entitlements* to salary payment while being unable to work. Rather, in that case, Art. 362(1) CO applies. The employee's waiver of his future entitlements is only admissible if it does not violate Art. 324a CO in connection with Art. 362(1) CO.[98] In order to decide whether there is such violation, one must analyse whether the employee's waiver is a mere circumvention of mandatory employment law or whether the employee had a *reasonable interest* to waive his entitlements.[99] This "reasonable interest"-test is more appropriate for assessing the arbitrability of domestic employment law disputes than the mechanical test whether or not the affected claim is covered by Art. 341(1) CO, namely for the following reasons:

66 First, the reasonable interest-test somewhat reconciles the conflicting ideas upon which Swiss domestic arbitration law and Swiss employment law are based (see above, paras. 3 ff.): The employee's claims resulting from mandatory employment laws are only arbitrable if the employee had a reasonable interest to agree to arbitration. Hence, the "blue-collar worker" is somewhat protected against unreasonable agreements to arbitration clauses that are only the result of the employer's power and influence over the employee. In other words, the reasonable interest-test protects the employee also in Swiss domestic arbitration law.

67 Furthermore, the reasonable interest-test allows the circumstances of the individual case at hand to be considered (see above, paras. 35 ff.). For example, a

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95 Confirmed in BGE 4A_7/2018, Rec. 2.3.2.

96 STREIFF/VON KAENEL/RUDOLPH (see footnote 9), p. 906 and p. 1291, with further references.

97 Art. 324a CO in connection with Art. 362(1) CO and Art. 341(1) CO.

98 STREIFF/VON KAENEL/RUDOLPH (see footnote 9), p. 906 and p. 1291, with further references.

99 Ibid., p. 907; PORTMANN /RUDOLPH (see footnote 25), para. 31 on Art. 335 OR.

member of an international company's top management, with a public reputation to lose, may have a reasonable interest in agreeing, *in advance*, to dispute resolution in confidential arbitration proceedings. In contrast, it would be more difficult to show that a regular "blue-collar worker" has a reasonable interest in agreeing to an arbitration clause in his employment contract. Still, depending on the individual circumstances, he might have such an interest.

68 In addition, if one applied the reasonable interest-test, a specific claim of the employee would not be arbitrable when (i) the claim resulted from mandatory employment law *and cumulatively* (ii) the employee had no reasonable interest to agree to the arbitration clause. Hence, the state court or arbitral tribunal, respectively, could first focus on the employee's "reasonable interest" when deciding on its jurisdiction. If the employee had such "reasonable interest", the (potentially rather complicated) question of whether the employee's claim resulted from mandatory law would be irrelevant for the decision on jurisdiction (see above, paras. 53 ff.).

69 Finally, the reasonable interest-test is also in line with current tendencies in Swiss employment law. For those employees that are covered by the SLA[100], the Swiss legislator recently revised the provisions of the first decree to the SLA regarding timekeeping. According to the revised Art. 73a(1) of Decree No. 1 to the SLA, an employee may agree with his employer to waive the keeping of his worktime if (i) this possibility is provided for in a collective employment agreement, (ii) the employee is highly autonomous in the organization of his work and worktime and (iii) he earns an annual gross salary of more than CHF 120'000. Simply put, the Swiss legislator recognized that, even for those employees that are covered by the SLA, the appropriate level of protection against excessive worktime depends on the employee's individual hierarchy and autonomy. The same idea also applies to the "protection" of an employee against dispute resolution in arbitration proceedings. The reasonable interest-test follows this tendency by considering the level of protection that the individual employee needs.

70 It is unfortunate that the reasonable interest-test was not applied by the Swiss Supreme Court. Essentially, this is a result of its practice to assess termination agreements under Art. 341(1) CO instead of Art. 361 and 362 CO, even though these agreements usually address only the employee's *future* claims. Against this background, it is nothing but logical that the Swiss Supreme Court also applied the same practice to the assessment of arbitration clauses agreed upon at the beginning of the employment relationship. If the Swiss Supreme Court upholds its practice that mandatory employment law has some effects on the arbitrability in terms of Art. 354 SCCP, it would be reasonable to amend that practice and apply the reasonable interest-test instead of the mechanic "Art. 341(1) CO"-test.

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100 Cf., especially, Art. 3(d) SLA.

About the Author

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Revision of Arbitral Awards in Switzerland – Procedural Aspects

Nicolas Pellaton

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I. Introduction

The mechanisms by which one can call an arbitral award into question differ from country to country[1] and are generally specific to arbitration in their nature and/or terms. In Switzerland, the following means are available: an action for annulment, a request for revision and a request for correction or interpretation.[2] 1

The present paper will focus on the procedural aspects relating to revision of arbitral awards rendered in Switzerland. Such procedural aspects will be examined in parallel for both domestic arbitration (Part III.) and international arbitration (Part IV.). 2

After general considerations on the concept of revision (Part II.) and general remarks on revision (Section III.A. and Section IV.A), the following aspects will be analysed: the decisions that can be subject to revision (Section III.B. and Section IV.B.), the competent authority to rule on requests for revision (Section III.C. and Section IV.C.), other admissibility requirements (Section III.D. and Section IV.D.), the proceedings (Section III.E. and Section IV.E.) and the decision on the request for revision (Section III.F. and Section IV.F.). Subsequently, the arbitration proceedings after a positive decision on the request for revision has been rendered (Section III.G. and Section IV.G.) and the decisions that can be taken at that stage (Section III.H. and Section IV.H.) will be analysed. The possibility to waive the right to apply for revision will also be examined (Section III.I. and Section IV.I.). Finally, brief conclusions will be made (Part V.). 3

II. The General Concept of Revision

As a general matter, revision can be defined as an extraordinary means of appeal, exceptional in nature, through which an enforceable judgment may be annulled (in whole or in part) and the case may be reassessed under specific 4

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1 See POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, para. 843 ff.; RIGOZZI/SCHÖLL, Die Revision von Schiedssprüchen nach dem 12. Kapitel des IRPG, Basel 2002, p. 5-8; HIRSCH, Révision d'une sentence arbitrale 12 ans après, in: Jusletter of 04.01.2010, para. 51-61; VOSER/GEORGE, Revision of Arbitral Awards, in: TERCIER (Ed.), Post Award Issues, New York 2011, p. 43 ff., p. 44-52.

2 For statistics on revision of arbitral awards in Switzerland, see DASSER/WÓJTOWICZ, Challenges of Swiss Arbitral Awards – Updated and Extended Statistical Data as of 2015, in: ASA Bulletin 2016, p. 280 ff., p. 283 ff.; VOSER/GEORGE (see footnote 1), p. 66-67.

and very limited circumstances.[3] Revision, which is a concept more familiar to civil law[4], aims at correcting a judgment that takes into consideration facts which retrospectively turn out to be incomplete or erroneous; however, revision is not a means to adapt the judgment to subsequent changes in the circumstances.[5] In Switzerland, two situations are traditionally recognized for the revision of judgments: (i) the decision has been influenced to the detriment of one of the parties by a felony or misdemeanour conduct or (ii) a party later discovers facts or important evidence[6] that could not have been submitted in the previous proceedings.

5 Revision is thus a remedy that primarily relates to *res judicata*.[7] In that sense, it should be noted that a judgment which has the effect of *res judicata* is undisputable, while a judgment that is no longer subject to an extraordinary appeal such as revision is irrevocable.[8] Revision "*is a compromise between, on the one side, legal certainty regarding the validity of decisions and, on the other side, justice not to maintain a judgment flawed in its foundations*"[9]. Revision serves to establish material truth, but it does not necessarily achieve such a purpose.[10]

6 Revision is generally considered as a subsidiary legal remedy, in comparison to other legal remedies. Thus, where grounds for revision are discovered

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3 See e.g. POUDRET/BESSON (see footnote 1), para. 843; PONCET, Obtaining Revision of „Swiss" International Arbitral Awards – Whence After *Thalès*?, in: Stockholm International Arbitration Review (SIAR) 2/2009, p. 39 ff., p. 41; BGE 4A_688/2012 and 4A_126/2013, Rec. 5.3.1; BGE 4A_666/2012, Rec. 5.2.1, RSPC 5/2013, p. 428 ff.

4 PONCET (see footnote 3), p. 41.

5 BGE 4A_105/2012, Rec. 2.2 (not published in BGE 138 III 542 but reproduced in RSPC 5/2012, p. 429), referring to BGE 86 II 385, Rec. 1, and BGE 73 II 123, Rec. 1. See also BGE 140 III 278, Rec. 3.3.

6 Cf. BGE 4P.285/2001, Rec. 5.2 (and references): "[i]*n the context of a review limited to the abstract causality, evidence will be considered as decisive when it can alter the disputed decision and change the conviction of the judge* […]" (free translation).

7 Cf. SCHWEIZER, Le recours en révision – Spécialement en procédure civile neuchâteloise, Diss. Bern 1985 [cited: SCHWEIZER, Diss.], p. 106; see also GÖKSU, Schiedsgerichtsbarkeit, Zurich St. Gallen 2014, para. 2246.

8 BOHNET, Procédure civile, 1st edition, Basel 2011, p. 271; ZOLLER, Observations sur la révision et l'interprétation des sentences arbitrales, in: Annuaire français de droit international, vol. 24, 1978, p. 327 ff., para. 7.

9 BGE 118 II 199, Rec. 2b/cc (free translation). See also BGE 142 III 521, Rec. 2.1; HIRSCH (see footnote 1), para. 39.

10 Cf. SCHWEIZER, Summary and Commentary on the Swiss Supreme Court Decision BGE 118 II 199, in: RSDIE 7/1993, p. 209 ff. [cited: SCHWEIZER, RSDIE], p. 213; see also BGE 142 III 521, Rec. 2.1.

within the time limit for setting aside the arbitral award[11] and where both legal means are used in parallel[12], the motion to set aside will, as a general rule, be dealt with first while the revision proceedings will be stayed until a decision on the motion to set aside is rendered.[13]

7 According to the Swiss conception of revision in civil proceedings, the revision procedure is divided into two parts: (1) the proceedings and decision on the request for revision (*rescindant*, *judicium rescindens*; the "***rescindant***"), after which the judgment is annulled if the invoked ground(s) for revision turn(s) out to be admissible and founded; (2) the further proceedings and new decision on the admissibility/merits of the case (*rescisoire*, *judicium rescissorium*; the "**rescisoire**"). In the first part (*rescindant*), the existence of a right to have the case reassessed is definitively decided upon by the entry into force of the decision on *rescindant*. If the request for revision is granted, the proceedings are, in the second part (*rescisoire*), renewed in whole or in part,

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11 See Art. 389 SCCP taken together with Art. 77 para. 1 lit. b and Art. 100 para. 1 BGG regarding set aside proceedings against domestic arbitral awards; Art. 191 SPILA taken together with Art. 77 para. 1 lit. a and Art. 100 para. 1 BGG regarding set aside proceedings against international arbitral awards.

12 See also BGE 142 III 521 (international arbitration), Rec. 2.3.5, regarding the specific situation where a party discovers a ground for the challenge of an arbitrator after the time limit for setting aside the arbitral award has elapsed. The Supreme Court has considered, in what can be regarded as an *obiter dictum*, that it should be possible in such situations to request the revision of the arbitral award. The Supreme Court, however, decided to leave the question open (question also left open in BGE 4A_53/2017, Rec. 3.1).

13 See BGE 129 III 727, Rec. 1 (international arbitration), translated in part by MÜLLER, Swiss Case Law in International Arbitration, 2nd revised edition, Zurich 2010 [cited: MÜLLER, Swiss Case Law], p. 342-343; see also BGE 142 III 521, Rec. 2.1; VOSER/GEORGE (see footnote 1), p. 60, 63; STIRNIMANN, Revision of Awards, in: ARROYO (Ed.), Arbitration in Switzerland – The Practitioner's Guide – Commentary, Alphen aan den Rijn 2013, p. 1265 ff., para. 11. Regarding the various and complex coordination issues that may arise from such situations, see SCHWEIZER, De l'articulation des voies de droit directes contre les sentences arbitrales internationales suisses, in: BOHNET/WESSNER (Ed.), Liber Amicorum Knoepfler, Basel 2005, p. 375 ff. [cited: SCHWEIZER, Liber Amicorum Knoepfler], p. 397 ff.; DERAINS, La révision des sentences dans l'arbitrage international, in: BRINER/FORTIER/BERGER, Liber Amicorum Böckstiegel, Law of International Business and Dispute Settlement in the 21st Century, Köln 2001, para. 22-25. It should also be noted that further procedural coordination difficulties in domestic arbitration may arise from the fact that the authorities competent to rule on requests for revision and on motions to set aside are two different authorities (see BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd edition, Bern 2010 [cited: BERGER/KELLERHALS, 2010], para. 1784).

following the same procedural rules as those applicable to the proceedings that led to the initial decision.[14]

8 Revision is an extraordinary means of appeal[15], which "*means that it is a remedy that neither precludes the entry into force nor the enforcement of the decision, and which is generally limited in terms of grounds for appeal. By contrast, an ordinary means of appeal has suspensive effect and precludes the enforcement of the judgment, and allows in principle a broad review/re-examination of the matter*"[16].

9 Revision has no devolving effect (*effet dévolutif*; *Devolutivwirkung*), which means that the matter should – theoretically – not become pending in an appellate court but lie with the authority that rendered the decision.[17] In other words, revision is a means of retracting (*voie de rétractation*).[18]

10 As the competent authority for *rescindant* should theoretically be the same authority that rendered the decision whose revision is sought, a positive decision on *rescindant* could, where appropriate, be issued *uno actu* with the decision on *rescisoire*.[19]

III. Revision in Domestic Arbitration

A. General Remarks

11 The provisions of Part 3 of the Swiss Civil Procedure Code ("**SCCP**") (domestic arbitration; Art. 353-399 SCCP) apply if the seat of the arbitral tribunal is in Switzerland and if all the parties at the time the arbitration agreement was concluded had either their domicile or their habitual residence in Switzer-

14 Cf. SCHWEIZER, Diss. (see footnote 7), p. 287-288 and *passim*.

15 SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 394; GULDENER, Das Schweizerische Zivilprozessrecht, Zurich 1948, vol. II, p. 489.

16 See BGE 141 III 596, Rec. 1.4.2 (free translation).

17 See SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 389; SCHWEIZER, note ad BGE 4A_14/2012, RSPC 4/2012 p. 337 ff.; see also BGE 118 II 199, Rec. 3. See e.g. Art. 328 para. 1 *ab initio* SCCP and Art. 333 para. 1 SCCP in Swiss state court proceedings.

18 SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 394; GULDENER (see footnote 15), p. 489; see also BGE 113 Ia 62; BGE 118 II 199, Rec. 3; RIGOZZI/SCHÖLL (see footnote 1), p. 14.

19 BGE 5A_366/2016, Rec. 4 and 6.

land (Art. 353 para. 1 SCCP taken together with Art. 176 of the Swiss Private International Law Act, "**SPILA**").[20]

The SCCP expressly regulates revision in domestic arbitration in Art. 396-399 SCCP. Revision procedure in domestic arbitration is considered to be imperatively and exhaustively regulated by Art. 396-399 SCCP, which means that other procedural rules set forth in the SCCP do not apply.[21] 12

B. Decisions Subject to Revision

1. Domestic Nature

Decisions subject to revision under Art. 396-399 SCCP are those rendered in domestic arbitration under the provisions of Part 3 of the SCCP. 13

The parties cannot elect to opt out of the provisions of Chapter 12 of the SPILA (international arbitration) and (instead) opt into the provisions of Part 3 of the SCCP (domestic arbitration) based on Art. 176 para. 2 SPILA *after* a decision that may be subject to revision has been issued.[22] In other words, there can be no opt-out/opt-in agreement limited to the annulment/revision actions.[23] 14

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20 One can already note that the parties can elect to opt out of the provisions of Part 3 of the SCCP on domestic arbitration and opt into the provisions of Chapter 12 of the SPILA (Art. 176-194 SPILA) on international arbitration (Art. 353 para. 2 SCCP) and that, similarly, opt out of the provisions of Chapter 12 of the SPILA on international arbitration and opt into the provisions of the SCCP on domestic arbitration (Art. 176 para. 2 SPILA).

21 Under the former ICA: JOLIDON, Commentaire du Concordat suisse sur l'arbitrage, Bern 1984, para. 1 on Art. 41-43 ICA; LALIVE/POUDRET/REYMOND, Le droit de l'arbitrage interne et international en Suisse – Edition annotée et commentée du Concordat sur l'arbitrage du 27 mars 1969 et des dispositions sur l'arbitrage international de la Loi fédérale du 18 décembre 1987 sur le droit international privé, Lausanne 1989, Art. 41 ICA, p. 234, Art. 42 ICA, p. 237. Under the SCCP: among others, GÖKSU (see footnote 7), para. 2296-2297.

22 Conversely, the parties cannot elect to opt out of the provisions of Part 3 of the SCCP in favor of the provisions of Chapter 12 of the SPILA based on Art. 353 para. 2 SCCP *after* a decision that may be subject to revision has been issued.

23 KAUFMANN-KOHLER/RIGOZZI, International Arbitration – Law and Practice in Switzerland, Oxford 2015 [cited: KAUFMANN-KOHLER/RIGOZZI, International Arbitration], para. 2.43.

2. Types of Decisions

15 The SCCP does not specify which types of decisions are subject to revision under Art. 396-399 SCCP. The opinions expressed in legal doctrine are unanimous on that point: the decisions which can be revised are (i) preliminary or interim awards (e.g. on the jurisdiction of the arbitral tribunal), (ii) partial awards (e.g. on liability) and (iii) final awards (which should include awards on agreed terms)[24].

16 The decisive criterion is whether or not the decision is binding for the arbitral tribunal itself. Therefore, decisions which are subject – for any reason whatsoever – to a new assessment or a reassessment by the arbitral tribunal in the course of the proceedings, such as procedural orders or interim measures, do not fall under the provisions of the SCCP on revision.[25]

17 The Swiss Supreme Court (the "**Supreme Court**") considered in that respect that "[f]*inal awards (*Endentscheide*) have the force* […] *of* res judicata […]. *Partial awards (*Teilentscheide*)* […] [are decisions] *in which the arbitral tribunal shall decide on a quantitatively limited part of the claims submitted, or, on one of the many contentious claims* [; these decisions] *too have the force of* res judicata [...] *but only for the claims on which the arbitral tribunal has ruled, excluding other or further conclusions* [...]. *As to preliminary or interim awards (*Vor- or Zwischenentscheide*), that govern preliminary procedural and substantive issues, they do not have the force of* res judicata*; nonetheless, and unlike simple procedural orders or guidelines that can be modified or revoked in the course of proceedings, preliminary or interim awards bind the arbitral tribunal from which they originate* […]. *Thus, to give one example, the arbitral tribunal that ruled, by an interim award, on the respondent's liability is bound by its decision on that particular point when it must render a decision, in its final award, on the quantum of the claimant's claims* […]".[26]

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24 Cf. BGE 139 III 133 in state court civil procedure: the state court settlement under Art. 241 SCCP, which has the effect of a decision entered into force, can be called into question by the means of the revision procedure under Art. 328 ff. SCCP.

25 Cf. BERGER/KELLERHALS, 2010 (see footnote 13), para. 1763; LALIVE/POUDRET/REYMOND (see footnote 21), Art. 41 ICA p. 234; cf. also SCHÜPBACH, Les voies de recours en matière d'arbitrage selon l'avant-projet de code de procédure civile, in: BOHNET/WESSNER (Ed.), Liber Amicorum Knoepfler, Basel 2005, p. 401 ff., p. 412-414; GULDENER (see footnote 15), p. 490.

26 BGE 128 III 191, Rec. 4a (free translation).

Expert opinions are not subject to revision[27] as they are (only) a type of evidence (see Art. 168 para. 1 lit. d SCCP and Art. 183 ff. SCCP). The issue whether arbitrator's expert opinions (*expertises-arbitrage*, see Art. 189 SCCP) are subject to revision is left open. 18

3. Decision of the Arbitral Tribunal vs. Decision of the Swiss Supreme Court

The author refers, *mutatis mutandis*, to the developments made under Section IV.B.3. below. 19

C. Competent Authority to Rule on *Rescindant*

1. The Solution Provided for by the SCCP

The request for revision must be filed with the highest cantonal court (the "**cantonal court**") designated by the canton in which the arbitral tribunal has its seat (Art. 356 para. 1 lit. a SCCP taken together with Art. 396 para. 1 SCCP).[28] This solution corresponds to the solution prevailing under the former Intercantonal Concordat on Arbitration of 1969 ("**ICA**") (cf. Art. 3 lit. f ICA).[29] 20

It arises from the preparatory works of the former ICA that the decision to grant cantonal state courts the power to rule on applications for revision of arbitral awards – instead of empowering the arbitral tribunals which rendered such awards – was deliberate. Indeed, state courts had been regarded as offering better guarantees to rule on the *rescindant*.[30] 21

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27 Cf. MÜLLER, Swiss Case Law (see footnote 13), p. 352 and references.

28 In Geneva: the Civil Chamber of the Geneva High Court (Chambre civile de la Cour de justice; Art. 120 para. 1 lit. a of the Judiciary Organization Act of 26.09.2011, RSG E 2 05). In Zurich: the Obergericht (Zurich High Court; Art. 46 of the *Gesetz vom 10.05.2010 über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess*, GS/ZH 211.1). For an example, see BGE 138 III 542, Rec. 1.1.

29 SCHWEIZER, Commentary on Art. 396-399 SCCP, in: BOHNET/HALDY/JEANDIN/SCHWEIZER/TAPPY (Ed.), Code de procédure civile commenté, Basel 2011 [cited: SCHWEIZER, SCCP Commenté], para. 18 on Art. 396 SCCP; cf. also Art. 42 ICA.

30 JOLIDON (see footnote 21), para. 25 on Art. 41-43 ICA; cf. also SCHWEIZER, SCCP Commenté (see footnote 29), para. 16 on Art. 396 SCCP.

22 More specifically, according to this view, which is shared by the case law and supported by the majority of legal scholars, state courts are more likely to ensure the efficiency of applications for revision, due to their permanent nature. By contrast, the mission of an arbitral tribunal ends with the issuance of the award, and it would be too burdensome to reconstitute the arbitral tribunal, sometimes many years after the award has been rendered.

23 As will be discussed in detail with respect to the revision of international arbitral awards (cf. Section IV. below), this argument is not convincing.[31]

24 One can already note that the solution provided for by the SCCP regarding the revision of domestic arbitral awards departs from the general rule prevailing in Swiss civil state court proceedings, according to which a request for revision must be filed with the authority that issued the decision whose revision is sought (*iudex a quo*).[32]

25 The "*iudex a quo*" rule also prevails in other countries. In France, for example, an application for revision brought against a French domestic arbitral award (cf. Art. 1502 para. 1 CPC-F) must be lodged with the arbitral tribunal that rendered the contested arbitral award (Art. 1502 para. 2 CPC-F).[33] However, in the event that the arbitral tribunal cannot be reunited, the application for revision can be lodged with the court of appeal that would have had jurisdiction to decide on other appeals against the arbitral award (Art. 1502 para. 3 CPC-F).[34]

26 One can also note that the solution provided for by the SCCP regarding the revision of domestic arbitral awards (i.e., to empower cantonal high courts) is

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31 Cf. also SCHWEIZER, SCCP Commenté (see footnote 29), para. 18 on Art. 396 SCCP and para. 5 on Art. 399 SCCP; SCHÜPBACH (see footnote 25), p. 418.

32 SCHWEIZER, SCCP Commenté (see footnote 29), para. 17 on Art. 396 SCCP; BERGER/KELLERHALS, 2010 (see footnote 13), para. 1774, 1787; GULDENER (see footnote 15), p. 489, 523; BGE 118 II 199, Rec. 3. See also para. 9 above.

33 Art. 1502 CPC-F applies when the arbitral tribunal was established on or after 01.05.2011 (cf. Art. 3 para. 2 of the Decree n° 2011-48 of 13.01.2011 on the review of arbitration, JORF n° 0011 of 14.01.2011, p. 777).

34 As an example, in the matter "Crédit Lyonnais", the "*Consortium de réalisation*" (the organization responsible for managing the liabilities of the Crédit Lyonnais bank) filed a request for revision on 27.06.2013 with the Court of Appeal of Paris on the basis of Art. 1491 of the former CPC-F (version in force until 30.04.2011) against the arbitral award that granted, on 07.07.2008, the sum of EUR 405 mio (EUR 45 mio of which were compensation for moral damage) to Mr. Bernard Tapie (see <http://www.lemonde.fr/societe/article/2013/06/28/affaire-tapie-l-etat-a-depose-un-recours-en-revision-contre-l-arbitrage_3438380_3224.html>; <https://fr.wikipedia.org/wiki/Affaire_Tapie_-_Cr%C3%A9dit_lyonnais#cite_note-73> (accessed on 17.05.2018)).

in conflict with Art. 389 para. 1 SCCP that appoints the Supreme Court as the competent court to hear actions for annulment (*iudex ad quem*) against the same domestic arbitral awards.[35] BERGER and KELLERHALS consider in this respect that it would have been more appropriate to vest the Supreme Court with jurisdiction to decide on requests for revision of domestic arbitral awards as well.[36]

One can finally note that the preliminary draft bill of 11 January 2017 on the modification of Chapter 12 of the SPILA[37] neither contains any provision amending the provisions of Part 3 of the SCCP with respect to the authority competent to decide on *rescindant* nor provides any discussion in that respect. This is regrettable as the current revision would have been a good opportunity to consider unifying the rules on competence regarding actions for revision in domestic and international arbitration. 27

2. (No) Possibility of Derogating from the Solution Provided for by the SCCP

As mentioned above[38], the procedural rules pertaining to the revision of domestic arbitral awards are considered to be imperatively and exhaustively regulated by the SCCP. Therefore, the parties cannot in principle validly agree on vesting the/an arbitral tribunal with jurisdiction to rule on a request for revision of a domestic arbitral award (*rescindant*).[39] In the author's opinion, this solution remains questionable as it restrains the contractual freedom of the parties (cf. principle of party autonomy). 28

35 SCHWEIZER, SCCP Commenté (see footnote 29), para. 19 on Art. 396 SCCP.

36 Cf. BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015 [cited: BERGER/KELLERHALS, 2015], para. 1949; BERGER/KELLERHALS, 2010 (see footnote 13), para. 1784.

37 See para. 66 below.

38 Cf. para. 12.

39 MRÁZ, in: BaslerKomm ZPO, para. 6 on Art. 396 SCCP; HIRSCH (see footnote 1), para. 44 and footnote 88; comp. SCHÜPBACH (see footnote 25), p. 418.

D. Other Admissibility Requirements

1. Parties (Standing to Sue; Interest in Bringing Proceedings)

29 Revision of a domestic arbitral award can only be requested by a party to the proceedings that led to the arbitral award in question, or by its successor(s).[40]

30 The requesting party must establish that it has a specific and actual interest in the annulment and reiteration[41] of (all or part of) the arbitral award in question.[42] According to BERGER and KELLERHALS, the fact that an arbitral award has already been successfully enforced is not a sufficient reason to prevent its revision.[43] However, legal doctrine is divided on this issue; reference is made in this respect to the developments and references made below regarding the revision of international arbitral awards.[44]

31 Should the requesting party have no standing to sue and/or no legal interest in bringing proceedings, the request for revision is to be declared inadmissible, which means that the merits of the request will not be examined.

2. Time Limits

32 According to Art. 397 para. 1 SCCP, a request for revision must be filed within 90 days of discovery of the ground(s) for revision (relative time limit).[45] According to Art. 397 para. 2 SCCP, the right to request revision expires 10 years after the arbitral award comes into force (absolute time limit)[46], except in case of an arbitral award affected by a criminal offense in the sense of Art. 396 para. 1 lit. b SCCP.[47]

33 The statutory time limits set out in Art. 397 SCCP are mandatory; they can neither be extended contractually by the parties nor by the court (cf. Art. 144

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40 BGE 4A_688/2012 and 4A_126/2013, Rec. 3.

41 Cf. Sections III.F.1. and III.G. below.

42 Cf. BGE 4A_596/2008, Rec. 3.5.

43 BERGER/KELLERHALS, 2010 (see footnote 13), para. 1778; BERGER/KELLERHALS, 2015 (see footnote 36), para. 1941.

44 See para. 111.

45 For further details, see BERGER/KELLERHALS, 2015 (see footnote 36), para. 1939.

46 The former ICA provided for an absolute time limit of 5 years: see Art. 42 ICA.

47 For further details, see BERGER/KELLERHALS, 2010 (see footnote 13), para. 1776; MRÁZ, BaslerKomm ZPO, para. 1-8 on Art. 397 SCCP.

para. 1 SCCP).[48] Said time limits should, however, be suspended during judicial recesses (cf. Art. 145 SCCP) – this corresponds to the solution adopted by the Supreme Court in the context of revision of international arbitral awards.[49]

A request for revision submitted after one of the time limits provided for in Art. 397 SCCP has elapsed is inadmissible.[50] 34

3. Language(s)

The request for revision must be written in (one of) the official language(s) of the canton in which the arbitral tribunal has its seat. The same applies to the opposing party's and the arbitral tribunal's answers[51] to the request for revision. 35

The preliminary draft bill on the modification of Chapter 12 of the SPILA[52] does not contain any provision amending or supplementing the provisions of Part 3 of the SCCP with respect to the language of the request for revision in domestic arbitration. By contrast, the preliminary draft bill contains a draft new Art. 77 para. 2bis of the Swiss Supreme Court Act ("**BGG**") which provides that memorials – which includes requests for revision of international arbitral awards – can be filed with the Supreme Court in English.[53] 36

One can note, however, that it follows from the draft new Art. 77 para. 2bis BGG that decisions by the cantonal court on *rescindant* can be challenged before the Supreme Court[54] in English. 37

E. Proceedings on *Rescindant*

1. Power of Review of the Cantonal Court

A request for revision is an "unlimited" means of appeal.[55] This means that the cantonal court has a full power of review, *de facto* and *de jure*, within the 38

48 GÖKSU (see footnote 7), para. 2292-2293; LALIVE/POUDRET/REYMOND (see footnote 21), Art. 42 ICA p. 238.
49 Cf. para. 121 below.
50 For an example, cf. BGE 4A_688/2012 and 4A_126/2013, Rec. 5.3.
51 See respectively para. 40-41 below.
52 See para. 66 below.
53 See para. 124 below.
54 See Section III.F. below.

framework of the grounds for revision invoked. With regard to the nature of the review that must be carried out by the court, the author refers, *mutatis mutandis*, to the developments made below in Section IV.E.1.

2. Proceedings

39 Except for two provisions that regulate specific procedural issues (Art. 330 and 331 SCCP, applicable by reference of Art. 398 SCCP), the SCCP does not define the proceedings pertaining to the phase of *rescindant*.

40 Pursuant to Art. 330 SCCP, the cantonal court shall invite the respondent to respond to the request for revision, unless the court considers that the request is "obviously inadmissible or obviously unfounded". This refers to the admissibility/merits of the request for revision (*rescindant*) and not to the admissibility/merits of the claims that were decided upon by the arbitral tribunal and which would have to be re-examined by the same tribunal (*rescisoire*) in case of a positive decision on *rescindant*.

41 The arbitral tribunal should also be invited to comment on the request for revision.[56] It should be provided with a copy of the decision on *rescindant* as well.

42 Pursuant to Art. 331 para. 1 SCCP, the request for revision does not have suspensive effect, i.e., does not suspend the enforceability of the arbitral award.[57] Art. 331 para. 2, first sentence, SCCP, however, provides that the cantonal court may grant such suspensive effect.

43 Suspensive effect is generally granted upon request. It should be mentioned that suspensive effect may also be granted *ex officio* – even though Art. 331 SCCP does not expressly provide for such solution.[58] However, such situation seems quite unlikely to happen in practice.

44 According to the Swiss Federal Council's Message regarding the SCCP, the cantonal court seized with a request for suspensive effect shall consider the

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55 Cf. SCHWEIZER, RSDIE (see footnote 10), p. 214.

56 MRÁZ, BaslerKomm ZPO, para. 4 on Art. 398 SCCP; GÖKSU (see footnote 7), para. 2303; on this question, cf. also para. 132 below in international arbitration.

57 Cf. also BERGER/KELLERHALS, 2010 (see footnote 13), para. 1777; under the former ICA, JOLIDON (see footnote 21), para. 27 on Art. 41-43 ICA; LALIVE/POUDRET/REYMOND (see footnote 21), Art. 41 ICA p. 234; cf. also GULDENER (see footnote 15), p. 490.

58 Cf. BERGER/KELLERHALS, 2010 (see footnote 13), para. 1777; GÖKSU (see footnote 7), para. 2301. See also para. 134 below in international arbitration.

likelihood of success of the revision and the extent of the damage that a denial of suspension could cause.[59]

Art. 331 para. 2, second sentence, SCCP also allows the cantonal court to order if necessary – on demand and probably also *ex officio* – (other) protective measures, e.g. order a party who obtained suspensive effect to provide security. This provision is to be considered as taking precedence over Art. 374 SCCP which provides that the relevant state court or – unless the parties have agreed otherwise – the arbitral tribunal, may order interim measures at the request of a party.[60] 45

The requesting party and the defendant should have the possibility to reply. The right to reply derives from the right to be heard and the adversarial principle. Insofar as the right to be heard should have the same meaning and scope in arbitration as in the regular judicial system[61], the right to reply should also apply in arbitration. In practice, the Supreme Court grants the right to reply in arbitration in the context of actions for annulment;[62] the same should apply to revision of arbitral awards. 46

The cantonal court must give reasons for its decision on *rescindant* in writing (Art. 29 para. 2 Fed. Cst.; cf. also Art. 239 SCCP in civil state court procedure). The parties cannot validly renounce their right to obtain a reasoned decision by the cantonal court on *rescindant* (comp. with Art. 384 para. 1. lit. e SCCP regarding the reasoning of domestic arbitral awards).[63] 47

F. Decision on *Rescindant*

1. Types and Effects

At the stage of *rescindant*, the cantonal court may decide in three ways: (i.a) declare the request inadmissible, for example on the grounds that it is time-barred or that the requesting party lacks interest or (i.b) reject the request on the merits if the ground(s) for revision is/are not legitimate, or (ii) grant the request for revision if the ground(s) for revision is/are legitimate and, conse- 48

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59 SWISS FEDERAL COUNCIL, Message regarding the draft SCCP, Official Gazette 2006 p. 6841 ff., p. 6988; see also GÖKSU (see footnote 7), para. 2302 and references.

60 On this question, cf. also para. 136 below in international arbitration.

61 See e.g. SCHWEIZER, SCCP Commenté (see footnote 29), para. 33 ff. on Art. 393 SCCP.

62 BGE 4A_509/2013, Rec. 1.2; BGE 4A_234/2010, Rec. 2.2 *in fine* (not published in BGE 136 III 605).

63 Cf. SCHWEIZER, SCCP Commenté (see footnote 29), para. 2 on Art. 398 SCCP.

quently, annul (in whole or in part[64]) the contested arbitral award and remand the case to the arbitral tribunal for a new decision (cf. "cassatory nature") on the admissibility/merits of the case (*rescisoire*; cf. Art. 399 para. 1 SCCP).[65]

2. Legal Remedies

49 In the absence of any provision in Part 3 of the SCCP stating that the decision of a cantonal court on *rescindant* shall be final and not subject to any appeal[66,67], the cantonal court's decision on *rescindant* is subject to an appeal to the Supreme Court.[68]

50 A decision rendered by the cantonal court *rejecting* the request for revision of a domestic arbitral award (cf. situations i.a. and i.b. mentioned in para. 48 above) is a final decision (*Endentscheid*) in the meaning of Art. 90 BGG. As such, it is subject to an (immediate) appeal to the Supreme Court, without any

64 A partial annulment of the arbitral award implies that the considered issue(s) in the arbitral award is/are independent from other issue(s) of the case. See BERGER/KELLERHALS, 2010 (see footnote 13), para. 1779; LALIVE/POUDRET/REYMOND (see footnote 21), Art. 43 ICA, p. 240; MRÁZ, BaslerKomm ZPO, para. 6 on Art. 399 SCCP; cf. also GULDENER (see footnote 15), p. 491. See also, in international arbitration, BERGER/KELLERHALS, 2010 (see footnote 13), para. 1810; STIRNIMANN (see footnote 13), para. 60, 63.

65 BGE 138 III 542, Rec. 1.2; LALIVE/POUDRET/REYMOND (see footnote 21), Art. 43 ICA, p. 240; cf. also e.g. GÖKSU (see footnote 7), para. 2306. Cf. also SCHÜPBACH (see footnote 25), p. 418-419, who specifies that the parties may, after a positive decision on *rescindant*, agree to waive arbitration and initiate state court proceedings on *rescisoire*. See also, in international arbitration, BGE 134 III 286, Rec. 2; BGE 4A_666/2012, Rec. 3.1, RSPC 5/2013, p. 428 ff.; BGE 4A_12/2012, Rec. 3.1.1; PFISTERER, in: BaslerKomm SPILA, para. 97 on Art. 190 SPILA.

66 By contrast, in case the parties expressly declared that the arbitral award can be contested by way of an appeal to the highest cantonal court rather than to the Supreme Court (cf. Art. 319 para. 1 SCCP), Art. 390 para. 2, second sentence, SCCP provides that the cantonal court's decision ruling on the ordinary appeal is definitive.

67 Art. 332 SCCP, which provides that a decision on *rescindant* rendered by a state court may be challenged by way of an appeal, does not apply to revision of domestic arbitral awards. Indeed, said provision is not part of the provisions which are referred to in Part 3 of the SCCP on revision of arbitral awards: Art. 398 SCCP, which regulates the procedure of revision of domestic arbitral awards, only refers to Art. 330 and 331 SCCP (which are both applicable to revision of state court decisions).

68 BGE 138 III 542, Rec. 1.1 and references.

particular restrictions in that respect.[69] The Supreme Court confirmed such approach in a recent decision.[70]

A decision rendered by the cantonal court *granting* the request for revision and remanding the case to the arbitral tribunal (cf. situation [ii] mentioned in para. 48 above) is to be considered as an interim decision (*Zwischenentscheid*) in the meaning of Art. 93 para. 1 BGG. As such, it is subject to an immediate appeal before the Supreme Court, however, under the restrictive conditions provided by Art. 93 para. 1 BGG.[71] Such conditions should in principle be met, as an appeal against a positive decision on *rescindant*, if successful, would potentially prevent lengthy and costly discovery proceedings during the phase of *rescisoire* (cf. Art. 93 para. 1 lit. b BGG). 51

In the author's opinion, the situation presented above is satisfactory and is not to be understood as providing for a "two-stage set of recourse".[72] The author recalls in that respect that revision is a means of retracting and not an appeal *stricto sensu* in a higher court, i.e., that it does not have a devolving effect.[73] In the author's opinion, this explains and justifies that a decision on *rescindant* can be appealed to the Supreme Court. 52

For the sake of completeness, the author indicates that the cantonal court's decision on *rescindant* is itself subject to revision. The same applies for the Supreme Court's decision ruling on the appeal against the cantonal court's decision on *rescindant*. 53

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69 See e.g. GEISINGER/MAZURANIC, Challenge and Revision of the Award, in: GEISINGER/VOSER (Ed.), International Arbitration in Switzerland – A Handbook for Practitioners, Alphen aan den Rijn 2013, p. 223 ff., p. 273; MRÁZ, BaslerKomm ZPO, para. 12 on Art. 399 SCCP; GÖKSU (see footnote 7), para. 2307; SCHWEIZER, SCCP Commenté (see footnote 29), para. 2 on Art. 332 SCCP.

70 BGE 138 III 542, Rec. 1.1 and references.

71 GÖKSU (see footnote 7), para. 2307; MRÁZ, BaslerKomm ZPO, para. 12 on Art. 399 SCCP. See also SCHWEIZER, Diss. (see footnote 7), p. 288-289; SCHWEIZER, SCCP Commenté (see footnote 29), para. 2 on Art. 332 SCCP.

72 Comp. BERGER/KELLERHALS, 2010 (see footnote 13), para. 1783 and 1784: "*a two-stage set of recourse is simply inefficient and stands in contrast to the action for annulment where, precisely for reasons of efficiency, a single-stage set of recourse has been implemented*"; see also BERGER/KELLERHALS, 2015 (see footnote 36), para. 1948.

73 See para. 9 above.

G. Proceedings on *Rescisoire* (i.e., After a Positive Decision on *Rescindant*)

1. Reconstitution of the Arbitral Tribunal

54 Since revision does not have a devolving effect[74], the cantonal court, after a positive decision on *rescindant*, should not *stricto sensu* have to "remit" the case to the arbitral tribunal (*renvoi*; *Rückweisung*) for a new decision, as is imprecisely stated in Art. 399 para. 1 SCCP.[75] The arbitral tribunal's mission should be considered as reactivated *ipso jure* by the cantonal court's judgment.[76] In practice, however, the (*de facto*) reconstitution of the arbitral tribunal generally occurs on request of one of the parties.[77]

55 As mentioned above[78], there may be difficulties in reconstituting the arbitral tribunal, *inter alia* in view of the time that may have elapsed since the issuance of the arbitral award. Furthermore, if the request for revision is granted (*rescindant*) on the grounds that the arbitral award was affected by a criminal offence committed by one or several of the members of the arbitral tribunal[79], the concerned person(s) would have to be replaced.[80] The SCCP, however, provides solutions for several specific situations.

56 Art. 399 para. 2 SCCP refers to Art. 371 SCCP in case the arbitral tribunal is no longer complete.

57 Art. 371 paras 1 and 2 SCCP address the issue of the replacement of an arbitrator. Art. 371 para. 1 SCCP provides that if an arbitrator must be replaced, the same procedure as for appointment applies, unless the parties agree or have agreed otherwise. Art. 371 para. 2 SCCP further indicates that, if the replacement cannot be effectuated in this way, the new arbitrator shall be nominated by the state court (cf. *juge d'appui*) that has jurisdiction under

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74 See para. 9 above.

75 Cf. SCHWEIZER, note on BGE 4A_14/2012, RSPC 4/2012, p. 337 ff., p. 346-347: "*inappropriate term since appeal does not have a devolving effect*" (free translation).

76 Regarding this matter, which should be considered equally in domestic and international arbitration (BGE 4A_14/2012, RSPC 4/2012, p. 337 ff., note SCHWEIZER p. 346-347, p. 346), cf. also Section IV.G.1. below.

77 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1943.

78 See para. 22-23.

79 See also footnote 12 above regarding the situation where a party discovers a ground for the challenge of an arbitrator after the time limit for setting aside the arbitral award has elapsed.

80 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1944. See also para. 89 below (international arbitration).

Art. 356 para. 2 SCCP, unless the arbitration agreement excludes this possibility or becomes ineffective by the retirement of an arbitrator.

Art. 371 paras 3 and 4 SCCP define the duties of the newly constituted arbitral tribunal. Art. 371 para. 3 SCCP provides that in the absence of an agreement between the parties, the newly constituted arbitral tribunal shall decide on the extent to which procedural steps in which the replaced arbitrator has participated must be repeated. Art. 371 para. 4 SCCP specifies that the time limit within which the arbitral tribunal must issue its award is not suspended during the replacement procedure. 58

2. Repetition of (Part of) the Arbitral Proceedings

The arbitral tribunal only has to repeat or supplement the procedural steps which relate to the newly discovered fact(s) or evidence or which were affected by the criminal offence that was recognized in the meantime by a criminal court. Therefore, there is generally no need to repeat the entire arbitral proceedings.[81] 59

H. Decision on *Rescisoire*

1. Types and Effects

When deciding on *rescisoire*, the arbitral tribunal can either (i) annul/modify its (former) decision in whole or in part or (ii) come to the conclusion that the elements brought forward by the requesting party as ground(s) for revision (i.e., the newly discovered facts or evidence or the criminal offense) do not change the result of the original arbitral award, i.e., that the dispositive section of the arbitral award remains unchanged.[82] The decision includes a decision on the costs of the arbitration.[83] 60

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81 BERGER/KELLERHALS, 2010 (see footnote 13), para. 1781; MRÁZ, BaslerKomm ZPO, para. 7 on Art. 399 SCCP; cf. also GULDENER (see footnote 15), p. 491.

82 Cf. MRÁZ, BaslerKomm ZPO, para. 8 on Art. 399 SCCP; BERGER/KELLERHALS, 2015 (see footnote 36), para. 1980 (international arbitration).

83 Cf. GULDENER (see footnote 15), p. 491; Art. 333 para. 2 SCCP in state court civil procedure.

2. Legal Remedies

61 The decision on *rescisoire* is subject to an appeal to the Supreme Court (Art. 389 para. 1 SCCP)[84].[85] It is also subject to a (further) request for revision.

I. Waiver of the Right to Apply for Revision

62 As mentioned above[86], the procedural rules pertaining to the revision of domestic arbitral awards are considered to be imperatively and exhaustively regulated by the SCCP. Part 3 of the SCCP does not provide for any provision with respect to waiving the right to apply for revision. As a consequence, the parties cannot legitimately exclude the possibility to request revision of domestic arbitral awards.[87] In the author's opinion, this solution remains questionable as it restrains the contractual freedom of the parties.

63 One can also note that the preliminary draft bill on the modification of Chapter 12 of the SPILA[88] (international arbitration) provides that the parties, to the extent that neither of them have their domicile, habitual residence, place of business or seat in Switzerland, can expressly waive, in the arbitration clause or subsequently by means of a written agreement, part of their right to apply for revision (draft new Art. 190a para. 3 SPILA). By contrast, the preliminary draft bill neither contains any provision amending the provisions of Part 3 of the SCCP (domestic arbitration) with respect to a waiver of the right to apply for revision nor provides any discussion in that respect. This is regrettable as the revision of Chapter 12 of the SPILA, as it stands, creates a discrepancy between the relevant rules on the waiver of the right to apply for revision in domestic and international arbitration.

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84 Respectively, to the highest cantonal court in cases where the parties agree(d) that such court is competent instead of the Supreme Court (Art. 390 para. 1 SCCP). The decision of the highest cantonal court is then definitive (Art. 390 para. 2, second sentence, SCCP), i.e., cannot be subject of another appeal to the Supreme Court.

85 BERGER/KELLERHALS, 2010 (see footnote 13), para. 1782.

86 Cf. para. 12.

87 MRÁZ, BaslerKomm ZPO, para. 6 on Art. 396 SCCP.

88 See para. 66 below.

IV. Revision in International Arbitration

A. General Remarks

The provisions of Chapter 12 of the SPILA (Art. 176-194 SPILA; international arbitration) apply if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties, at the time when the arbitration agreement was concluded, had neither its domicile nor its habitual residence in Switzerland (Art. 176 para. 1 SPILA).[89] 64

Chapter 12 of the SPILA in its present form remains silent on the question of revision in international arbitration. In a landmark decision of 11 March 1992,[90] the Supreme Court noted that the SPILA contains a proper *lacuna*[91] with respect to the revision of international arbitral awards rendered in Switzerland. Considering that *"[t]he revision of arbitral awards under Art. 176 ff. SPILA has established itself as an essential consequence of the rule of law"*[92] *and that 'the absence of any reassessment would constitute a clear violation of the fundamental principles of procedure'*[93], the Supreme Court thus created jurisprudentially (i.e., acting as legislator by virtue of Art. 1 para. 2 of the Swiss Civil Code ["**ZGB**"]) the possibility to (re)question the authority of an international arbitral award through the mechanism of revision.[94] The Supreme Court declared that the provisions on revision of decisions issued by 65

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89 One should remember (see footnote 20 above) that the parties can elect to opt-out of the provisions of Chapter 12 of the SPILA on international arbitration in favor of the provisions of the SCCP on domestic arbitration (Art. 176 para. 2 SPILA) and similiarly, can elect to opt-out the provisions of the SCCP on domestic arbitration in favor of Chapter 12 of the SPILA on international arbitration (Art. 353 para. 2 SCCP).

90 BGE 118 II 199.

91 And not a silence of the law; on this subject, cf. SCHWEIZER, RSDIE (see footnote 10), p. 212-213; RIGOZZI/SCHÖLL (see footnote 1), p. 9-11; SCHÜPBACH (see footnote 25), p. 402-403; BUCHER, in: CR LDIP, para. 60 on Art. 191 SPILA.

92 BGE 118 II 199, Rec. 2b/cc (free translation).

93 BGE 118 II 199, Rec. 2b/cc (excerpt translated in PONCET (see footnote 3), p. 42).

94 BGE 118 II 199, Rec. 2c. The French Court of Cassation, facing a similar issue, considered in its decision "*Fougerolle*" of 25.05.1992, confirmed by the decision "*Westman*" of 19.12.1995, that revision of international arbitral awards rendered in France is admissible on certain conditions and within certain limits (cf. DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 1 and references; cf. also RIGOZZI/SCHÖLL (see footnote 1), p. 7-8). The above-mentioned case law has been codified in the French Civil Procedure Code in Art. 1502 para. 1 and 2 CPC-F, applicable in international arbitration by reference of Art. 1505 para. 5 CPC-F (Cf. Decree n° 2011-48 of 13.01.2011 on the review of arbitration, JORF n° 0011 of 14.01.2011, p. 777).

the Supreme Court (Art. 123-127 BGG; formerly Art. 137 and 140-143 of the Federal Judicial Organization Act of 16 December 1943 ["**JOA**"][95]) apply by analogy to international arbitral awards rendered in Switzerland.[96]

66 On 11 January 2017, the Swiss Federal Council presented a preliminary draft bill on the modification of Chapter 12 of the SPILA.[97] The planned revision intends to amend the existing law by *inter alia* integrating the solutions developed in the case law of the Supreme Court over the last 30 years and to clarify certain issues which have so far remained unresolved.[98] The Swiss Federal Council noted that, although the Supreme Court and legal doctrine are unanimous in saying that international arbitral awards may be subject to revision, Chapter 12 of the SPILA does not contain any provision on the revision of international arbitral awards.[99] As it will be seen below, the preliminary draft bill contains draft new provisions on revision of international arbitral awards.[100]

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95 Since the entry into force on 01.01.2007 of the BGG, the provisions of the BGG apply (by analogy) to revision of international arbitral awards rendered in Switzerland, instead of the provisions of the former JOA (see BGE 134 III 286). There are no transitional law issues since the applicability of the rules on revision of Supreme Court's judgments to revision of international arbitral awards, as a judge-made law, is done by analogy (HIRSCH (see footnote 1), para. 49).

96 BGE 118 II 199, Rec. 4. See also BGE 142 III 521, Rec. 2.1.

97 See SWISS FEDERAL COUNCIL, Preliminary draft Bill dated 11.01.2017 on the modification of Chapter 12 of the SPILA, <https://www.ejpd.admin.ch/dam/data/bj/aktuell/news/2017/2017-01-11/vorentw-f.pdf> (accessed on 17.05.2018)] [cited: SWISS FEDERAL COUNCIL, Preliminary Draft Bill].

98 See SWISS FEDERAL COUNCIL, Explanatory Report dated 11.01.2017 regarding the Preliminary draft Bill on the modification of Chapter 12 of the SPILA, <https://www.ejpd.admin.ch/dam/data/bj/aktuell/news/2017/2017-01-11/vn-ber-f.pdf> (accessed on 17.05.2018)] [cited: SWISS FEDERAL COUNCIL, Explanatory Report SPILA], p. 2 and *passim*.

99 See SWISS FEDERAL COUNCIL, Explanatory Report SPILA (see footnote 98), p. 26 and 28.

100 Questions of transitional law will not be addressed in the present paper. One can, however, note that the preliminary draft bill on the modification of Chapter 12 of the SPILA does not contain any draft provision in that respect. Compare with Art. 405 SCCP, which provides that appellate remedies are governed by the procedural law in force when notice of the decision is given to the parties (para. 1) and that the review of a decision notified under the previous law is governed by the new procedural law (para. 2).

B. Decisions Subject to Revision

1. International Nature

Decisions subject to revision are those rendered in international arbitration under the provisions of Chapter 12 of the SPILA. 67

The parties cannot elect to opt out of the provisions of Part 3 of the SCCP (domestic arbitration) and (instead) opt into the provisions of Chapter 12 of the SPILA (international arbitration) based on Art. 353 para. 2 SPILA *after* a decision that may be subject to revision has been issued.[101] In other words, there can be no opt-out/opt-in agreement limited to the annulment/revision actions.[102] 68

2. Types of Decisions

Like the SCCP in domestic arbitration, Chapter 12 of the SPILA does not specify which types of decisions are subject to revision. Here too, it is commonly agreed that decisions subject to revision in international arbitration are (i) preliminary or interim awards, (ii) partial awards and (iii) final awards.[103] 69

The requirement is that the decision is binding for the arbitral tribunal itself, i.e., has acquired the force of *res judicata*. This is not the case when the arbitral tribunal made an explicit reservation with respect to a modification of its award.[104] In the case of preliminary or interim awards particularly, depending on the circumstances of the case, the situation should be carefully examined.[105] 70

Awards on agreed terms as well as termination orders arising from acceptance or withdrawal of a claim – which are all decisions putting an end to the arbi- 71

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101 Conversely, the parties cannot elect to opt out of the provisions of Chapter 12 of the SPILA in favor of the provisions of Part 3 of the SCCP based on Art. 353 para. 2 SCCP *after* a decision that may be subject to revision has been issued.

102 KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 2.43.

103 BGE 142 III 521, Rec. 2.1; BGE 134 III 286, JdT 2010 I 686, Rec. 2.2; BGE 122 II 492, Rec. 1b/bb; BGE 4P.102/2006, Rec. 1.

104 BGE 134 III 286, JdT 2010 I 686, Rec. 2.2; BGE 122 II 492, Rec. 1b/bb; BGE 4P.237/2005, Rec. 3.2; MÜLLER, Swiss Case Law (see footnote 13), p. 343-344.

105 See BERGER/KELLERHALS, 2015 (see footnote 36), para. 1968.

tral proceedings – could also, under particular circumstances, be subject to revision.[106]

3. Decision of the Arbitral Tribunal vs. Decision of the Swiss Supreme Court

72 When a party unsuccessfully challenged an arbitral award before the Supreme Court (cf. Art. 190-191 SPILA), the question arises whether such party shall apply for revision against either the award rendered by the arbitral tribunal or the decision of the Supreme Court, or against both decisions.[107]

73 The principle is that a motion for revision of the Supreme Court's decision can only be requested for reasons directly linked to such decision. For other reasons, the applicant must target the arbitral award.[108]

C. Competent Authority to Rule on *Rescindant*

1. The Supreme Court Has Declared Itself Competent

74 As mentioned above[109], the Supreme court filled what it considered to be a *lacuna* of Chapter 12 of the SPILA by stating, in 1992, that provisions regarding the revision of Supreme Court's judgments (Art. 123-127 BGG; formerly Art. 137 and 140-143 JOA) apply by analogy to revision of international arbitral awards rendered in Switzerland.[110]

75 In doing so, the Supreme Court designated itself as the competent authority for deciding on requests for the revision of such awards (*rescindant*). Indeed, Art. 124 para. 1 BGG – which then applies by analogy – provides that applications for revision of Supreme Court's judgments shall be filed with the Supreme Court.

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106 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1969; RIGOZZI/SCHÖLL (see footnote 1), p. 13-14; STIRNIMANN (see footnote 13), para. 13; see also Section III.B.2. above (domestic arbitration).

107 See also para. 6 above on the question of concurrence/simultaneity of an action for annulment and a request for revision.

108 Cf. MÜLLER, Swiss Case Law (see footnote 13), p. 349-350 and references.

109 Cf. Section IV.A.

110 BGE 118 II 199, Rec. 4. See also BGE 142 III 521, Rec. 2.1.

According to the Supreme Court, this choice was made for "practical reasons".[111] It purported to establish some consistency with the former ICA which provided that the cantonal state court designated by the canton in which the arbitral tribunal has its seat was the competent authority to rule on requests for revision (*rescindant*) of domestic arbitral awards.[112] The Supreme Court was also convinced by the idea of a state court being the competent authority: *"since arbitral tribunals are generally not institutionalized, their mission expires at the end of the procedure. In some circumstances, it may be impossible to get back to the initial arbitral tribunal as arbitrators may be deceased or unreachable or may simply refuse to handle the case again. On the contrary, state courts provide precisely the guarantee to render a decision on the request for revision [...]. It is therefore justified to qualify the Supreme Court as the competent judicial authority* [to rule on applications] *for revision* [of international arbitral awards rendered in Switzerland]"[113]. The Supreme Court furthermore indicated that this solution *"takes into account the Legislator's wish to limit legal remedies; if a cantonal state court was instituted as a court of revision, its decisions could then be challenged before the Supreme Court through an appeal* […]"[114]. 76

The Supreme Court confirmed its case law in a decision rendered on 1 November 1996[115] (and, since then, in numerous decisions[116]). In this case, a party filed a request for revision of a partial award with the arbitral tribunal which was still seized of the case. The arbitral tribunal then issued its final award, by which it *inter alia* dismissed the request for revision for lack of jurisdiction. The Supreme Court held that the arbitral tribunal lacked jurisdiction over the request for revision of the (partial) award and therefore dismissed the action for annulment brought against the final award.[117] 77

111 Cf. BGE 122 III 492, Rec. 1a.

112 BGE 118 II 199, Rec. 3; cf. also BGE 122 II 492, Rec. 1b/aa.

113 BGE 118 II 199, Rec. 3 (free translation).

114 BGE 118 II 199, Rec. 3 (free translation).

115 BGE 122 III 492.

116 Cf. e.g. BGE in ASA Bulletin 1997, p. 498; BGE 134 III 286; BGE 4A_688/2012 and 4A_126/2013; BGE 4A_666/2012, Rec. 3.1, RSPC 5/2013, p. 428 ff.

117 BGE 122 III 492, facts, p. 492.

2. The Preliminary Draft Bill on the Modification of Chapter 12 of the SPILA Confers Jurisdiction to the Supreme Court

78 The preliminary draft bill on the modification of Chapter 12 of the SPILA[118] provides, in the draft modified Art. 191 SPILA as well as in the draft new Art. 119b para. 1 BGG, that the Supreme Court has jurisdiction to rule on revision (*rescindant*) of international arbitral awards.

79 In its Explanatory Report of 11 January 2017 regarding the preliminary draft bill on the modification of Chapter 12 of the SPILA, the Swiss Federal Council indicated that "*in accordance with the case law*", the intended procedure provided by the preliminary draft bill follows and enshrines in law the rules set out by the BGG. The Swiss Federal Council, however, did not justify the decision to establish the Supreme Court as the competent authority to rule on revision (*rescindant*) of international arbitral awards.[119] This is regrettable since this question – which has been ruled upon by the Supreme Court acting as legislator by virtue of Art. 1 para. 2 ZGB – remains disputed among legal scholars.[120]

80 This being said, the solution that consists of vesting the Supreme Court with jurisdiction to rule on revision (*rescindant*) of international arbitral awards is most likely the solution that will be proposed by the Swiss Federal Council in the forthcoming (amended) draft bill on the modification of Chapter 12 of the SPILA which will be submitted to the Swiss Parliament.

3. Discussion on the Justification of Such a Choice

a) Introductory Remarks

81 The arguments developed by the Supreme Court in support of its case law[121] can be grouped into three categories: (i) the consistency with the solution prevailing in domestic arbitration, (ii) the conformity with the will of the Legislator to limit legal remedies and (iii) avoiding pitfalls arising from the passage of time and from the fact that the arbitral tribunal may be *functus officio*. As will be shown below (Subsections b. to d.), these arguments are

118 See para. 66 above.
119 See SWISS FEDERAL COUNCIL, Explanatory Report SPILA (see footnote 98), p. 26 and 28-29.
120 See Section IV.C.3. below.
121 See Sections IV.C.1. and IV.C.3.a. above.

unconvincing.[122] In particular, the support offered by the arbitral institutions and/or by the *juge d'appui* is not to be underestimated (Subsection e.). This leads the author to conclude that the arbitral tribunal should be the competent authority to rule also on *rescindant* (Subsection f.).

b) Consistency with Domestic Arbitration Should Not Prevail Over Conformity with General Rule Prevailing in Swiss Civil State Court Procedure

It must be kept in mind that the general rule prevailing in Swiss civil state court procedure is that a request for revision of a decision shall be filed with the authority which rendered that decision (*judex ad quo*).[123] Indeed, revision as a means of retracting has (should theoretically have) no devolving effect and is not (should theoretically not be) a legal remedy actionable before a superior court.[124] 82

As indicated above[125], the solution prevailing in domestic arbitration with regard to the competent authority to rule on revision (*rescindant*) does not follow the general rule prevailing in Swiss civil state court procedure – which the author considers regrettable. These limits, in the author's opinion, the validity of the argument of consistency between international and domestic arbitration. 83

One alternative solution (i.e., alternative to the – in the author's opinion – preferable solution of vesting the arbitral tribunal with jurisdiction to also decide on *rescindant*) could, *potentially*, be to provide, like Art. 356 para. 1 lit. a SCCP in domestic arbitration, that the highest cantonal court in which the arbitral tribunal has its seat has jurisdiction to rule on requests for revision (*rescindant*) of international arbitral awards. This alternative solution would ensure consistency with the system prevailing in domestic arbitration. It 84

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122 Comp. e.g. VOSER/GEORGE (see footnote 1), p. 74, qualifying this solution as appropriate.

123 Cf. para. 9 and Section III.C.1. above. See also SCHWEIZER, SCCP Commenté (see footnote 29), para. 18 on Art. 396 SCCP; BERGER/KELLERHALS, 2010 (see footnote 13), para. 1774, 1787; BGE 118 II 199, Rec. 3.

124 SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 383, 389; comp. POUDRET/BESSON (see footnote 1), para. 846: "[a] *revocation is a challenge and it must logically be submitted to the jurisdiction competent to hear a challenge and not to the authors of the incriminated award*".

125 Section III.C.1.

would also overcome the absence of legal remedies against awards on revision (*rescindant*) – absence which the author considers problematic.[126]

c) The Argument Arising from the Will of the Legislator to Limit Legal Remedies Is Irrelevant

85 The "practical" solution – criticized by the author – of vesting the Supreme Court with jurisdiction to rule on requests for revision of international arbitral awards (*rescindant*), leads to a situation where there is no legal remedy against the decision on *rescindant*. The Supreme Court considers such solution as being in line with the Legislator's wish to limit legal remedies.

86 In the author's opinion, the absence of any means of appeal against the decision on *rescindant* is, on the contrary, problematic and should not be considered as an advantage.[127]

87 The *potential* alternative solution (i.e., alternative to the – in the author's opinion – preferable solution of vesting the arbitral tribunal with jurisdiction to also decide on *rescindant*) outlined above[128], i.e. to grant the highest cantonal court in which the arbitral tribunal has its seat jurisdiction over requests for revision (*rescindant*) of international arbitral awards, would create the possibility to file an appeal before the Supreme Court against the highest cantonal courts decisions on *rescindant*. This would not create a system of two instances of judicial review[129] and should, therefore, not be considered as harming the attractiveness of Switzerland as a place of arbitration.

d) The Passage of Time and/or the Fact That the Arbitral Tribunal May Be Functus Officio Are Not (Insuperable) Obstacles

88 The passage of time and/or the fact that the arbitral tribunal may be *functus officio*[130] are not (insuperable) obstacles to granting the arbitral tribunal the power to rule on *rescindant*.[131]

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126 See also Section IV.C.3.c. below.

127 Comp. BERGER/KELLERHALS, 2010 (see footnote 13), para. 1787; BERGER/KELLERHALS, 2015 (see footnote 36), para. 1952; RIGOZZI/SCHÖLL (see footnote 1), p. 17-18.

128 See para. 84.

129 See also Section III.F.2. above.

130 Cf. BGE 4A_14/2012, RSPC 4/2012, Rec. 3.1.1: "[…] *in accordance with the maxim* lata sententia iudex desinit esse iudex*, the judge is divested of the case from the moment he renders his/her judgment, in the sense that he/she cannot change it anymore*

First, the arbitral tribunal may still be standing if the request for revision is directed against a preliminary/interim award or a partial award.[132] The difficulty arising from the fact that a request for revision may be based on the ground of a criminal offence committed by one of the arbitrators[133] can be solved by challenging the arbitrator in question (cf. Art. 180 para. 1 lit. b and c SPILA; see also Art. 369 SCCP in domestic arbitration).[134] 89

Second, an arbitral tribunal which is (was) *functus officio* can decide whether the conditions necessary for the renewal/rebirth of its judicial function are met, in the same way that it has the inherent power to rule on its own jurisdiction to deal with the claim initiated by a party (cf. principle of *compétence-compétence*).[135] 90

Third, it should be taken into account that if the request for revision is granted, then, in any case, the arbitral tribunal shall reconstitute itself or a new (in full or in part) arbitral tribunal shall be constituted[136], in order to rule on *rescisoire*.[137] One should, however, note that the Supreme Court's solution offers the advantage that the reconstitution of the arbitral tribunal is only necessary if the request for revision has been granted at the stage of *rescindant*.[138] 91

Fourth, and most importantly, it is necessary to underline that arbitral tribunals – at least when the arbitral tribunal is the same arbitral tribunal that issued the arbitral award which is the subject of the request for revision – are 92

[…]. *That which applies to the judge also applies to the arbitrator, in international arbitration as in domestic arbitration: the award is final once communicated to the parties (Art. 190 para. 1 SPILA), and as of this moment it has the same effects as legally-binding and enforceable state court decisions (Art. 387 SCCP). Thus, as soon as the final award is rendered, the arbitral tribunal's jurisdiction ends and such tribunal becomes* functus officio*, subject to various exceptions* […]" (free translation).

131 See DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 16 and 24; LALIVE/POUDRET/REYMOND (see footnote 21), Art. 43 ICA p. 240.

132 SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 383; SCHWEIZER, SCCP Commenté (see footnote 29), para. 17 on Art. 396 SCCP; DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 24; BUCHER, in: CR LDIP, para. 61 on Art. 191 SPILA.

133 Cf. BERGER/KELLERHALLS, 2010 (see footnote 13), para. 1802, footnote 58.

134 In such case, the challenge should be filed before or in parallel to the request for revision (also depending on the respective time limits which apply in that respect) and be dealt with before the request for revision.

135 DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 17.

136 BGE 4A_666/2012, Rec. 3.1, RSPC 5/2013, p. 428 ff.

137 SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 383.

138 See also, among others, DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 24.

generally in a better position to assess the impact of new issues/elements occurring in the context of revision, be it at the stage of *rescindant* or *rescisoire*.[139]

93 The reconstitution of the arbitral tribunal could, however, present practical difficulties (death of an arbitrator, challenge of an arbitrator, etc.). As it will be shown below (Subsection e.), these difficulties turn out to be largely overestimated.

e) The Valuable Support Offered by the Arbitral Institutions and/or by the Juge d'Appui

94 The provisions of Chapter 12 of the SPILA (Art. 179 and 180 SPILA[140]) as well as the applicable institutional rules (if any) regarding the appointment, removal and replacement of arbitrators apply in any case. Should the arbitral tribunal have jurisdiction to also decide on *rescindant*, potential issues that may arise in the context of the (re)constitution of the arbitral tribunal and of the functioning of said arbitral tribunal could then be settled by applying such legal and institutional provisions. This valuable support should not be understated.[141]

95 In institutional arbitration, the arbitral institution is a permanent body to which the parties can refer in order to (re)create an (the) arbitral tribunal.

96 As an example, the ICC Rules address the specific issue of the replacement of arbitrators. Art. 15 para. 1 of the ICC Rules *inter alia* defines as grounds for replacement of arbitrators the decease of an arbitrator, an arbitrator's resignation or a challenge of an arbitrator. Art. 15 para. 3 of the ICC Rules, furthermore, provides that an arbitrator shall also be replaced on the own initiative of the ICC Court when it decides that the arbitrator is prevented *de jure* or *de facto* from fulfilling its functions, or when the arbitrator is not fulfilling those functions in accordance with the ICC Rules or within the prescribed time limits. Art. 15 para. 4 of the ICC Rules also provides that, when an arbitrator is to be replaced, the ICC Court has discretion to decide whether or not to follow the original nominating process, and that, once reconstituted, the arbitral tribunal shall, after having invited the parties to comment, determine if and to what extent prior proceedings shall be repeated in front of the reconstituted arbitral tribunal. Art. 15 para. 5 of the ICC Rules finally provides that

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139 *Idem*, para. 11 and 15; RIGOZZI/SCHÖLL (see footnote 1), p. 16-17.

140 See also Art. 371 SCCP in domestic arbitration.

141 See in that sense KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.208 and 8.228.

subsequent to the closing of the proceedings, instead of replacing an arbitrator who has passed away or been removed by the ICC Court pursuant to Art 15 para. 1 or 2 of the ICC Rules, the ICC Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the ICC Court must take into account the views of the remaining arbitrators and the parties, and any other matters that it considers appropriate in the circumstances.

The ICSID Convention[142] also provides that (the request for revision shall be formally addressed to the Secretary-General [Art. 51 para. 1 ICSID Convention] and that) if it is not possible to submit the request for revision to the tribunal which rendered the award (see Art. 51 para. 3, first sentence, ICSID Convention), then "*a new* [t]*ribunal shall be constituted in accordance with* [Art. 37-40 of the ICSID Convention]" (Art. 51 para. 3, second sentence, ICSID Convention).[143] 97

In *ad hoc* arbitration, the situation is more delicate.[144] The *juge d'appui* could, however, provide the necessary support (see Art. 179 para. 2 and Art. 180 para. 3 SPILA). 98

f) Interim Conclusion: The Arbitral Tribunal Should Be the Competent Authority to Rule on Rescindant

In the light of the above, the author considers that the arbitral tribunal should be the competent authority to rule on *rescindant*.[145] This would be in conformity with the *judex ad quo* principle which (theoretically) applies in that context.[146] The arguments supporting the "practical" – at first sight – solution 99

142 Switzerland signed the ICSID Convention on 22.09.1967 and the Convention entered into force on 14.06.1968. It should be noted that arbitrations under the ICSID Convention are not subject to any national arbitration law.

143 See also VOSER/GEORGE (see footnote 1), p. 54-55.

144 Cf. KAUFMANN-KOHLER/RIGOZZI, Arbitrage international – Droit et pratique à la lumière de la LDIP, 2nd revised edition, Bern 2010 [cited: KAUFMANN-KOHLER/RIGOZZI, Arbitrage international], para. 853.

145 This is the solution adopted by the Organization for the Harmonization of Business Law in Africa (OHADA) in the Uniform Act on Arbitration adopted on 11.03.1999 and revised on 23.11.2017: according to Art. 25 para. 5 of the Uniform Act on Arbitration, the arbitral award may "*be subject to an appeal for revision before the arbitral tribunal* […]" (free translation). The Uniform Act on Arbitration is intended to apply to any arbitration where the seat of the arbitral tribunal is in one of the States Parties to the Treaty of 17.10.1993 (amended on 17.10.2008) on the harmonization of business law in Africa ("Treaty OHADA"; Art. 1 of the Uniform Act on Arbitration).

146 See para. 82 above.

which consists of vesting the Supreme Court with jurisdiction to rule on *rescindant* are unconvincing.[147]

100 The solution which confers the jurisdiction to rule on revision (*rescindant*) of international arbitral awards to the Supreme Court is, however – and regrettably –, most likely to be the solution which will be adopted in the forthcoming (amended) draft bill on the modification of Chapter 12 of the SPILA which will be submitted to the Swiss Parliament in the coming months.

4. Is the Supreme Court's Jurisdiction Exclusive?

101 The question arises whether the parties can derogate from the Supreme Court's jurisdiction to rule on requests for revision of international arbitral awards (*rescindant*)[148] by agreeing that the/an arbitral tribunal has jurisdiction to rule on such requests.[149] Legal scholars are divided on this question.[150]

102 In the author's opinion, the validity of an agreement between the parties providing for a specific procedural framework regarding revision should not be excluded. Indeed, such option follows from the principle of party autonomy. This position is justified by the fact that procedural rules pertaining to revision of international arbitral awards (i.e., Art. 123-127 BGG), as judge-made law, apply by analogy only, and therefore should not be considered as imperative and exhaustive.[151] The fact that the arbitral tribunal is, in some

147 See also, in that sense, SCHWEIZER, SCCP Commenté (see footnote 29), para. 18 on Art. 396 SCCP; SCHÜPBACH (see footnote 25), p. 402-403; comp. BGE 118 II 199, Rec. 3.

148 See Sections IV.C.1. and IV.C.2. above.

149 HIRSCH (see footnote 1), para. 44; STIRNIMANN (see footnote 13), para. 5-6.

150 *Pro*: KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.210; KAUFMANN-KOHLER/RIGOZZI, Arbitrage International (see footnote 144), para. 855; RIGOZZI/SCHÖLL (see footnote 1), p. 18-19; BERGER/KELLERHALS, 2015 (see footnote 36), para. 1971; BERGER/KELLERHALS, 2010 (see footnote 13), para. 1802; SCHWEIZER, Doping – Request of Review/Revision, in: WILD (Ed.), CAS and Football – Landmark Cases, The Hague 2012, p. 167 ff. [cited: SCHWEIZER, CAS and Football], p. 169-171. *Contra*: POUDRET/BESSON (see footnote 1), para. 845; DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 19; GÖKSU (see footnote 7), para. 2297. Cf. also HIRSCH (see footnote 1), para. 45 and references ad footnote 90; ZOLLER (see footnote 8), para. 13, in international public law. See also VOSER/GEORGE (see footnote 1), p. 52-53, on the question of the "inherent power" of the arbitral tribunal to revise its awards.

151 See however para. 105-106 below: The Supreme Court considers to have exclusive jurisdiction. See also para. 107 below regarding the solution proposed in the preliminary draft bill on the modification of Chapter 12 of the SPILA.

cases, still formed[152] also speaks in favour of a possible "derogation" by the parties.[153]

Practically speaking, specific agreements between the parties regarding the specific procedural framework of a (possible) revision of arbitral awards are quite unlikely to happen – at least prior to the award.[154] This being said, one could imagine the set of rules of an arbitration institution to provide for such an attribution of competence.[155] In this regard, it is worth mentioning that the ICSID Convention[156] provides that requests for revision shall, if possible, be submitted to the tribunal which rendered the award (Art. 51 para. 3 ICSID Convention).[157] 103

Although the Code of Sports-related Arbitration does not provide for such a solution, a panel of the Court of Arbitration for Sport ("**CAS**") decided in one case that the arbitral tribunal has jurisdiction to rule on *rescindant*.[158] In that specific case, the CAS panel held that the parties agreed, after the award had been rendered, that the arbitral tribunal should have jurisdiction to determine whether there was any ground for a revision of the award, applying by analogy and for guidance the rules – including those of the BGG – which govern revision of court decisions.[159] 104

However, it should be noted that the Supreme Court considers it has exclusive jurisdiction with respect to the revision of international arbitral awards rendered in Switzerland, regardless of the nature of the award subject to the request for revision. The Supreme Court indeed declared that "*the principle established in* [the decision BGE 118 II 199] *is of general scope and applies* 105

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152 Cf. situation where revision is sought against a partial, a preliminary or an interim award. For an example, cf. BGE 122 III 492.

153 BERGER/KELLERHALLS, 2010 (see footnote 13), para. 1802, footnote 58; SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 383; DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 24. Comp. BGE 122 III 492. See also para. 89 above.

154 See however Section IV.I. below. Compare also with para. 68 above.

155 Cf. DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 20.

156 See footnote 142 above. It has to be noted that such arbitrations under the ICSID Convention are not subject to any national arbitration law.

157 See also VOSER/GEORGE (see footnote 1), p. 54-55.

158 CAS award 2008/A/1557 of 27.07.2009, <https://jurisprudence.tas-cas.org/Shared%20Documents/1557-R.pdf> (accessed on 17.05.2018).

159 CAS award 2008/A/1557 of 27.07.2009, <https://jurisprudence.tas-cas.org/Shared%20Documents/1557-R.pdf> (accessed on 17.05.2018), commented by SCHWEIZER, CAS and Football (see footnote 150), and also referred to by VOSER/GEORGE (see footnote 1), p. 53-54 and by KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.210.

to all revision cases in international arbitration"[160]. It also recently confirmed that "*the Supreme Court is the judicial authority to have jurisdiction on requests for revision of any international arbitral award* [...]"[161].

106 In view of the Supreme Court's constant case law, the defendant may object to the arbitral tribunal's affirmation of its jurisdiction to rule on the request for revision (*rescindant*) and, if need be, lodge an appeal with the Supreme Court on the ground that the arbitral tribunal wrongly accepted jurisdiction to rule on the request for revision (*rescindant*) (see Art. 190 para. 2 lit. b SPILA).[162]

107 Finally, it must be noted that the preliminary draft bill on the modification of Chapter 12 of the SPILA[163] provides, in the draft modified Art. 191 SPILA (see also draft new Art. 119b para. 1 BGG), that requests for revision of international arbitral awards may only be brought before the Supreme Court. This means that, like in domestic arbitration[164] and as is the case in international arbitration according to the current jurisprudence of the Supreme Court[165], the parties will probably not be allowed to vest the/an arbitral tribunal with jurisdiction to rule on a request for revision of an international arbitral award (*rescindant*). In the author's view, the validity of such solution – if adopted – would remain questionable as it restrains the contractual freedom of the parties (cf. principle of party autonomy).

D. Other Admissibility Requirements

1. General Requirements

108 The request for revision must fulfil the conditions mentioned in Art. 42 BGG.[166] Notably, Art. 42 para. 1 BGG requires that the briefs submitted to the Supreme Court be drafted in an official language, indicate the conclusions, the reasons and the means of evidence and finally, be signed; Art. 42 para. 3 BGG requires that all documents used as evidence be filed along with the respective briefs.

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160 BGE 122 II 492, Rec. 1b/aa (free translation); cf. also SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 382-383; HIRSCH (see footnote 1), para. 2-4.

161 BGE 4A_666/2012, Rec. 3.1, RSPC 5/2013, p. 428 ff. (free translation).

162 BERGER/KELLERHALLS, 2015 (see footnote 36), para. 1970.

163 See para. 66 above.

164 See Section III.C.2. above.

165 See para. 105 above.

166 GIRSBERGER/VOSER, International Arbitration in Switzerland, Zurich 2008, para. 1114.

2. Parties (Standing to Sue; Interest in Bringing Proceedings)

The author refers *mutatis mutandis* to the analysis made in Section III.D.1. above regarding the standing to sue requirement. GEISINGER and MAZURANIC also mention the issue of the admissibility of a request for revision filed by third parties. According to these authors, this issue is essentially the same as the issue of admissibility of third party challenges against arbitral awards.[167] 109

Like in domestic arbitration, the requesting party must establish that it has a specific and actual interest in the annulment of (all or part of) the international arbitral award in question.[168] This requirement refers to the general notion of interest in bringing proceedings[169]; it probably does not result from Art. 76 BGG since this provision only concerns the admissibility of actions for annulment filed with the Supreme Court under Art. 72 ff. BGG.[170] In the author's opinion, the interest requirement should not be interpreted too restrictively, in particular in view of the fact that the tribunal deciding on the *rescindant* should in principle neither prejudge nor discuss in detail the foreseeable outcome of the proceedings (if any) on *rescisoire*.[171] 110

Following the approach proposed by BERGER and KELLERHALS as well as by RIGOZZI and SCHÖLL, the author considers that the fact that the arbitral award has already been successfully enforced is not a sufficient reason to prevent its revision.[172] 111

A party requesting the revision of an arbitral award containing alternative or subsidiary reasons must challenge all alternative reasons, respectively the principal as well as the subsidiary reasons. When it fails to do so, it has no legal interest in obtaining revision of such award.[173] 112

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167 GEISINGER/MAZURANIC (see footnote 69), p. 263; cf. also RIGOZZI/SCHÖLL (see footnote 1), p. 24; STIRNIMANN (see footnote 13), para. 9.

168 Cf. HIRSCH (see footnote 1), para. 39 and footnote 78; GEISINGER/MAZURANIC (see footnote 69), p. 263; KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.211.

169 On this notion, see e.g. BGE 110 II 352, JdT 1985 I 354, Rec. 2.

170 Comp. KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.211.

171 See also Section IV.E.1. below.

172 BERGER/KELLERHALS, 2010 (see footnote 13), para. 1809; RIGOZZI/SCHÖLL (see footnote 1), p. 25; comp. GÖKSU (see footnote 7), para. 2300.

173 RIGOZZI/SCHÖLL (see footnote 1), p. 25; GÖKSU (see footnote 7), para. 2300; cf. also BGE 138 I 97, Rec. 4.1.4, and references.

113 Should the requesting party have no standing to sue and/or no legal interest in bringing proceedings, the request for revision is to be declared inadmissible.

3. Time Limits

114 The Swiss Supreme Court Act, applicable by analogy pursuant to the Supreme Court's case law[174], provides for a relative time limit of 90 days (Art. 124 para. 1 lit. d BGG), respectively 30 days (Art. 124 para. 1 lit. a BGG) if the revision pursuant to Art. 121 para. 1 BGG can be requested (cf. situation where a party discovers a ground for the challenge of an arbitrator after the time limit for setting aside the arbitral award has elapsed)[175], as well as for an absolute time limit of 10 years (Art. 124 para. 2 *in initio* BGG). However, according to Art. 124 para. 2 lit. b BGG, the absolute time limit of 10 years does not apply in case of an arbitral award affected by a criminal offense in the sense of Art. 123 para. 1 BGG.[176]

115 The preliminary draft bill on the modification of Chapter 12 of the SPILA[177] contains a draft new Art. 190a para. 2 SPILA which provides for (i) a single relative time limit of 90 days and (ii) an absolute time limit of 10 years, without exception.

116 According to Art. 124 para. 1 lit. d BGG (other grounds for revision), the request for revision shall be filed with the Supreme Court within 90 days (relative time limit) following the discovery of the grounds for revision, but at the earliest upon notification of the fully reasoned award or upon closure of the penal proceedings.

117 The Supreme Court pointed out that "*when several grounds for revision are invoked, the time limit begins to run separately for each one of them; it is therefore not the longest time limit that applies for the request for revision as a whole*"[178].

118 The Supreme Court in its case law provided details with respect to the degree of diligence which is expected from the requesting party. The Supreme Court considered, regarding the ground for revision provided for in Art. 123 para. 2 lit. a BGG, that "*the discovery of the ground for revision implies that the*

174 See Sections IV.A. and IV.C.1. above.

175 The Supreme Court has left this issue open: see footnote 12 above.

176 See also, among others, BERGER/KELLERHALS, 2010 (see footnote 13), para. 1804-1805; RIGOZZI/SCHÖLL (see footnote 1), p. 26-29; STIRNIMANN (see footnote 13), para. 15-19.

177 See para. 66 above.

178 BGE 4A_666/2012, Rec. 5.1, RSPC 5/2013, p. 428 ff. (free translation).

requesting party has sufficient reliable knowledge of the new fact in question to invoke it, even if it cannot provide clear evidence of such fact; mere speculation is not sufficient. With regard to new evidence, the requesting party shall have documentary evidence establishing it or have sufficient knowledge of such fact for requesting the taking of evidence. It is the requesting party's responsibility to establish the relevant circumstances which allow to verify whether the above-mentioned time limit has been met"[179].

119 The Supreme Court further considered, with respect to the ground for revision provided for in Art. 123 para. 1 BGG, that the time limit does not start to run before the closure of the penal proceedings[180] and shall start as soon as the requesting party is aware that the conviction entered into force or, if a conviction is no longer possible, as soon as it becomes aware of the breach of law and of the corresponding evidence.[181]

120 The Supreme Court also stated that "*it would be* […] *contrary to the exceptional nature of the revision procedure and to the spirit of case law related to Art. 124 para. 1 lit. d BGG to allow a party who discovered conclusive evidence to defer the filing of the request for revision and to benefit from the subsequent discovery of new evidence, only reinforcing the previous one, in order to artificially take advantage of the extension of the* […] *time limit provided by the above-mentioned provision*"[182].

121 The Supreme Court also decided that the statutory time limit of Art. 124 para. 1 lit. d BGG is suspended during judicial recesses (cf. Art. 46 BGG, which applies by analogy to the revision of international arbitral awards).[183] As a general matter, Art. 44-50 BGG, which regulate time limits before the Supreme Court, should apply to the revision of international arbitral awards.[184]

122 A request for revision submitted after any of the time limits provided for in Art. 124 BGG has elapsed is inadmissible.[185]

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179 BGE 4A_570/2011, Rec. 4.1 (free translation). See also BGE 4A_247/2014, Rec. 2.3.

180 BGE 4A_666/2012, Rec. 5.2.2, RSPC 5/2013, p. 428 ff. (free translation).

181 BGE 4A_596/2008, Rec. 3.3 (free translation), and references.

182 BGE 4A_666/2012, Rec. 5.2.1, RSPC 5/2013, p. 428 ff. (free translation); see also BGE 4A_105/2012, Rec. 2.2 (not published in BGE 138 III 542 but reproduced in RSPC 5/2012, p. 429, with a note by SCHWEIZER); GULDENER (see footnote 15), p. 488.

183 BGE 4A_222/2011, Rec. 2.2; see also BGE in RSDIE 1998 p. 580.

184 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1975.

185 GEISINGER/MAZURANIC (see footnote 69), p. 265.

4. Language(s)

123 The request for revision must be written in one of the official languages of Switzerland (Art. 42 para. 1 *in initio* BGG). The same applies to the opposing party's as well as to the arbitral tribunal's answers[186] to the request for revision.[187]

124 The preliminary draft bill on the modification of Chapter 12 of the SPILA[188] contains a draft new Art. 77 para. 2bis BGG which provides that memorials can be filed with the Supreme Court in English.

125 In its Explanatory Report of 11 January 2017 regarding the preliminary draft bill on the modification of Chapter 12 of the SPILA, the Swiss Federal Council indicated in that respect that *"English is the most used language in arbitration proceedings today. In view of the importance of said language, the Supreme Court is tolerant and often does not request, in the framework of challenges against international arbitral awards, translations of annexes and documents written in English. The preliminary draft bill goes further as it expressly provides, in a draft new Art. 77 para. 2bis BGG, that the parties can write and submit memorials in English to the Supreme Court in the framework of recourses and requests for revision against arbitral awards* […]"[189].

E. Proceedings on *Rescindant*

1. Power of Review of the Supreme Court

126 A request for revision is an unlimited means of appeal, which means that the Supreme Court has full power of review, *de facto* and *de jure*, within the framework of the grounds for revision invoked.[190]

127 In a decision of 16 October 2003, the Supreme Court has described the nature of its review at the stage of *rescindant* as follows: "[a]*s the judicial authority*

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186 See respectively para. 131-132 below. The opposing party and the arbitral tribunal can use another official language than the language chosen by the requesting party (cf. BGE 142 III 521, Rec. 1).

187 See also BGE 142 III 521, Rec. 1, regarding the question of the language of the decision of the Supreme Court.

188 See para. 66 above.

189 SWISS FEDERAL COUNCIL, Explanatory Report SPILA (see footnote 98), p. 28 (free translation).

190 Cf. para. 38 above.

having jurisdiction on requests for revision of an international arbitral award, the Supreme Court is not the competent authority to decide what will be the practical impact, resulting from the new facts invoked by the applicant, on the dispositive part of the award that shall be rendered in case the request for revision is granted. It is the arbitral tribunal, to which the cause is remanded, or another arbitral tribunal specially set up for this purpose, which has to decide on that question"[191].

128 Later in the same decision, the Supreme Court, however, added that "[t]*he role of the Supreme Court consists exclusively in a hypothetical review of the relevance of the new facts with regard to the legal reasons underlying the award for which the revision has been requested. In other words, the Supreme Court, when deciding on a motion for revision of an award* [...], *only has to verify, taking into account the legal reasons set forth in the challenged award, whether the new facts, had they been known by the arbitrators, would have led them, in all probability, to render a different award*"[192].

129 This last statement goes beyond what the author considers to be the proper scope of review of an authority in the phase of *rescindant*. Indeed, the Supreme Court should not have the power to assess "*whether the new facts, had they been known by the arbitrators, would have led them, in all probability, to render a different award*". It should only examine whether the new facts or evidence in question are relevant to the case and material to its outcome.[193] If this is the case, it shall remand the case to the arbitral tribunal (*rescisoire*) for further assessment of the respective new facts or evidence.

2. Proceedings

130 As indicated above, the Supreme Court decided that the provisions of the Swiss Supreme Court Act regarding the revision of decisions rendered by the Supreme Court apply by analogy to the revision of international arbitral awards.[194] The preliminary draft bill on the modification of Chapter 12 of the SPILA[195] plans to enshrine such solution in law (cf. draft revised Art. 191 SPILA).

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191 BGE 4P.117/2003, Rec. 1.2 (free translation).

192 BGE 4P.117/2003, Rec. 1.2, translated in part by MÜLLER, Swiss Case Law (see footnote 13), p. 351; cf. also RIGOZZI/SCHÖLL (see footnote 1), p. 47-51.

193 In that sense: KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.223.

194 See Sections IV.A. and IV.C.1.

195 See para. 66 above.

131 The opposing party shall be requested to submit its comments on the request for revision, unless the Supreme Court considers the request obviously inadmissible or obviously unfounded (cf. Art. 127 BGG applicable by analogy; see also draft new Art. 119b para. 2, second sentence, BGG). This refers to the admissibility/merits of the request for revision (*rescindant*) and not to the admissibility/merits of the claims which were decided upon by the arbitral tribunal and that may have to be re-examined by the same tribunal (*rescisoire*) in case of a positive decision on *rescindant*. The parties may also exercise their right of reply.[196]

132 According to the Supreme Court's practice, which in this regard is identical to set aside proceedings against international arbitral awards, the arbitral tribunal is also requested to submit its comments.[197] It should be noted that this practice does not derive *stricto sensu* from Art. 127 BGG, since the arbitral tribunal is neither a "previous authority" (as the arbitral award, whose revision is requested, is not a decision rendered by a state court), nor is it "a possible other party" or a possible "participant in the proceedings", and even less "an authority entitled to appeal" within the meaning of the said provision.[198]

133 The determinations of the arbitral tribunal, if any, may be useful for the Supreme Court's decision.[199] This brings us back to the issue discussed above regarding the authority having jurisdiction to rule on the *rescindant*[200]: if the arbitral tribunal is in a position to comment on the request for revision, it should then also be capable of (reforming itself and) ruling alone on the *rescindant*.

134 Pursuant to Art. 190 SPILA, international arbitral awards rendered in Switzerland are final once communicated to the parties. In principle, the request for revision does not have suspensive effect.[201] However, according to Art. 126 BGG, applicable by analogy, the Supreme Court has the power to grant the suspensive effect *ex officio* or upon request of one of the parties.[202] According to the preliminary draft bill on the modification of Chapter 12 of

196 Cf., *mutatis mutandis*, para. 46 above.

197 HIRSCH (see footnote 1), para. 41-42.

198 Comp. GÖKSU (see footnote 7), para. 2303; GIRSBERGER/VOSER (see footnote 166), para. 1116.

199 Cf. HIRSCH (see footnote 1), para. 43.

200 Cf. Section IV.C. above.

201 See, among others, PFISTERER, in: BaslerKomm SPILA, para. 97 on Art. 190 SPILA. See also para. 4 above: revision is an extraordinary means of appeal.

202 Cf. also SCHWEIZER, Diss. (see footnote 7), p. 272, who points out that the stay of the execution of the judgment is a true protective measure and is neither a characteristic of the request for revision nor one of its effects.

the SPILA[203], Art. 126 BGG would also apply, this time by reference of the draft revised Art. 191 SPILA.

Suspensive effect will rarely be granted since the decision is already legally binding, and has possibly been carried out in Switzerland and/or abroad. In deciding whether or not to grant suspensive effect, the Supreme Court shall in particular take into consideration the likelihood of success of the revision and the possible damage that a refusal to suspend could cause.[204] 135

Art. 126 BGG also provides the possibility for the Supreme Court to grant, *ex officio* or upon request of a party, "other protective measures". In contrast with Art. 331 SCCP applicable (by reference of Art. 398 SCCP) to revision of domestic arbitral awards, Art. 126 BGG does not expressly provide the possibility to order the provision of securities. This possibility should, however, be considered as being included in the notion of "protective measures" within the meaning of Art. 126 BGG. 136

Art. 126 BGG seems to take precedence over Art. 183 SPILA, which provides that the arbitral tribunal may order protective measures upon request of a party. The situation is, however, not entirely clear if one takes into account the fact that the arbitral tribunal is not necessarily *functus officio* at that stage (cf. revision of a preliminary, interim or partial award). In the author's opinion, a parallel jurisdiction of the arbitral tribunal and of the Supreme Court should be possible. If the situation cannot await the (re)constitution of the/an arbitral tribunal, and depending on the institutional rules that may be applicable, the parties could also refer the matter to an emergency arbitrator when possible (cf. e.g. Art. 29 ICC Rules; Art. 43 Swiss Rules). 137

F. Decision on *Rescindant*

1. Types and Effects

The author refers *mutatis mutandis* to the analysis presented above regarding the revision of domestic arbitral awards.[205] The author limits himself to indi- 138

203 See para. 66 above.

204 Cf. GÖKSU (see footnote 7), para. 2302 and the references.

205 See Section III.F.1. See also DASSER/WÓJTOWICZ (see footnote 2), p. 283 ff., who indicate that since 1992, 23 published decisions on requests for revisions have been issued by the Supreme Court, of which only two decisions grant the request for revision (the two arbitral awards in question were both rendered in international arbitration).

cating that the Supreme Court rules on the *rescindant* only.[206] This is reflected in the preliminary draft bill on the modification of Chapter 12 of the SPILA[207], which contains a draft new Art. 119b para. 3 BGG providing that "[i]*f the Supreme Court grants the request for revision, it cancels the award and refers the case back to the arbitral tribunal for a new decision*"[208].

2. Legal Remedies

139 The Supreme Court's decision on *rescindant* is not subject to appeal[209], which is, in the author's opinion, problematic. The decision on *rescindant* should (also)[210] be subject to an appeal in a higher court.[211] The fact that the decision is rendered by the highest state court in Switzerland – a solution which the author considers questionable[212] – *de facto* prevents the unsuccessful party to lodge any appeal against the decision on *rescindant*.

140 For the sake of completeness, the author indicates that the Supreme Court's decision on *rescindant* is itself subject to a request for revision.[213] In principle, the division of the Supreme Court that rendered the considered judgment has jurisdiction to rule on a request for revision of said judgment.[214]

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206 Cf. SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 395; KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.224. See also BGE 142 III 521, Rec. 2.1; BGE 4A_412/2016, Rec. 2.1 and 4.

207 See para. 66 above.

208 Free translation.

209 GÖKSU (see footnote 7), para. 2309.

210 See Section IV.H.2. below regarding legal remedies against decisions on *rescisoire*.

211 SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 389.

212 Cf. Section IV.C.3. above.

213 Cf. BERGER/KELLERHALLS, 2010 (see footnote 13), para. 1816-1817; VOSER/GEORGE (see footnote 1), p. 65; GIRSBERGER/VOSER (see footnote 166), para. 1120; cf. also SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 400 for the consequences on the arbitral award of a decision on *rescindant* which would be subsequently challenged by a revision.

214 Cf. BGE 2F_11/2011, Rec. 1, in RSPC 6/2011, p. 500-501.

G. Proceedings on *Rescisoire* (i.e., After a Positive Decision on *Rescindant*)

1. Reconstitution of the Arbitral Tribunal

Since revision does not have a devolving effect[215], there is no need for the Supreme Court, in case of a positive decision on *rescindant*[216], to "remit the case" to the arbitral tribunal for a new decision (*rescisoire*). The arbitral tribunal's mission should be considered as reactivated *ipso jure* by the Supreme Court's judgment.[217] In practice, however, the (*de facto*) reconstitution of the arbitral tribunal generally occurs on request of one of the parties.[218] 141

The Supreme Court, in a decision of 23 March 2005, expressed its view on this issue as follows: "*the decision to annul puts an end to the revision proceedings itself and causes the previous proceedings to be reopened. It has an* ex tunc *effect so that* [the tribunal] *and the parties are placed in the situation they once were in when the cancelled judgment was rendered, the cause having to be decided upon as if the judgment never existed* […]"[219]. 142

The Supreme Court furthermore pointed out, in a decision of 2 May 2012, that "[a]*s to the arbitrators* [...] *their mission is not accomplished, or is reactivated if one considers that it had been temporarily accomplished. It is, therefore, not illogical to admit, in such a case, that the arbitral tribunal which rendered the annulled award and which shall render a new one, was never* functus officio […] *or was* functus officio *only during the time elapsed between the communication and the annulment of the award*"[220]. 143

As already stated above, there may be difficulties in reconstituting the arbitral tribunal, *inter alia* in view of the time that may have elapsed since the issuance of the arbitral award. Furthermore, if the request for revision is granted (*rescindant*) on the grounds that the arbitral award was affected by a criminal offence committed by one or several of the members of the arbitral tribu- 144

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215 See para. 9 above.

216 See MÜLLER, Das Schweizerische Bundesgericht revidiert zum ersten Mal einen internationalen Schiedsspruch – Eine Analyse im Lichte des neuen Bundesgerichtsgesetzes, SchiedsVZ 2/2007 (no. 5), p. 64 ff.

217 Cf. BGE 4A_14/2012, RSPC 4/2012 p. 337 ff. Comp. STIRNIMANN (see footnote 13), para. 52; KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.225.

218 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1943 (domestic arbitration).

219 BGE 4P.198/2004 and 4C.294/2004, RSPC 3/2005 p. 303 ff. (rendered in a matter other than arbitration), Rec. 4.1 (free translation); STIRNIMANN (see footnote 13), para. 64.

220 BGE 4A_14/2012, RSPC 4/2012 p. 337 ff., Rec. 3.1.1 (free translation).

nal[221], the concerned person(s) would have to be replaced.[222] It may also be that arbitrators refuse to resume their duties within the (re)constituted arbitral tribunal – although they should not be allowed to do so without valid reason.[223] The parties should, in such situations, seek support from the competent arbitral institution (if any) and/or from the *juge d'appui* (see Art. 179 paras. 1 and 2 SPILA).[224]

2. Repetition of (Part of) the Arbitral Proceedings

145 The arbitral tribunal only needs to repeat or supplement the procedural steps which relate to the newly discovered fact(s) or evidence, or which were affected by the criminal offence having been recognized in the meantime by a criminal court. Therefore, there is generally no need to repeat the entire arbitral proceedings.[225]

146 The author refers to the legal doctrine available with respect to issues such as the evidence that can be provided and the arguments that can be presented by the parties, as well as the power of examination of the arbitral tribunal.[226]

147 The question arises whether the protective measures ordered by the Supreme Court during the phase of *rescindant*[227] subsist or not during the phase of *rescisoire*. The parties may consider requesting that the arbitral tribunal, if needed and where appropriate, orders new protective measures during the phase of *rescisoire*. In the author's opinion, one could also consider that the annulment of the arbitral award (*rescindant*), in view of its *ex tunc* effect[228], revives the protective measures ordered at the time by the arbitral tribunal during the arbitral proceedings.

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221 See also footnote 12 above regarding the situation where a party discovers a ground for the challenge of an arbitrator after the time limit for setting aside the arbitral award has elapsed.

222 Berger/KELLERHALS, 2015 (see footnote 36), para. 1979. See also para. 89 above.

223 STIRNIMANN (see footnote 13), para. 55-57; comp. BGE 118 II 199, Rec. 3, which mentions the arbitrators' refusal to (re)group.

224 See Section IV.C.3.e. above.

225 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1945 and 1979.

226 See e.g. KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.224 ff.; RIGOZZI/SCHÖLL (see footnote 1), p. 56-58 and *passim*; GEISINGER/MAZURANIC (see footnote 69), p. 272-273; GÖKSU (see footnote 7), para. 2310-2311; STIRNIMANN (see footnote 13), para. 60-67.

227 On the possibility of requesting that the arbitral tribunal orders protective measures during the phase of *rescindant*, cf. para. 137 above.

228 See para. 142 above.

Since 1 January 2012, the ICC Rules of Arbitration contain a provision concerning remission of arbitral awards to arbitral tribunals, which *inter alia* applies to revision.[229] Pursuant to Art. 36 para. 4 of the ICC Rules, "[w]*here a court remits an award to the arbitral tribunal, the provisions of Articles 32, 34, 35* [respectively: making the award; scrutiny of the award by the ICC Court; notification, deposit and enforceability of the award] *and* [of] *Article 36 shall apply* mutatis mutandis *to any addendum or award made pursuant to the terms of such remission. The* [ICC] *Court may take any steps as may be necessary to enable the arbitral tribunal to comply with the terms of such remission and may fix an advance to cover any additional fees and expenses of the arbitral tribunal and any additional ICC administrative expenses*".[230] 148

H. Decision on *Rescisoire*

1. Types and Effects

When deciding on *rescisoire*, the arbitral tribunal can either (i) annul/modify its (former) decision in whole or in part or (ii) come to the conclusion that the elements brought forward by the requesting party as ground(s) for revision do not change the result of the original award, i.e., that the dispositive section of the arbitral award remains unchanged.[231] The decision includes a decision on the costs of the arbitration.[232] 149

2. Legal Remedies

The arbitral award issued following the Supreme Court's decision to admit the request on the *rescindant* is subject to an appeal to the Supreme Court.[233] It is also subject to a (further) request for revision. 150

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229 VOSER, Overview of the Most Important Changes in the Revised ICC Arbitration Rules, in: ASA Bulletin 2011, p. 783 ff., p. 809-810.

230 See also Art. 2 para. 10 of the Appendix III to the ICC Rules regarding the cost and fees of the arbitration.

231 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1980.

232 Cf. GULDENER (see footnote 15), p. 491; Art. 333 para. 2 SCCP in state court civil procedure.

233 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1987; VOSER/GEORGE (see footnote 1), p. 65; GIRSBERGER/VOSER (see footnote 166), para. 1120; PFISTERER, in: BaslerKomm SPILA, para. 97 on Art. 190 SPILA.

I. Waiver of the Right to Apply for Revision

1. The Current State of the Question According to Case Law and Legal Doctrine

151 The Supreme Court initially left the question of whether the parties in international arbitration can waive the right to apply for revision[234] open, although suggesting that a waiver of revision would be ineffective.[235]

152 Legal doctrine is divided on this issue.[236] Among others, BERGER and KELLERHALS consider that a waiver of revision is admissible in principle. The author puts forward that specific reference to revision of arbitral awards is not necessary; the clear and incontestable expression of the common intention of the parties to waive "any recourse" against the award being sufficient.[237] The author also indicates that the waiver to apply for revision can either be general or relate to specific grounds for revision.[238] The author, moreover, points out that some specific circumstances, although they could not be invoked as grounds for revision, may be invoked as grounds for refusal during the *exequatur* phase.[239]

153 The question also arises whether a contractual waiver of a motion to set aside pursuant to Art. 192 para. 1 SPILA entails the (in)admissibility of the request

234 BGE 4P.265/1996, Rec. 1a.

235 SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 376-377, referring to BGE in RSDIE 1998 p. 580, Rec. 1.

236 *Pro*: HIRSCH (see footnote 1), para. 46; POUDRET/BESSON (see footnote 1), para. 845; BERGER/KELLERHALS, 2015 (see footnote 36), para. 1982; GÖKSU (see footnote 7), para. 2249; VOSER/GEORGE (see footnote 1), p. 64. *Contra*: RIGOZZI/SCHÖLL (see footnote 1), p. 29-30; PATOCCHI/JERMINI, in: BaslerKomm SPILA, para. 22 on Art. 192 SPILA; BUCHER, in: CR LDIP, para. 5 on Art. 192 SPILA (this last author, however, proposes, in view of BGE 4A_234/2008, to admit an anticipated waiver of revision with respect to the grounds for revision which overlap with the grounds for appeal provided by Art. 190 SPILA). Taking a nuanced approach: KAUFMANN-KOHLER/RIGOZZI, Arbitrage International (see footnote 144), para. 861.

237 BERGER/KELLERHALS, 2010 (see footnote 13), para. 1813-1813a. BERGER/KELLERHALS, 2015 (see footnote 36), para. 1981 ff.

238 BERGER/KELLERHALS, 2010 (see footnote 13), para. 1814.

239 BERGER/KELLERHALS, 2010 (see footnote 13), para. 1815 (awards affected by a criminal offence, which can be considered as falling within the ground for refusal provided by Art. V para. 2 lit. b NYC); see also HIRSCH (see footnote 1), para. 117. Comp. POUDRET/BESSON (see footnote 1), para. 843, who – rightly in the author's view – relativize the scope of such a possibility.

for revision.[240] The Supreme Court, in a decision of 14 August 2008, left this question open, however pointing out in an *obiter dictum* that "*it appears difficult to admit that a party who has expressly waived its option to challenge the award, i.e., to invoke the plea provided for in* [Art. 190 para. 2 lit. a SPILA]*, may nevertheless seize the* [Supreme Court] *indirectly by invoking the same plea* […] *with a request for revision, otherwise* [Art. 192 SPILA] *would become a dead letter*"[241]. The Supreme Court, in a decision of 17 October 2017, confirmed this approach and enshrined it in its case law – thereby indirectly admitting that the parties can waive their right to apply for revision.[242]

In another decision, the Supreme Court had to determine how to understand the following sentence arising from an arbitration clause: "*neither party shall seek recourse to a law court nor other authorities to appeal for revision of this decision*". The Supreme Court considered that these terms clearly reflect the parties' will to exclude any legal remedy that may be brought before a state court against the arbitral award. Therefore, the Supreme Court held that the parties waived their right to bring an action for annulment against the arbitral award.[243] The Supreme Court, however, did not directly address the issue of the validity of a waiver of the right to apply for revision. 154

2. The Preliminary Draft Bill on the Modification of Chapter 12 of the SPILA

The preliminary draft bill on the modification of Chapter 12 of the SPILA[244] provides in the draft new Art. 190a para. 3 SPILA that the parties can expressly waive, in the arbitration clause or subsequently by means of a written agreement, part of their right to apply for revision, provided that neither of the parties has its domicile, habitual residence, place of business or seat in Swit- 155

240 MÜLLER, Swiss Case Law (see footnote 13), p. 343, 367.

241 BGE 4A_234/2008, Rec. 2.1, translated by BERGER/KELLERHALS, 2010 (see footnote 13), para. 1812. Compare with KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.217, who indicate that "*one should not overlook the fact that the availability of revision becomes all the more important precisely because under Swiss law the parties can validly waive their right to challenge arbitral awards*".

242 BGE 4A_53/2017, Rec. 3.2 (due for publication). For a commentary of this decision, see STOYANOV/SMAHI, Anticipatory Renunciation to Challenge Arbitral Awards Under Swiss Law – An Update, in: Kluwer Arbitration Blog, 10.01.2018, <http://arbitrationblog.kluwerarbitration.com/2018/01/10/recent-developments-swiss-arbitration-law/> (accessed on 17.05.2018).

243 BGE 4A_577/2013, Rec. 3.4.

244 See para. 66 above.

zerland.[245] According to the draft new Art. 190a para. 3 SPILA, such possibility would be available with respect to one of the two grounds for revision provided for in the draft new Art. 190a para. 1 SPILA, namely the ground for revision of Art. 190a para. 1 lit. a SPILA.

V. Conclusion

156 The instrument of revision of arbitral awards is to be considered as a necessary consequence of the rule of law in Switzerland.[246] It should be noted, however, that the laws of some countries do not provide for such a mechanism[247], and that the UNCITRAL Model Law on International Commercial Arbitration does not provide for the instrument of revision[248]. In any event, revision of arbitral awards rendered in Switzerland is and will remain an extraordinary legal means, which is allowed only in exceptional cases.

157 The preliminary draft bill on the modification of Chapter 12 of the SPILA[249] intends to fill the *lacuna* left by the current version of Chapter 12 of the SPILA with regard to the revision of international arbitral awards. Although one can consider that the project, as it stands, has some shortcomings in that respect, it has the merit of regulating the situation.

158 The preliminary draft bill, however, does not contain any modification of the provisions of the SCCP regarding the revision of domestic arbitral awards. The ongoing modification would, however, be an opportunity for harmonizing the procedure of revision of domestic and international arbitral awards. In particular, the competence to rule on the revision of domestic arbitral awards (*rescindant*) could be given to the Supreme Court instead of the cantonal courts.[250]

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245 See SWISS FEDERAL COUNCIL, Preliminary Draft Bill (see footnote 97).

246 Cf. para. 5 above.

247 See e.g., in international arbitration, Germany (cf. RIGOZZI/SCHÖLL (see footnote 1), p. 7; VOSER/GEORGE (see footnote 1), p. 46 and 50; HIRSCH (see footnote 1), para. 58) and England (cf. RIGOZZI/SCHÖLL (see footnote 1), p. 7; HIRSCH (see footnote 1), para. 57). Italy had once chosen to expressly exclude revision of international awards (cf. Art. 838 of the former SCCP-I, exclusion except when the parties explicitly agree otherwise), before reestablishing this possibility (cf. DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 5; POUDRET/BESSON (see footnote 1), para. 847; RIGOZZI/SCHÖLL (see footnote 1), p. 7).

248 Cf. RIGOZZI/SCHÖLL (see footnote 1), p. 6; VOSER/GEORGE (see footnote 1), p. 45-46.

249 See para. 66 above.

250 See also para. 26-27 above. See, however, para. 84 above.

It will be interesting to see in that respect the solutions that will be proposed by the Swiss Federal Council in the forthcoming (amended) draft bill on the modification of Chapter 12 of the SPILA which will be submitted to the Swiss Parliament. 159

Finally, and from a general point of view, one can consider that numerous procedural difficulties, on both theoretical and practical levels, will continue to arise regarding the revision of arbitral awards in Switzerland. 160

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Selected Issues of Alternative Dispute Resolution Involving Cross-border Technology Licensing Agreements

Barbara Schroeder de Castro Lopes

Table of Contents

I. Introduction

1 The overall aim of this paper is to follow up on the process introduced by Trevor Cook and Alejandro I. Garcia, who were among the "pioneers" in bridging the gap between intellectual property law on the one hand and international arbitration practice on the other.[1] In the author's view, the ideal "bridge" between the two practice areas is a licensing agreement: an agreement whereby the licensor grants to the licensee the right to use an intellectual property right (hereafter: "**IPR**") in return for the payment of regular royalties.[2] Especially in cross-border licensing agreements, parties ought to spend some thoughts on the appropriate dispute resolution mechanism.

2 Why is it useful to dedicate a special paper on the resolution of disputes involving licensing agreements? It seems there are a number of factors that illustrate why this can provide an added-value:

3 First of all, licensing agreements have a significant economic impact and are often – if not always – designed as a continuing relationship lasting several years or even decades.[3] They thus entail a relationship of mutual trust and confidence.[4] Moreover, licensing contracts frequently have an international dimension[5] – contrary to IPR, the main object of these agreements, which are

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1 COOK/GARCIA, International intellectual property arbitration, Arbitration in Context Series, Vol. 2, Kluwer Law International 2010, preface.

2 PROBST, Der Lizenzvertrag: Grundlagen und Einzelfragen, in: Jusletter, 2 September 2013, para. 4; HILTY, Lizenzvertragsrecht, Bern 2001, p. 6.

3 The common traits of long-term contractual relationships are identified as: '*a significant level of uncertainty and an inherent tension between the goals of contractual risk distribution and the need to maintain flexibility to adjust to inevitable change occurring during the life of the contract*', cf. BÜHRING-UHLE/KIRCHHOFF/SCHERER, Arbitration and Mediation in International Business, Second Revised Edition, Kluwer Law International 2006, p. 11.

4 DESSEMONTET, Licensing and arbitration, in: DE WERRA (Ed.), Research Handbook on Intellectual Property Licensing, Cheltenham 2013, p. 338.

5 Cf. ANDERSON, International Patent Licensing, in: DE WERRA (Ed.), Research Handbook on Intellectual Property Licensing, Cheltenham 2013, pp. 126 ff., p. 148: Most patent license agreements are international in character, involving a licensed territory of more than one jurisdiction, or being between parties from different jurisdictions.

generally limited to national boundaries. Finally, there are often no national laws governing licensing contracts that can give guidance to the parties.[6]

These factors certainly lead to increased risks of disputes. Indeed, according to a survey conducted by the WIPO Arbitration and Mediation Center, licenses most frequently give rise to disputes among technology-related agreements (25% of the agreements).[7] Approximately one-fifth to one-sixth of all ICC arbitration cases every year cover licensing issues, sometimes in conjunction with other operations.[8] Thus, some thoughts on the peculiarities of dispute resolution in relation to licensing agreements appear worthwhile. 4

In practice, this is often neglected because the business partners are focused on the main deal, and nobody wants to be perceived as a "deal-breaker" because of a seemingly minor element in contract negotiations. Also, not all companies have sufficient resources to include the know-how of both transaction and arbitration or litigation lawyers at the stage of contract drafting.[9] Others may not have a legal review of their agreement at all. However, if a dispute were to arise, unnecessary costs could be avoided with a more considerate choice related to precisely this final provision.[10] 5

This paper focuses on technology-related patent and know-how licensing agreements. The first section (Part II) will give a brief introduction on the particular advantages of arbitration in technology licensing disputes. A subsequent presentation of selected issues (Part III) will distinguish three stages: pre-licensing issues, jurisdictional issues and setting aside and enforcement issues. Particular attention is devoted to the somewhat unconventional scenario of pre-licensing and the so-called FRAND disputes (i.e., disputes regarding the obligation to license essential IPR on **f**air, **r**easonable **a**nd **n**on **d**iscrimina- 6

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6 DESSEMONTET (see footnote 4), p. 352.

7 WIPO | ADR, Results of the WIPO Arbitration and Mediation Center International Survey on Dispute Resolution in Technology Transactions, March 2013, p. 17, <http://www.wipo.int/amc/en/center/survey/results.html> (accessed on 17.05.2018): R&D agreements (18%) rank second, followed by non-disclosure agreements (16%), settlement agreements (13%), assignments (13%) and M&A agreements (13%).

8 DESSEMONTET (see footnote 4), p. 337 – However, presumably not all of these licensing agreements are technology-related; cf. also cf. also BAUMANN, Patentstreitigkeiten vor Schiedsgerichten, Brussels/New York/Oxford/Vienna 2007, pp. 22 f.

9 HALKET/NYCOM, The Arbitration Agreement, in: HALKET (Ed.), Arbitration of International Intellectual Property Disputes, New York 2012, pp. 97 ff., p. 103.

10 COURVOISIER/ZOGG, Streiterledigungsplanung im internationalen Geschäft, in: MÜNCH/PASSADELIS/LEHNE (Eds.), Handbuch internationales Handels- und Wirtschaftsrecht, Basel 2015, p. 389, para. 8.2; HILTI/TANNER, Rechtsstreitigkeiten in den USA als existentielles Risiko für Schweizer Unternehmen, Anwaltsrevue 2016, pp. 41 ff., p. 42.

tory terms), which has so far received rather little attention from the arbitration community.[11] Although arbitration is the main alternative dispute resolution (hereafter: "**ADR**") mechanism looked into, mediation is also mentioned where appropriate. Yet, the arbitrability of IPR disputes has already been the subject of extensive debate[12] and will be touched upon only if need be. Also, this paper cannot go into detail on strategic or tactical questions that are related to ADR and which must be answered on a case-by-case basis.

II. Why Arbitration is Useful in International Disputes Involving Technology Licensing Agreements

A. General Advantages of Arbitration over State Courts

7 The generally cited advantages of arbitration over state court litigation include, among others, the possibility to choose arbitrators who possess the required expert knowledge, the flexibility of the procedure (including the choice of language) and an almost universal enforceability of the arbitral award. Also in licensing agreements, these are valid reasons to prefer arbitration as a dispute resolution mechanism.[13] Furthermore, in view of considerable differences in national substantive and procedural laws[14] and, consequently, the risk of con-

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11 To the knowledge of this author, the only noteworthy exception is DE WERRA, The Expanding Significance of Arbitration for Patent Licensing Disputes: from Post-Termination Disputes to Pre-Licensing FRAND Disputes, ASA Bulletin 2014, pp. 692 ff., pp. 696 f.

12 The issue is likely not one of high practical relevance, because, among other reasons, there is a clear trend towards a liberal approach to permit resolution of IP-related disputes by arbitration, cf. BOOG/MENZ, Arbitrating IP disputes: the 2014 WIPO Arbitration Rules, Journal of Arbitration Studies 2014, pp. 105 ff., p. 110; GIRSBERGER/VOSER, International Arbitration in Switzerland, Zurich/Basel/Geneva 2016, p. 107, para. 438; DE WERRA, New Developments of IP arbitration and Mediation in Europe: The Patent Mediation and Arbitration Center Instituted by the Agreement on a Unified Patent Court, Arbitragem e Mediaçao em Matéria de Propriedade Intelectual, Comitê Brasileiro de Arbitragem CBAr&IOB 2014, pp. 17 ff., p. 19; LEGLER, L'arbitre Suisse face à l'arbitrabilité des litiges en matière de propriété dans un context international, in: PYTHON/PETER (Eds.), L'éclectique juridiwue, Receuils d'articles en l'honneur de Jacques Python, Geneva/Zurich/Basel 2011, pp. 178 f.

13 HALKET, Introduction, in: HALKET (Ed.), Arbitration of International Intellectual Property Disputes, New York 2012, pp. 1 ff., p. 10.

14 Compare for an overview concerning licensing agreements ANDERSON (see footnote 5), pp. 126 ff., p. 142 f.; similarly DE WERRA, The need to harmonize intellectual

flicting outcomes, arbitration enables the parties to bundle several disputes in one proceeding.[15] Another "cornerstone of arbitration", the principle of finality of the awards,[16] helps to speed up proceedings and contributes to the time-(and cost-)efficiency of this dispute resolution mechanism.

Besides, it appears that arbitration is a more acceptable compromise for both parties, whereas state court jurisdiction at the corporate seat of one of them is usually a more controversial issue. If the contractual relationship involves a US-based company it is important to note that for many European (and other) companies, litigation in the US can be a threat to their existence.[17] Average costs for IP litigation in the US amount to 3-5 Mio Swiss Francs.[18] These costs still exclude the respondent's risk of being ordered to pay high damages.[19] 8

B. Confidentiality

Confidentiality is a particularly important issue in technology-related licensing agreements as it often involves know-how, of which the public disclosure can destroy its economic value.[20] It is important to note that arbitration does not automatically provide strict confidentiality guarantees and that more needs to be done to effectively ensure confidentiality. Firstly, when it comes to the choice of the arbitration institution, it is important to consider whether the respective rules impose duties of confidentiality upon the parties, the arbi- 9

property licensing law: a European perspective, in: DE WERRA (Ed.), Research Handbook on Intellectual Property Licensing, Cheltenham 2013, pp. 450 ff., p. 451.

15 GROZ/FRÜH, Revision der Schiedsordnungen der WIPO, sic!-Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht 2014, pp. 436 ff., p. 436.

16 MOURRE/RADICATI DI BROZOLO, Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back, Journal of International Arbitration 2006, pp. 171 ff., p. 172.

17 HILTI/TANNER (see footnote 10), Anwaltsrevue 2016, p. 41.

18 Ibid., p. 42; in the US, some courts order average damages of USD 42'854'609, cf. figures presented by MURPHY, Associate, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, IP court litigation in the USA, presentation held at WIPO Conference on IP Disputes Resolution in Life Sciences, Bonn, 10th November 2016, <http://www.wipo.int/amc/en/events/workshops/2016/bonn/program.html> (accessed on 17.05.2018).

19 HILTI/TANNER (see footnote 10), Anwaltsrevue 2016, p. 41.

20 GROZ/FRÜH (see footnote 15), sic!-Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht 2014, p. 441, cf. also the examples in COOK/GARCIA (see footnote 1), pp. 229 f. (FN 7).

trators, and the administering institution.[21] In the absence of confidentiality obligations arising out of the express agreement among the parties or out of the parties' reference to institutional rules that impose such obligations upon them, confidentiality will depend on the law applicable to the matter in dispute.[22] In most cases, that law will be the *lex arbitri*. In those countries, where no confidentiality is provided for by law, national courts may take different positions as regards confidentiality.[23] It is, therefore, advisable to provide for clear contractual duties in this respect. This also includes the agreements with the translators when they are needed, as they would not only know who the parties are but they would also have access to the files in order to ensure the quality of their translations.

10 In all cases, certain confidentiality loopholes can arise in setting-aside proceedings before state courts and in relation to mandatory publicity rules for listed companies.[24]

C. Particular Reasons to Prefer Arbitration with Regard to Technology Licensing Contracts

11 Scholars also put forward the, at first sight, paradox argument that the increase of specialized patent courts would favour the choice of arbitration even more, particularly in international disputes.[25] The reason for this is that the jurisdiction of these specialized courts is often conceived very narrowly and thus entails a risk of bifurcated jurisdiction. In the case of Switzerland, this risk arises, for example, in those cases where not only a pure patent license is granted but rather the licensor also reveals its secret know-how to the licensor for an optimum use of the licensed technology. It can even be said that a pure patent license is probably hardly encountered in practice.[26] However, know-

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21 The WIPO Rules are particularly strict in terms of confidentiality, also, but in a less far-reaching manner, the Swiss Rules. ICC Rules do not automatically guarantee confidentiality but rather rely on a tailor-made system of measures to protect confidentiality, cf. GROZ, p. 442.

22 COOK/GARCIA (see footnote 1), p. 238.

23 Ibid., p. 239.

24 GROZ/FRÜH (see footnote 15), sic!-Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht 2014, p. 443.

25 DE WERRA, Global policies for arbitrating intellectual property disputes, in: DE WERRA (Ed.), Research Handbook on Intellectual Property Licensing, Cheltenham 2013, pp. 354 f.

26 Cf. HENN, Patent-und Know-how-Lizenzvertrag, Handbuch für die Praxis, Heidelberg, 5th edition 2003, no. 34.

how is generally not qualified as IPR.[27] For commercial IPR disputes in Switzerland, the jurisdiction of the courts is limited to the higher cantonal courts, to the federal patent court and, for appeals, to the Supreme Court (cf. Art. 5 lett. a of the Swiss Code of Civil Procedure ["**SCCP**"], Art. 26 paras.1 and 2 Swiss Code on a Federal Patent Court). Know-how related disputes are dealt with firstly by the lower cantonal courts since they are outside the scope of Art. 5 lett. a of the SCCP. This leads to some legal uncertainty as to which court is competent for technology licensing agreements in which – from an economic point of view – one single technology is licensed, but – from a legal point of view – two different objects are part of that agreement.[28] Such jurisdictional issues can be easily avoided by choosing arbitration as a dispute resolution mechanism.

Finally, a point that practitioners criticize in particular about specialized courts is that – although technical knowledge of judges is considered important – their expertise is usually limited to their own area.[29] 12

D. When Does Arbitration Not Work?

When closing this short overview about the advantages of arbitration, its limits should also be briefly mentioned.[30] First of all, arbitral awards are only exceptionally granted *erga omnes* effect as to the validity and scope of an IP right.[31] Also in relation to classic patent infringement disputes, for example, there is by definition no arbitration clause in an agreement that the parties could rely upon.[32] In such cases, it can be more difficult to agree on arbitration. 13

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27 HILTY (see footnote 2), p. 13, para 16.

28 These issues were raised by LING/SCHIRBACH, Das Lizenzobjekt in gemischten Lizenzverträgen, presentation held at the Licensing Executive Society Switzerland – Weekend 16/17th September 2016 (not publicly available).

29 Issue raised by FELDGES, Partner Allen & Overy LLP, Focus Arbitration, presentation held at WIPO Conference on IP Disputes Resolution in Life Sciences, Bonn, 10th November 2016, <http://www.wipo.int/amc/en/events/workshops/2016/bonn/program.html> (accessed on 17.05.2018).

30 Cf. for a critical reflection in relation with IP disputes BAUMANN (see footnote 8), p. 23; cf. for a more in-depth analysis of pros and cons of either dispute resolution mechanism COOK/GARCIA (see footnote 1), pp. 23 f.

31 Among the exceptions are Swiss and Belgian law, cf. WIPO | Advisory Committee on Enforcement, Alternative Dispute Resolution (ADR) as a tool for Intellectual Property Enforcement – Executive Summary, Geneva, 3-5 March 2014, p. 5, <http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ace_9/wipo_ace_9_3.pdf> (accessed on 17.05.2018).

32 HALKET (see footnote 13), p. 9.

III. Selected Issues

A. Pre-licensing Disputes

14 The following section is dedicated to the highly interesting and somewhat unconventional question of how arbitration and ADR can step in at a very early stage where a licensing contract has not even been concluded.

15 The first scenario is discussed in relation to technological standards. The second scenario concerns licensing option agreements which are typically concluded between biotechnology start-ups or universities and larger pharmaceutical companies.

1. Pre-licensing FRAND Disputes

a) Standard Essential Patents (SEPs)

16 Standards ensure interoperability and compatibility between related products. This may have benefits[33] and is, in principle, considered a driver of competition and innovation and can lower costs by increasing the volume of manufactured products.[34] Indeed, the unparalleled speed with which new features and functionality have been introduced in connection with such products is remarkable[35] Standards frequently make reference to technologies that are protected by patents, especially in industries dependent upon network interoperability such as telecommunications.[36] Hundreds or even thousands of patents may read on a single standard.

17 Patents that are essential to a standard are those that cover technology to which a standard makes reference.[37] These patents are known as SEPs. SEPs are different from patents that are not essential to a standard ("non-SEPs").

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33 Cf. Guidelines on the applicability of Art. 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, pp. 1 ff., para. 263.

34 CASE AT.39939, Commission decision of 29.4.2014, Samsung – Enforcement of UMTS standard essential patents, C(2014)2891 final, public version, Annex 1, para 22.

35 LAROUCHE/PADILLA/TAFFET, Settling FRAND Disputes: Is Mandatory Arbitration a Reasonable and Non-Discriminatory Alternative?, Tilburg Law School, Legal Studies Research Paper Series No. 023/2013, p. 2, Social Science Network Electronic Paper Collection; < https://www.ssrn.com/abstract=2346892> (accessed on 17.05.2018).

36 CASE AT.39939, Commission decision of 29.4.2014, Samsung – Enforcement of UMTS standard essential patents, C(2014)2891 final, public version, Annex 1, para. 26.

37 Ibid., para 27.

This is because it is normally technically possible to design around a non-SEP without sacrificing key functionality. By contrast, a user of a standard ("implementer") has to use the technology protected by a SEP when manufacturing a standard-compliant product.[38]

Although SEPs are most prevalent in the telecommunications industry, a rising number of standards that include patent-protected technologies are emerging in many other sectors, such as automotive, energy/smart grids, healthcare, electrical and electronic engineering, audio-video-media, smart mobility and more broadly the internet-of-things (IoT).[39] Nearly every industry sector introducing "smart" systems is expected to rely heavily on compatibility standards.[40] An example concerns the on-going convergence among digital technologies, medical technology and healthcare ("e-health"), where issues of network-interoperability and, consequently, standards, begin to play an important role.[41] 18

b) Competition Law Concerns

One of the risks generated by SEPs is that the owner of such patents may unduly block the use of their patented technology by third parties and thus may prevent them from complying with the relevant technological standard.[42] This creates a risk of "patent holdup", a situation where the patent owner can delay the product development by demanding unreasonable or discriminatory royalties.[43] The threat of injunctive relief can be used as a tactical weapon in order to extract excessive value from their SEPs.[44] Unsurprisingly, this type of behaviour can be considered as anti-competitive conduct.[45] 19

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38 ITU, Understanding patents, competition and standardization in an interconnected world, ITU 2014, p. 46.

39 EUROPEAN COMMISSION, Public Consultation on Patents and Standards – a modern Framework for Standardisation involving Intellectual Property Rights, Brussels, 27 October 2015 p. 3.

40 ITU (see footnote 38), p. 16.

41 Ibid.

42 DE WERRA (see footnote 11), ASA Bulletin 2014, p. 697.

43 Ibid., p. 697; SHAPIRO, Navigating the Patent Thicket: Cross Licenses, Patent Pools and Standard Setting, in: JAFFE/LERNER/STERN (Eds.), Innovation Policy and the Economy 1, Cambridge (MA)/London 2000, pp. 119 ff., pp. 124 f.; RAGAVAN/SRIVIDHYA/MURPHY/DAVE, Frand v. Compulsory Licensing: The Lesser of the Two Evils, Duke Law and Technology Review 2015, p. 89.

44 DE WERRA (see footnote 11), ASA Bulletin 2014, p. 697.

45 EUROPEAN COMMISSION, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ

c) Standard Setting Organizations (SSO) and their IPR Policies

20 SSOs are organisations of which one of the primary activities is to develop and maintain standards by bringing together industry participants and relevant stakeholders to evaluate competing technologies for inclusion in standards.[46] If standardization is to be successful, standards must be broadly implemented by producers and suppliers of standardized products and services, who should have access to the patented technology that is standardized.[47] Competition and commercialisation concerns are addressed in the SSO IPR policies. These policies require participants wishing to have their IPR included in the standard to provide an '*irrevocable commitment to offer to license their essential IPR to all third parties on FRAND (i.e., **f**air, **r**easonable **a**nd **n**on **d**iscriminatory) terms*'.[48]

21 FRAND licensing does not specify the terms that must be agreed upon by patent owners and potential licensees. It is rather the SEP owners themselves who have to negotiate with each implementer seeking a license as to the commercial terms specific to their bilateral relationship that best reflect each party's commercial priorities, with both parties having the duty to do so in good faith.[49] Unsurprisingly, in particular an agreement on FRAND rates or royalties can sometimes not be reached in negotiations. The following sections will thus explore not only the potential but also the particular features of ADR in FRAND disputes.

d) The Role of ADR in FRAND Disputes: The Commitments of Samsung in the Samsung v. Apple Dispute

22 A high-profile dispute[50] between Apple and Samsung concerned the SEPs held by Samsung covering the Universal Mobile Telecommunications Ser-

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C 11/1 14 January 2011, para. 269; ITU, Understanding patents, competition and standardization in an interconnected world, ITU 2014, p. 46; cf. critical assessment by FRÜH, Die "Smartphone Wars" nach der Entscheidungsschlacht, sic! – Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht 2016, pp. 3 ff., pp. 10 f., regarding an analysis which considers competition law aspects only.

46 CASE AT.39939, Commission decision of 29.4.2014, Samsung – Enforcement of UMTS standard essential patents, C(2014)2891 final, public version, para 23.

47 LAROUCHE/PADILLA/TAFFET (see footnote 35), p. 2; ITU, Understanding patents, competition and standardization in an interconnected world, ITU 2014, p. 46.

48 Cf. ETSI, Rules of Procedure, 20 April 2016, Annex 6: ETSI Intellectual Property Rights Policy, section 6.

49 LAROUCHE/PADILLA/TAFFET (see footnote 35), p. 3.

50 Cf. summary and overview of the existing case law on FRAND disputes in FRÜH, (see footnote 45), sic! – Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht 2016, pp. 2 f.

vices (UMTS) technology. Samsung asserted nine of its UMTS SEPs against Apple before national courts in the EEA.[51] At the same time Samsung had committed to FRAND terms during the standard-setting process in the European Telecommunications Standards Institute (ETSI). Due to these commitments and given the fact that Apple was not unwilling to enter into a licence agreement for Samsung's SEP on FRAND terms, the European Commission raised concerns as to the compatibility of Samsung's behaviour with EU competition law, in particular with Art. 102 TFEU.[52]

In its decision on 29 April 2014, the European Commission declared a number of commitments binding on Samsung. These commitments include *inter alia*, a detailed dispute resolution procedure[53]: Firstly, the commitments define a mandatory negotiation period of 12 months. In the event that the parties have not reached an agreement within this period of time, a next phase is to be initiated: the so-called third-party determination of FRAND disputes. In this phase, the parties submit the matter either to ICC-arbitration or to court adjudication. If the parties cannot agree within 60 days on the dispute resolution mechanism, the default option is litigation in front of the Patents Court, High Court of England and Wales or the Unified Patent Court (UPC). 23

Regarding the detailed commitments on the arbitration procedure the following points are noteworthy: Firstly, the arbitrators each need to possess at least 10 years of relevant experience in the ICT sector and/or in IP licensing. Moreover, the arbitral tribunal shall take into account issues of validity, infringement and essentiality. Secondly, the arbitral proceedings and the decision shall be confidential. However, a non-confidential version shall be published within 90 days of the decision. The purpose of the publication is to disclose the methodology relied upon by the arbitral panel to arrive at FRAND terms. However, the specific terms shall remain strictly confidential. Thirdly, the first arbitral tribunal's decision shall be subject to an appeal to a second arbitral tribunal on issues of fact and law. However, the Parties can agree to limit the issues to be considered on appeal. 24

51 CASE AT.39939, Commission decision of 29.4.2014, Samsung – Enforcement of UMTS standard essential patents, C(2014)2891 final, public version, p. 5, para.(2), FN 2.

52 Ibid., p. 5, para.(3).

53 Ibid., Annex 1, Section B, pp. 4 f.

e) The Role of ADR in FRAND Disputes: Results of a Public Consultation Carried out by the European Commission

25 In October 2014, the European Commission launched a public consultation procedure on patents and standards to gather stakeholders' views on a modern framework for standardisation involving intellectual property rights. The results of this consultation were published in October 2015.[54]

26 One of the key issues in the consultation procedure concerned SEP disputes and their resolution.[55] A particular focus was placed on ADR. The consultation revealed that ADR mechanisms in relation to SEPs are used, but in a limited manner, given that both parties' agreement to move to arbitration is a pre-requisite. Still, a large number of respondents pointed out that ADR can provide benefits for both parties when deciding on FRAND rates. It was mentioned that ADR can provide global portfolio and freedom to operate arrangements between companies, while litigation is nearly always limited to one jurisdiction and to a small selection of patents.

27 Stakeholders were divided on the confidential nature of ADR. While some considered this to be an interesting feature, others argued that the outcome should be made public to facilitate benchmarking. Given the complexity of SEP disputes, the benefit of specialist arbitrators was recognized.

28 Stakeholders held different opinions with regard to the mandatory or voluntary nature of ADR in SEP disputes. Some wished to include dispute resolution procedures in the SSO's IP policies, while others opposed this approach.

f) Mandatory or Voluntary Nature of ADR in FRAND Disputes?

29 Not only stakeholders, but also scholars are divided on the mandatory or voluntary nature of arbitration in FRAND disputes.

30 LEMLEY/SHAPIRO favour mandatory "baseball-style" arbitration as part of the SSOs' implementing process of FRAND commitments. In their opinion, this is a simple and cost-efficient way to set reasonable royalties for SEPs.[56] Patentees should be bound to engage in arbitration over the reasonable royalty

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54 EUROPEAN COMMISSION, Public Consultation on Patents and Standards – a modern Framework for Standardisation involving Intellectual Property Rights, Brussels, 27 October 2015.

55 Ibid., p. 10, section 3.5.

56 LEMLEY/SHAPIRO, A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents, Berkeley Technology Law Journal 2013, pp. 1134 ff., p. 1138, <http://scholarship.law.berkeley.edu/btlj/vol28/iss2/2> (accessed on 17.05.2018).

rates rather than litigating patents in court. More concretely, the term "baseball-style" arbitration means that each party submits its final offer to the arbitrator, who must then pick one of those two offers.[57] The parties need to produce evidence for their offer.[58] According to LEMLEY/SHAPIRO, the "baseball-style" drives parties towards making reasonable proposals, because the party that asks for too much (or offers too little) risks losing the case altogether.[59] For the non-discrimination commitment in FRAND licensing to be effective, LEMLEY/SHAPIRO also suggest that any arbitration decision will be disclosed to willing licensees as it is hard to know whether a royalty unfairly favours one party, unless we also know what other parties had to pay.[60] They go as far as granting access to the specific terms subject to suitable protections of confidential business information.[61] The proposal of LEMLEY/SHAPIRO also includes that the potential licensee would be free to litigate issues such as validity and essentiality in a subsequent proceeding while the arbitrated royalty rate will remain unchanged.[62]

This approach has been criticised by LAROUCHE ET AL.[63] According to them, the proposal outlined by LEMLEY/SHAPIRO will have a chilling effect on negotiated solutions.[64] Apparently, economic theory has shown that all dispute resolution mechanisms tend to reduce settlement rates and increase conflict and transaction costs.[65] Another main critique put forward by LAROUCHE ET AL. concerns a likely under-compensation of SEP owners. According to their economic model, the implementer will have no incentive to modify its proposed (extremely low) rate because it would always bring a validity challenge in the event the SEP holder's proposed rate is accepted, because litigating the SEPs' validity entails no cost in terms of royalty rates for the implementer.[66] Accordingly, parties should have access to all possible dispute resolution mechanisms as appropriate. 31

57 Ibid., p. 1138.
58 Ibid., p. 1144.
59 Ibid.
60 Ibid., p. 1145.
61 Ibid., p. 1145, FN 28.
62 Ibid., p. 1162.
63 LAROUCHE/PADILLA/TAFFET (see footnote 35).
64 Ibid., p. 19.
65 Ibid., pp. 19 and 21.
66 LAROUCHE/PADILLA/TAFFET (see footnote 35), p. 24. However, litigation costs are significant, especially in the US (cf. above, section II. 1). It is questionable why these costs are not considered in the economic model proposed by the authors.

g) Comments

32 Given the rising importance of SEP in a range of innovative sectors and, subsequently, also FRAND commitments, it is quite likely that also the numbers of disputes will increase.[67] As a consequence, there is indeed a significant potential for ADR to offer cost-and-time-efficient[68] options in case of disputes although, typically in pre-licensing disputes, the parties at this stage have not yet concluded an arbitration agreement. Hence, the WIPO offers tailored submission agreement models that were developed in cooperation with ETSI.[69]

33 An important advantage of arbitration in relation to FRAND disputes appears to be the fact that courts on both sides of the Atlantic encounter difficulties in handling such disputes[70] and are generally more reluctant in determining a "fair royalty" for an SEP portfolio. This can be highly demanding and in certain aspects defers from the already difficult concept of reasonable royalties in patent law which is used for damage calculation in infringement cases.[71]

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67 Apparently, this opinion is not shared by LAROUCHE/PADILLA/TAFFET (see footnote 35), pp. 10 f., but this contrasts with the recent observations and initiatives of various institutions such as WIPO and ITU, cf. DE CASTRO/WOLLGAST, WIPO Arbitration and Mediation Center: New 2014 WIPO Rules; WIPO FRAND Arbitration, ASA Bulletin 2014, p. 286, pp. 286 ff.; ITU, Understanding patents, competition and standardization in an interconnected world, ITU 2014.

68 Cf. ITU, Understanding patents, competition and standardization in an interconnected world, ITU 2014, p. 75; time delays can jeopardize entire projects or product lines. The choice of expedited arbitration also allows parties to avoid very significant costs associated with multi-jurisdictional court proceedings.

69 DE CASTRO/WOLLGAST (see footnote 67), ASA Bulletin 2014, pp. 289 f.

70 Cf. PERKINS/PRICE, A European Perspective on the Arbitration of Patent Disputes, Kluwer arbitration blog, <http://kluwerarbitrationblog.com/2016/03/29> (accessed on 17.05.2018) : Indeed, arbitration rather than national court litigation has been encouraged both by the European Commission and the U.S. Federal Trade Commission and U.S. Department of Justice; DE CASTRO/WOLLGAST (see footnote 67), ASA Bulletin 2014, p. 290.

71 Cf. LEMLEY/SHAPIRO (see footnote 56), Berkeley Technology Law Journal 2013, pp. 1146 f. Under US patent law, a reasonable royalty normally is based on a hypothetical, arms-length negotiation between a willing buyer and a willing seller [additional remark: a similar method is often used in practice in continental Europe, this method is called damage calculation by "licence analogy" (Lizenzanalogie), cf. as a Swiss example DSC 132 III 379, reason 3.2.2]. For SEPs, a reasonable royalty should be based on a hypothetical, arms-length negotiation that takes place at the time the SSO is setting the standard. Accordingly, a reasonable royalty should reflect what would happen as a result of well-informed ex ante technology competition. The incremental value of the patented technology over and above the next-best alternative serves as an upper bound to reasonable royalties. A reasonable royalty does thus not

Arbitrators are less shy and may enjoy more flexibility when including an economic approach in their awards – usually, the parties actually wish the arbitrators not only to possess but also to make use of their relevant industry knowledge. In this context, the level of expertise that can be expected from the arbitrators appears to be another advantage.[72] However, in order to be able to use it as a time- and cost-efficient tool, the idea of including an arbitral appeal mechanism as in the Samsung commitments appears to be counterproductive. Also, the proposal of LEMLEY/SHAPIRO to "carve out" issues of infringement and validity in relation to FRAND disputes appears to be unfortunate as this might give rise to grounds for questioning the jurisdiction of the arbitral tribunal.[73]

Interestingly, although confidentiality is again an important issue, in FRAND disputes there is an increased need for at least some transparency for benchmarking purposes. However, disclosure of the terms to a willing licensee as suggested by LEMLEY/SHAPIRO undermines one of the key advantages of arbitration for IP disputes. In this regard, the publication of a non-confidential version of the award that is limited to the disclosure of the methodology relied upon by the arbitrators appears to be an acceptable compromise. However, it is hard to see how such transparency could be implemented more uniformly without inclusion in the SSOs' IPR policies in case SEP holders opt to go for arbitration with a third-party licensee when a FRAND dispute arises. 34

Arbitration is typically and should remain a voluntary process and the flexibility with regard to the procedural rules is considered to be an important feature. Mandatory arbitration thus appears to prevent parties from using other ADR methods as they see appropriate and deprives them of the possibility to tailor the procedure to their specific needs. Besides, it is difficult to see how the mandatory nature of arbitration should be enforced by whom and against whom.[74] 35

include the value attaching to the creation and adoption of the standard itself. The authors convincingly argue that allowing patentees to capture that value, which flows from the collective adoption decisions of a group rather than from the underlying value of the technology chosen, would undermine the goals of FRAND commitment. However, it must be indicated that this issue is subject to controversy, compare ITU, Understanding patents, competition and standardization in an interconnected world, ITU 2014, p. 66 for an overview.

72 ITU (see footnote 38), p. 75.

73 This issue will be dealt with more in detail under section III B.

74 Imposing a certain type of ADR via regulations would need to be examined in more detail as this would amount to a massive intervention into the very nature of ADR.

36 Finally, it seems that the potential of mediation is still underexplored in the context of FRAND disputes[75], although e.g. WIPO reports average settlement rates of up to 70 %.[76] This is probably also due to the fact that people still tend to be unfamiliar with mediation, particularly those from a civil law background[77], and often wrongly perceive mediation as a "holding hands" approach not suitable for commercial disputes. However, when both parties have an interest to enter into a long-lasting contractual relationship, more formal and adversary proceedings can be detrimental at this stage. The interest of the potential SEP licensor lies in the fact that he has not only committed to the FRAND terms but also wishes to have the standard broadly implemented by producers and suppliers of standardized products[78] and/or to receive cross-licenses by the licensee. On the other hand, the possibility of reacting with infringement claims is limited since, in the light of all circumstances, this conduct might cause the unwanted attention of competition authorities. The obvious interest of the licensee lies in the access to the technology to produce a standard-compliant product. Moreover, mediation allows business decision makers to significantly influence the outcome of the process, whereas in more formal and "legalistic" proceedings they tend to feel excluded[79], which is detrimental to the acceptance of the outcome. For the process to be efficient and useful it is important to involve the persons with the adequate decision-making powers.[80]

37 An interesting tool that has been recently introduced in the latest version of the WIPO Mediation and Arbitration Rules (effective from 1 January 2016) concerns the possibility to request mediation unilaterally in the absence of a mediation agreement (Art. 4 WIPO Mediation Rules). Nonetheless, mediation offers no binding and enforceable decision but demands a lot of conflict man-

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75 Cf. for IP disputes in general, PLAYER/MOREL DE WESTGAVER, IP Mediation, in: COOK/TREVOR/GARCIA (Eds.), International intellectual property arbitration, Arbitration in Context Series, Vol. 2, Kluwer Law International 2010, p. 330.

76 DE CASTRO/WOLLGAST (see footnote 67), ASA Bulletin 2014, p. 291.

77 QUEEN MARY, UNIVERSITY OF LONDON IN COOPERATION WITH SCHOOL OF INTERNATIONAL ARBITRATION AND PINSENT MASONS, Pre-empting and Resolving Technology, Media and Telecoms Disputes, International Dispute Resolution Survey, November 2016, p. 20, <http://www.pinsentmasons.com/en/media/publications/pre-empting-and-resolving-technology-media-and-telecoms-disputes-international-dispute-resolution-survey/> (accessed on 17.05.2018).

78 LAROUCHE/PADILLA/TAFFET (see footnote 35), pp. 2 f.

79 Issue raised by NEUHOLD, Legal Counsel, Roche Diagnostics International AG, Resolving Disputes via Mediation, presentation held at WIPO Conference on IP Disputes Resolution in Life Sciences, Bonn, 10th November 2016, <http://www.wipo.int/amc/en/events/workshops/2016/bonn/program.html> (accessed on 17.05.2018).

80 Issue raised by NEUHOLD (see footnote 79).

agement responsibility from the parties. Furthermore, more transparency in order to foster implementation of the non-discrimination requirement cannot be expected from mediation.

2. License Option Agreements

FRAND disputes are not the only scenario in which a dispute can arise before the license agreement has been entered into. Another type of pre-contractual dispute can be found in relation to license option agreements typically concluded among larger pharmaceutical companies and smaller biotechnology start-ups or universities. 38

a) Option Agreements

Start-ups seldom produce and sell drugs, they instead license their intellectual property to large pharmaceuticals companies. In an emerging technology commercialisation project there are many risks[81] (technical, commercial, legal, regulatory, etc.) that may need to be reduced and controlled before a definitive commitment can be made for the market deployment of that technology.[82]Companies will recognize the potential advantage of a technology, but because of the early-stage nature of the work this might need more confirmatory evidence. Options to license patents or a mix of patents and know-how are in many instances the right precursor to a license of a technology.[83] Usually, options are granted on an exclusive basis.[84] 39

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81 Cf. for biotechnology inventions FREEMAN, Licensing Biotechnology Inventions, in: KRATTIGER/MAHONEY/NELSEN ET AL. (Eds.), Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices, Oxford/Davis 2007, p. 991, <www.ipHandbook.org> (accessed on 17.05.2018).

82 BELLEMARE, On The Use of Preferential Rights in Intellectual Property Agreements, Les Nouvelles, Journal of the Licensing Executives Society International 2016, pp. 116 ff., p. 116.

83 For the sake of completeness, it has to be noted that also other kinds of preferential rights exist and are used in IP transactions such as rights of first refusal / offer or right of first negotiation. In contrast to options, these rights are grantor triggered; cf. BELLEMARE (see footnote 82), Les Nouvelles, Journal of the Licensing Executives Society International 2016, p. 122 for an overview.

84 ANDERSON/KEEVEY-KOTHARI, Commercialization Agreements: Practical Guidelines in Dealing with Options, in: KRATTIGER/MAHONEY/NELSEN ET AL. (Eds.), Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best

40 In exchange for a consideration called the "option fee", an option gives its holder a right, but no obligation over an IP asset of the grantor during a defined period of time, the option period, where the option can be exercised.[85] Of particular interest is the case of the license option, where depending on the specifics of the option grant provision, the exercise can trigger the following[86]:

- The execution of a fully pre-negotiated license agreement; or
- The negotiation of a comprehensive license agreement based on a pre-negotiated term sheet; or
- The start of good faith negotiation on a license agreement (over a limited time period).

41 Although the first scenario is ideal in terms of clarity, it rarely occurs in practice since the parties often postpone the cost and effort required for a fully negotiated licence agreement.[87] The second scenario gives some business certainty without requiring too much time or money.[88] With regard to the third scenario, controversy exists regarding its enforceability and legal nature.[89] However, also these types of license options are frequently used in practice and are probably those that are most exposed to disputes.

b) The Parties' Interests and Possible Disputes

42 Option agreements are becoming increasingly popular, as they create additional flexibility within a deal for additional rights that the parties do not wish to commit to at the outset of the agreement.[90] From the licensee's perspective it is important not to spend too much capital before having more assurance on how the technology or drug performs. For a biotechnology company it might

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Practices, Oxford/Davis 2007, p. 1070, available at <www.ipHandbook.org> (accessed on 17.05.2018).

85 BELLEMARE, (see footnote 82), Les Nouvelles, Journal of the Licensing Executives Society International 2016, p. 116.

86 Ibid., p. 117.

87 Ibid.

88 Ibid.

89 ANDERSON/KEEVEY-KOTHARI (see footnote 84), p. 1075; BELLEMARE, (see footnote 82), Les Nouvelles, Journal of the Licensing Executives Society International 2016, p. 117.

90 Cf. Global Option and Evaluation Partnership Terms and Agreements in Pharma, Biotech and Diagnostics 2010-2016 report, summary available at: <https://www.prnewswire.com/news-releases/global-option-and-evaluation-partnership-terms-and-agreements-in-pharma-biotech-and-diagnostics-2010-2016-300422911.html/> (accessed on 17.05.2018).

be interesting to secure a license contract already at an early stage, especially if it needs to calm investors with some positive news flow.[91]

Negotiating and drafting license option agreements or license option clauses can be challenging both from a legal and commercial perspective.[92] An ambiguous wording of the provisions that determine when the option is exercised can already cause disagreement among the parties. Given the high risk in the pharmaceutical development process, the determination of the royalties can again give rise to disputes. A default mechanism to determine what happens when negotiations fail is highly recommended. 43

c) Case Example

In a case administered by WIPO[93], a European university holding pharmaceutical patent applications in several countries negotiated a license option agreement with a European pharmaceutical company. The company exercised the option and the parties started to negotiate a license agreement. After three years of negotiations, the parties were unable to agree on the terms of the license. This raises the question of how the dispute should be resolved appropriately. 44

d) Comments

As indicated above, when a license option agreement is entered into, the development process is usually at a very early stage. Accordingly, confidentiality of the proceedings is a most critical issue that should be taken into account when the dispute resolution mechanism is chosen. 45

Especially if the option only entails negotiations in good faith and one of the parties fails to do so, the question arises as to what extent an arbitral tribunal could have jurisdiction to decide on such a duty that is rather based on *culpa* 46

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91 AVANCE-Newsletter: How to determine option contract terms? August 2011, <http://www.avance.ch/newsletter/docs/avance_on_options.pdf> (accessed on 17.05.2018).

92 ANDERSON/KEEVEY-KOTHARI (see footnote 84), p. 1072.

93 SCHALLNAU, A Compilation of Practioners' Views – Life Sciences Dispute Resolution, Les Nouvelles, Journal of the Licensing Executives Society International 2016, pp. 128 ff., p. 128; case presented by SHORTHORSE, Partner Bird&Bird LLP, Contracts, Intellectual Property and Disputes in Life Sciences, presentation held at WIPO Conference on IP Disputes Resolution in Life Sciences, Bonn, 10th November 2016, <http://www.wipo.int/amc/en/events/workshops/2016/bonn/program.html> (accessed on 17.05.2018).

in contrahendo than on an enforceable contractual duty. This concern can arise particularly in cases where the scope of the arbitration clause is limited to contractual disputes.[94]

47 Given the advanced stage of cooperation and the mutual efforts that were put into the project, the parties' interest in an on-going relationship is still high and considered mutually beneficial. In contrast to FRAND disputes, there is no regulatory pressure to conclude an agreement and the interests at stake are mainly of commercial nature. Therefore, the idea that a judge or another "third party" should impose some or most terms of an "agreement" among two parties does not correspond to the common understanding of a contractual relationship. Nevertheless, as mentioned also in relation to FRAND disputes, this task might be better entrusted to an arbitral tribunal than to a court.[95]

48 In the above case example, the WIPO has successfully assisted the parties in resolving the dispute with mediation.[96] With the support of the WIPO Arbitration and Mediation Center and in accordance with the parties' request, a mediator who had a legal background, had worked in the pharmaceutical industry for many years, and had considerable licensing experience could be appointed. With the help of the mediator, who assisted the parties in identifying and deepening their understanding of the legal issues during a one-day meeting, the parties continued their negotiations and reached a settlement.

49 As this example shows, the personal capacities of the mediator are essential for the efficiency of this dispute resolution tool.[97] Other stakeholders have pointed out that litigation and/or court experience can also be helpful for raising awareness of the relevant issues and thereby assisting the parties in resolving their dispute.[98]

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94 According to MONDINI/MEIER, Patentübertragungsklagen vor internationalen Schiedsgerichten mit Sitz in der Schweiz und die Aussetzung des Patenterteilungsverfahrens, sic!-Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht 2015, pp. 289 ff., p. 291, in Switzerland also more narrow arbitration clauses are not a concern where there is a sufficient link to the agreement; cf. also the extensive application of the doctrine of severability by the Swiss Supreme Court (DSC 142 III 239).

95 Cf. HALKET (see footnote 13), p. 11, who considers that, since arbitration is flexible, in can be set up by the parties so as to maximise the likelihood that the business relationship will be preserved.

96 SCHALLNAU (see footnote 93), Les Nouvelles, Journal of the Licensing Executives Society International 2016, p. 128.

97 This includes issues such as trustworthiness and strict impartiality, cf. PLAYER/MOREL DE WESTGAVER (see footnote 75), p. 333.

98 Issue raised by NEUHOLD (see footnote 79).

Finally, another possibility for a dispute resolution clause in the option agreement could consist of an escalation clause combining mediation and arbitration. However, in order to preserve time efficiency of ADR it is recommended to set strict timelines for negotiations and mediation as appropriate in view of the complexity and commercial needs of the individual case. 50

B. Jurisdictional issues: The Scope of the Arbitration Clause

Interestingly, diverging interpretations of the scope of the arbitration clauses frequently materialize in international IP-related transactions.[99] However, any ambiguity in connection with the scope of the arbitration clause is highly detrimental to the desired cost- and time-efficient dispute resolution. They can lead to delaying tactics by the respondent and, consequently, to long discussions on jurisdiction before the arbitral tribunal and/or states courts. This ultimately leads to a significant increase in costs. 51

As will be explained in more detail, such ambiguity is often caused by apparently sophisticated clauses. Two scenarios can often be encountered in licensing agreements. The first one concerns so-called IP-carve out provisions and the second scenario can arise in relation to post-termination disputes. 52

1. IP Carve Out Provisions

a) Carve Out Provisions

A carve out provision splits the jurisdictional power between arbitration (for breach of contract claims) and court litigation by excluding certain types of disputes (essentially IP infringement claims) from the otherwise broad adjudication power of the arbitral tribunal.[100] However, in licensing agreements breaches of contractual provisions and violation of IPR are usually not as distinct as they might seem at first glance but are actually interrelated.[101] 53

Usually, IP carve out provisions are introduced for the purpose of reserving the power to enforce a contracting party's IPR against the other party before 54

99 DE WERRA (see footnote 11), ASA Bulletin 2014, p. 696.

100 DE WERRA, Risks of IP carve-out in arbitration clauses, Oxford Journal of Intellectual Property Law and Practice 2014, pp. 184 ff., p. 184.

101 ZAMMIT/HU, Arbitrating Intellectual Property Disputes, Dispute Resolution Journal 2009, p. 4; cf. also ANDERSON (see footnote 5), p. 129.

State courts[102] and to achieve an *erga omnes* decision for the infringement claim. Such carve out provisions are also inserted to avoid discussions about arbitrability at the enforcement stage.[103]

b) Case Example

55 In a licensing agreement involving a US company (Oracle America Inc.) as licensor and a Swiss IT company (Myriad Group AG) as licensee the arbitration clause was drafted as follows[104]:

56 '*Any dispute arising out of or relating to this License shall be finally settled by arbitration as set out herein, except that either party may bring any action, in a court of competent jurisdiction (which jurisdiction shall be exclusive) with respect to any dispute relating to such party's Intellectual Property Rights or with respect to Your [i.e., Myriad's] compliance with the TCK license. Arbitration shall be administered (i) by the American Arbitration Association (AAA) (ii) in accordance with the rules of the United Nations Commission of International Trade Law (UNCITRAL) […]; and (iii) the arbitrator will apply the substantive laws of California and the United States*.'

57 Myriad stopped paying royalties, relying on what it believed were its rights under the agreements. Oracle then filed suit against Myriad in a Californian State Court for breach of contract, violation of the Lanham Act, copyright infringement and unfair competition under Californian Law. Myriad reacted by moving to compel arbitration on the basis of the arbitration clause and submitted a request for arbitration to the ICDR, the international arm of the AAA.

58 After all, in this dispute the contractual bifurcation of adjudication powers between the State courts and the arbitral tribunal led to a stay of all (State court and arbitral) proceedings for around 18 months.[105]

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102 DE WERRA (see footnote 100), Oxford Journal of Intellectual Property Law and Practice 2014, p. 184.

103 ZAMMIT/HU (see footnote 101), Dispute Resolution Journal 2009, p. 3.

104 United States Court of Appeal for the 9th Circuit 11-17186, 724 F 3 d 1069, Oracle America Inc. v. Myriad Group, 26 July 2013; case discussed by DE WERRA (see footnote 100), Oxford Journal of Intellectual Property Law and Practice 2014, pp. 184 ff.

105 DE WERRA (see footnote 100), Oxford Journal of Intellectual Property Law and Practice 2014, p. 185.

2. Post-termination Disputes

Another scenario that can lead to analogous difficulties concerns a dispute that arises among parties after the termination of an agreement. The following case example that has recently been dealt with by the Swiss Supreme Court[106] will illustrate this issue: 59

The parties had agreed that the dispute resolution mechanism (negotiations followed by arbitration pursuant to Art. 11) would survive the expiration or termination of the agreement and would apply '*in respect of any matter arising prior to such expiration or termination*.' 60

However, the dispute that arose among the parties concerned a matter arising *after* the termination of the agreement. The licensors and claimants in the arbitration had requested in the arbitration that their ex-licensee shall stop the manufacturing and sale of contractual products which infringed on one of their patents. The licensee challenged the jurisdiction of the arbitral tribunal with respect to these claims. This challenge was rejected by an interim award of the arbitral tribunal. A subsequent appeal to the Swiss Supreme Court was dismissed. The Swiss Supreme Court confirmed the application of the well-established doctrine of severability under which the validity of an arbitration clause does not depend on the main agreement. Based on an interpretation in good faith of the contractual provisions and in line with its case law, the Court held that the arbitration clause had to be interpreted extensively as to encompass post-termination disputes. 61

3. Comments

In recent years, more and more countries have come to accept that IP disputes on infringement, sometimes even on validity, are perfectly arbitrable.[107] This development makes carve out provisions redundant. 62

Interestingly, also in relation to SEP disputes (cf. above, Section II.A.1.e), stakeholders (still) have expressed the opinion that the assessment of infringement or validity should not be determined by ADR, but rather patent offices and court litigation. However, when it comes to FRAND rates, ADR was considered appropriate. Also the ITU lists this topic among the questions 63

106 DSC 140 III 134, case discussed by DE WERRA (see footnote 11), ASA Bulletin 2014, and DE WERRA, "Zuständigkeit Schiedsgericht" Bundesgericht vom 27. Februar 2017, sic!-Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht 2014, pp. 471 ff.

107 Cf. above, p. 2, FN 12.

to be resolved.[108] This confirms the initial statement (cf. above, Section I) that licensing agreements are – if at all – seldom reviewed by lawyers with experience in dispute resolution. Consequently, the message about the harmfulness of such provisions is not yet spread widely enough – neither among stakeholders nor among their legal advisors.

64 The same is true for disputes arising before and after termination of the main agreement. The Swiss Supreme Court rightly points out that such a distinction could lead to abuses, as the jurisdiction of a subsequently undesired arbitral tribunal could be circumvented by termination of the agreement.[109] It is, therefore, correct to consider such post-termination disputes as disputes which are reasonably connected to the arbitration clause in the licensing agreement. Its contractual distinction though was detrimental to the efficiency of the chosen dispute resolution mechanism.

C. Setting Aside Proceedings and Enforcement: Violation of EU Competition Law

1. Competition Law as a Matter of Public Policy Within the Meaning of the New York Convention

65 Intellectual property and competition laws share the same objectives of promoting innovation and enhancing consumer welfare.[110] However, the monopoly-like exclusivity rights that are granted with IPR can cause competition concerns in particular situations. Not only do they arise in relation to SEPs and pre-licensing FRAND disputes, but also more generally in connection with technology transfer agreements.[111] It is beyond the scope of this paper to elaborate more in detail on the interference between IP and competition law. Yet, it is important to mention that competition law issues might cause stumbling blocks at the enforcement stage: Although the grounds of refusal of enforcement based on a violation of public policy are usually interpreted very

108 ITU (see footnote 38), p. 76.

109 DSC 140 III 134, reason 3.3.4.

110 EUROPEAN COMMISSION, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1 14 January 2011, para. 269.

111 Cf. Commission Regulation No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ L 93/17.

narrowly[112], a violation of competition law may precisely amount to such a violation of public order according to Art. V(2)(b) of the New York Convention. This principle has been established by the CJEU in its famous *Eco Swiss* case.[113] However, it was left open whether *all* rules of EU competition law belonged to the realm of public policy.[114] By contrast, in Switzerland, the Supreme Court has stated that EU competition law would not be part of the public policy rules.[115] As a consequence, an award that violates these rules would still be enforceable in Switzerland. The same is not necessarily true if the award has to be enforced in an EU Member State.

2. Recent Case Law

In a recent judgement C-567/14, *Genentech v Hoechst and Sanofi Aventis* of 7 July 2016, the CJEU has actually – on referral from the Court of Appeal in Paris – ruled that Art. 101 of the Treaty on the Functioning of the European Union ("**TFEU**") does not prevent the licensor of a patent licence agreement from requiring a licensee to pay royalties for the entire duration of the agreement, notwithstanding the revocation of the licensed patent(s) or the absence of a patent infringement. The licensee could have terminated the license agreement within a reasonable period of time. 66

During the CJEU proceedings, the licensor (Hoechst and Sanofi Aventis) argued that it is impossible for the CJEU to answer the question referred to it without infringing upon French law – which prevents international awards from being reviewed as to their substance except where there is a flagrant 67

112 Cf. LIEBSCHER, European Public Policy – A Black Box?, Journal of International Arbitration 2000, pp. 73 ff., p. 75: In a general context, public policy rules are understood to be fundamental rules of a legal order. In international arbitration the notion of public policy is increasingly interpreted from a non-national standard by the introduction of terms like 'transnational' which further narrows down the scope of this concept, Cf. KORKMAZCAN ISIK, The Monitoring and Enforcement of Commitments by way of Arbitration in EU Competition Law, in: GAUCH (Ed.), AISUF-Arbeiten aus dem Juristischen Seminar der Universität Freiburg Schweiz Band/Nr. 351, Zurich 2015, p. 33, para. 82.

113 Case C 126/97 *Eco Swiss China Time Ltd vs. Benetton International NV*. [1999] ECR I-3055, para. 39; cf. also summary and further references in BOTTA, Comment on "Genentech": The Arbitrability Paradox in EU Competition Law, International Review of Intellectual Property and Competition Law (IIC) 2017, p. 235, pp. 239 f.

114 KORKMAZCAN ISIK (see footnote 112), p. 34, para. 84.

115 DSC 132 III 389, reason 3.

infringement of international public policy.[116] Without such a flagrant infringement (as in the case of a cartel), Hoechst and Sanofi-Aventis drew a distinction between situations where the question of the compatibility with Art. 101 TFEU was not addressed in the international arbitral award, thereby endangering the effectiveness of competition law, and situations where this question was indeed raised in the award. In their opinion, in the second scenario, which arose in this case, the answer to the question referred for a preliminary ruling would make it necessary for the national court to review the award.[117] This opinion was not shared by the advocate general who considered that limitations of the scope of review of international arbitral awards as outlined by Hoechst and Sanofi Aventis are contrary to the principle of effectiveness of EU law.[118] The advocate general held the view that the system for reviewing the compatibility of international arbitral awards with substantive EU law through the public policy reservation, lies mainly with the Courts of the Member States and not with the arbitrators.[119] He then explained that the task of the arbitrators in international commercial arbitration is to interpret and apply the contract binding on the parties correctly. In the performance of this task, arbitrators may naturally find it necessary to apply EU law, if it forms part of the law applicable to the contract (*lex contractus*) or the law applicable to the arbitration (*lex arbitri*).[120] However, the responsibility for reviewing compliance with European public policy rules would lie with the courts, and not with the arbitrators, whether in the context for an action of annulment or proceedings for recognition and enforcement.[121]

3. Comments

68 Unlike the advocate general, the CJEU did not discuss whether French case law limiting the possibility to annul arbitral awards only in cases of a "flagrant breach" of public policy could hamper the effective enforcement of EU competition rules.[122] However, it comes as no surprise that such a scenario would be perceived by some member state courts as detrimental to their at-

116 Opinion of ADVOCATE GENERAL WATHELET on Case-567/2014, *Genentech Inc. v. Hoechst GmbH, Sanofi-Aventis Deutschland GmbH*, delivered on 17 March 2016, para. 48.
117 Ibid., para. 49.
118 Ibid., para 58.
119 Ibid., para 60.
120 Ibid., para 61.
121 Ibid.
122 Cf. Analysis by BOTTA (see footnote 113), International Review of Intellectual Property and Competition Law (IIC) 2017, p. 237.

tractiveness as a seat for international arbitration.[123] Hence, member states tried to narrow down the scope of violations that justify annulment or refusal of enforcement of awards based on a violation of public policy.[124] Nonetheless, possible non-compliance with EU competition law also poses a considerable challenge for the efficiency of international commercial arbitration proceedings , in particular proceedings related to licensing agreements. This is especially so when it cannot be excluded that the national court – based on the principle of effectiveness of EU law – will have to proceed to a substantial review of the award even at the stage of enforcement. This raises the question of who can or must do what and when in order to mitigate this risk.[125]

Obviously, at a first (negotiation) stage, compliance responsibilities lie mainly with the contracting parties and it is primarily their task to avoid EU-competition law issues. This is not only true when the applicable substantive law concerns the law of an EU member state, but even more so, when the effects of the agreement concern the EU market. In the context of technology transfer this essentially, but not only, means compliance with the technology transfer regulation.[126] 69

Still, when a dispute arises and arbitration proceedings are initiated, from an arbitration perspective it cannot be agreed with the advocate general's opinion that the arbitrator's responsibility is reduced to a mere (and possibly correct) interpretation of the contract. Instead, it is widely recognized that it is the arbitrator's duty towards the parties to render an enforceable award. Consequently, the arbitrator also has an implicit duty to apply competition law, even *ex officio*.[127] Hence, there are no hard and fast principles to guide arbitrators in this respect neither sanctions for a breach of duty for that matter.[128] On the other hand, as the relationship between the arbitrator and the parties is 70

123 Cf. KORKMAZCAN ISIK (see footnote 112), p. 53, para. 124 and 125.

124 KORKMAZCAN ISIK (see footnote 112), para. 125.

125 BOTTA suggests the adoption of an EU-directive to harmonize national rules concerning the grounds to exclude the recognition of an arbitral award under Art. 5 New York Convention, but believes that such a process still would take several years, BOTTA (see footnote 113), International Review of Intellectual Property and Competition Law (IIC) 2017, p. 244 f.

126 Cf. FN 110.

127 KORKMAZCAN ISIK (see footnote 112), para. 79; Interestingly, a number of arbitration institutions based in Europe have adopted internal rules to ensure compliance with EU competition law by their arbitrators to avoid the risk of annulment (e.g. the ICC), cf. BOTTA (see footnote 113), International Review of Intellectual Property and Competition Law (IIC) 2017, p. 240.

128 KORKMAZCAN ISIK (see footnote 112), para. 79.

according to the prevailing view contractual in nature[129], the parties could consider defining these duties more precisely in the arbitral contract (*receptum arbitri*). In the absence of such definition, the question of the scope of this duty is probably still unanswered both by national laws and the case law of the CJEU. It seems that a reasonable approach would be to limit such an *ex officio* control to a compliance-check of the award with core rules of EU-competition law[130], unless the arbitrator has a particular expertise in this field. Hence, examination of every Commission Decision is generally neither feasible nor in line with another duty of the arbitrator: the duty to render an award in an expeditious manner. If other rules of EU competition law should be looked into, it appears reasonable to expect from the parties to raise these issues themselves.

71 Finally, the CJEU case law also shows that compliance with competition law can jeopardize the efficiency of arbitration even when there actually is no competition issue. There is no possibility to prevent this risk other than by a pragmatic approach of national courts.

IV. Summary and Conclusion

72 In a nutshell, it seems that ADR has a vast potential for resolving disputes arising out of or in connection with technology licensing agreements. This is particularly true for the somewhat unconventional and not yet fully explored scenario of disputes at a pre-licensing stage. Smart technologies begin to play an increasing role in many industries, as do standards and, consequently, FRAND licensing. Yet, one has to bear in mind that regulatory concerns might have an influence on the shape of arbitration proceedings in relation to FRAND disputes, especially with regard to confidentiality aspects or even the voluntary nature of ADR as such. These same regulatory concerns might also naturally push the parties to go for arbitration or mediation rather than litigating patents in different jurisdictions. Besides, the expertise and industry knowledge of the arbitrators on the one hand and a certain reluctance by State courts to impose contractual terms on the other, might even further contribute to this development.

73 Other kinds of pre-licensing disputes, such as those in relation with license option agreements, will possibly also increase with the growing popularity of

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129 GIRSBERGER/VOSER (see footnote 12), p. 199, para. 828.

130 It is suggested that this includes mainly hard-core cartels. Which other rules – in particularly based on Art. 102 TFEU – would be part of these core rules would require a more in-depth-analysis.

these types of agreements in view of the high risks involved at the early (pharmaceutical) research and development stage. Even the most diligent contractual arrangements can never prevent all disputes that might arise among the parties.

As confidentiality is usually a vital issue in technology-related agreements, parties should be aware that – when choosing their dispute resolution mechanism – this needs to be included in the contract either by reference to particular institutional rules, the choice of the right seat, or directly into the licensing agreement. 74

In order to fully benefit from the cost-and-time efficiency gains that can be achieved with ADR, experience has shown that a number of pitfalls should be avoided. Particularly in relation to licensing agreements, this concerns first and foremost the avoidance of any bifurcation of the proceedings in view of contractual and non-contractual and pre- or post-termination disputes. It is precisely in licensing agreements where these distinctions are difficult to draw. Accordingly, the scope of the arbitration clause needs to be rather broad to avoid time- and cost-consuming discussions on jurisdiction. 75

If mediation is chosen, it is preferable to select a mediator with the relevant legal and industrial knowledge and to include the persons with the appropriate decision-making power into the process. Escalation clauses combining mediation and arbitration should impose appropriate time limits for each stage of the dispute resolution. 76

Finally, competition concerns should also be taken into account by the parties and the arbitrators alike at the earliest possible stage. Still, compliance issues with EU competition rules and the risk of time-consuming reviews of arbitral awards cannot completely be avoided neither by the arbitrators nor the parties but will be to some extent subject to competition among national courts. Yet, their practice will have to be taken into account by the parties when they are called to decide among different options where to enforce the award. 77

As has been shown, many pitfalls can be avoided at a very early stage during contract negotiations. It is thus highly recommendable not only to make a considerate choice on the appropriate dispute resolution mechanism but also to ensure that the benefits of either choice can be fully performed. Or in other words: By failing to prepare – you are preparing to fail (Benjamin Franklin). 78

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This paper has been written in 2016 and while Barbara practiced in a Swiss law firm. The opinions expressed are the author's own and do not reflect the opinion of her current employer.

Interim Measures: Seeking them before Arbitral Tribunals or Courts?

Claudia Walz

Table of Contents

I. Introduction

1 Interim measures[1] are often required if there is the risk that a party could compromise the counterparty's claim while legal proceedings on the merits are still pending or even before they are initiated.[2] This paper examines whether interim measures should be sought before arbitral tribunals or state courts.

2 This paper firstly provides an overview of the different types of interim measures and analyses the prerequisites for obtaining interim relief before arbitral tribunals and Swiss state courts. Secondly, the concurrent jurisdiction of state courts and arbitral tribunals is discussed. Thirdly, the paper focuses on the powers of state courts and arbitral tribunals, respectively, and reflects on the arguments for and against seeking interim relief before each of those authorities. The focus is limited to the situation in Switzerland, i.e., Swiss state courts and international arbitral tribunals having their seat in Switzerland and being constituted under either the Swiss Rules of International Arbitration (the "**Swiss Rules**")[3] or the ICC Rules of Arbitration (the "**ICC Rules**")[4]. Domestic arbitration is not addressed in this paper.

II. Interim Measures – General Overview

A. Definition and Types of Interim Measures

3 Interim measures may be defined as procedural tools that courts and arbitral tribunals apply to deal with urgent matters arising during the proceedings.[5] They are often necessary at an early stage of the proceedings but possibly also later with the aim of preserving the subject matter of the dispute.[6] They are

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1 In this paper, the terms "interim measures" and "interim relief" are used as synonyms.

2 BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015, para. 1236.

3 Swiss Rules of International Arbitration issued by the Swiss Chambers' Arbitration Institution, edition June 2012.

4 ICC Rules of Arbitration issued by the International Chamber of Commerce, edition 1 March 2017.

5 EHLE, Concurrent Jurisdiction: Arbitral Tribunals and Courts Granting Interim Relief, in: ALIBEKOVA/CARROW (Eds.), International Arbitration and Mediation – From the Professional's Perspective, Salzburg 2007, p. 157 ff., p. 157.

6 EHLE (see footnote 5), p. 157 ff., 157.

characterised by urgency and their temporary nature.[7] In principle, decisions on interim measures do not have *res judicata* effect.[8] If the circumstances upon which interim measures were ordered change while the proceedings are ongoing, the measures ordered may be altered or revoked.[9] Whether interim measures are needed depends on the specific circumstances of the case irrespective of whether the jurisdiction to decide the dispute on the merits lies with an arbitral tribunal or a state court.[10]

The content and admissibility of interim measures are governed by the procedural law or the arbitration rules applicable to the dispute.[11] In general, interim measures are mainly ordered:[12] 4

- to facilitate the conduct of the proceedings, e.g. to preserve evidence;
- to prevent a party from current or imminent harm;
- to regulate the relationship between the parties or to maintain or restore the *status quo* while proceedings on the merits are ongoing, e.g. to determine whether the performance of a contract is suspended or not;
- to facilitate and ensure the enforcement of the final award or judgment, respectively, e.g. means of preserving assets; or
- to provide security for costs.[13]

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7 BERGER/KELLERHALS (see footnote 2), para. 1246; YESILIRMAK, Interim and Conservatory Measures in ICC Arbitral Practice, 1999-2008, ICC Bull. 2011, p. 5 ff., p. 5.

8 KAUFMANN-KOHLER/RIGOZZI, International Arbitration – Law and Practice in Switzerland, Croydon 2015, para. 6.86; LEMBO/GUIGNET, Interim Measures of Protection: The Concurrent Jurisdiction of Courts and Arbitral Tribunals in Switzerland, conference paper prepared for the 2011 Fall Meeting of the American Bar Association, International Section in Dublin, p. 5, <http://www.baerkarrer.ch/publications/11_10_27ABAPaper_InterimMeasures.pdf> (accessed on 17.05.2018).

9 KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.86; YESILIRMAK (see footnote 7), ICC Bull. 2011, p. 5 ff., p. 7.

10 BERGER/KELLERHALS (see footnote 2), para. 1236.

11 OETIKER, in: Swiss Rules Commentary, para. 9 on Art. 26 Swiss Rules.

12 Ibid.; GIRSBERGER/VOSER, International Arbitration, Comparative and Swiss Perspectives, 3rd edition, Zurich/Basel/Geneva 2016, para. 1102; see also MAGLIANA, in: ARROYO (Ed.), Arbitration in Switzerland, The Practitioner's Guide, Biggleswade 2013, para. 3 on Art. 28 ICC Rules; GRIERSON/VAN HOOFT, Arbitrating under the 2012 ICC Rules, Paris 2012, p. 157; YESILIRMAK (see footnote 7), ICC Bull. 2011, p. 5 ff., p. 7; VON SEGESSER/BOOG, Chapter 6: Interim Measures, in: GEISINGER/VOSER (Eds.), International Arbitration in Switzerland: A Handbook for Practitioners, 2nd edition, Biggleswade 2013, p. 107 ff., p. 112 ff.; BLACKABY/PARTASIDES et al. (Eds.), Redfern and Hunter on International Arbitration, 6th edition, 2015, para. 5.27 ff., para. 7.14; VON SEGESSER/KURTH, Chapter 5 – Interim Measures, in: KAUFMANN-KOHLER/STUCKI (Eds.), International Arbitration in Switzerland – A Handbook for Practitioners, The Hague/Zurich 2005, p. 69 ff., p. 72 ff. With regard to Swiss state courts, see Art. 262 SCCP.

B. Prerequisites for Obtaining Interim Relief

5 The requirements for obtaining interim relief from a Swiss state court are set out in Art. 261 of the Swiss Civil Procedure Code ("**SCCP**"). The party seeking interim relief has to credibly demonstrate the following: the existence of the party's right, the current or imminent violation of such right which causes harm that would not be easily reparable, as well as urgency and proportionality of the requested relief.[14]

6 With regard to interim relief requested from an arbitral tribunal, Art. 183 of the Swiss Private International Law Act ("**SPILA**") does not set out the requirements.[15] They are considered subject to Art. 182 SPILA, according to which the parties are free to agree on the procedure applicable to their dispute and on the requirements for obtaining interim relief.[16] Also the Swiss Rules and the ICC Rules remain silent on this subject and simply state that the arbitral tribunal may order any interim measures it deems appropriate.[17] Therefore, the arbitral tribunal is – absent a party agreement to the contrary – entitled to order any type of relief it considers necessary to protect a party's rights until a final award has been rendered.[18]

7 Pursuant to Art. 183(1) SPILA, the arbitral tribunal is not allowed to order interim measures *ex officio*, i.e., absent a respective request from a party.[19] Similar to before a state court, the requesting party generally has to demonstrate on the basis of *prima facie* proof that the requested measure is proportional, i.e., it must be credibly shown that the requested measure is justified

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13 This list is not conclusive as to the content of interim measures. GÖKSU, Schiedsgerichtsbarkeit, Zurich 2014, para. 1907; SPRECHER, in: BaslerKomm, para. 13 on Art. 262 SCCP.

14 Art. 261(1) SCCP; SPRECHER, in: BaslerKomm, para. 10 on Art. 261 SCCP; HUBER, in: Kommentar zur Schweizerischen Zivilprozessordnung (ZPO), SUTTER-SOMM/HASENBÖHLER/LEUENBERGER (Eds.), para. 17 ff. on Art. 261 SCCP.

15 WIRTH, Interim or Preventive Measures in Support of International Arbitration in Switzerland, ASA Bull. 2000, p. 31 ff., p. 32.

16 Art. 182 ff. SPILA; BOOG, in: ARROYO (Ed.), Arbitration in Switzerland, The Practitioner's Guide, Biggleswade 2013, para. 11 on Art. 183 SPILA.

17 Art. 26(1) Swiss Rules (first sentence): '*At the request of a party, the arbitral tribunal may grant any interim measures it deems necessary or appropriate'*; Art. 28(1) ICC Rules (second half of the first sentence): '[…] *the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate*'.

18 See WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 32.

19 Ibid. p. 37. Art. 183(1) SPILA provides that the arbitral tribunal may order interim measures 'on the motion of one party'.

when compared to the current or imminent harm of the requesting party.[20] In addition, the arbitral tribunal must be satisfied that it has *prima facie* jurisdiction over the dispute and that there is a reasonable chance of success on the merits on the part of the requesting party.[21] Those prerequisites are not exhaustive and the specific circumstances of each case have to be taken into account.[22]

State courts as well as arbitral tribunals may make the granting of interim relief subject to the requesting party providing appropriate security.[23] 8

III. Concurrent Jurisdiction of Arbitral Tribunals and State Courts

A. In General

Modern laws on arbitration generally entitle arbitral tribunals to grant interim relief while simultaneously refraining from limiting or barring the state courts' respective power.[24] It is generally accepted that after the constitution 9

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20 GIRSBERGER/VOSER (see footnote 12), para. 1089; BOOG (see footnote 16), para. 12 on Art. 183 SPILA; BERGER/KELLERHALS (see footnote 2), para. 1252 ff.; VON SEGESSER/BOOG (see footnote 12), 107, 109.

21 OETIKER, in: Swiss Rules Commentary, para. 6 on Art. 26 Swiss Rules; GIRSBERGER/VOSER (see footnote 12), para. 1089; BOOG (see footnote 16), para. 12 on Art. 183 SPILA; BERGER/KELLERHALS (see footnote 2), para. 1250 f.; MAGLIANA (see footnote 12), para. 3 f. on Art. 28 ICC Rules; VON SEGESSER/BOOG (see footnote 12), 107, 109; VON SEGESSER / KURTH (see footnote 12), 69, 71.

22 MAGLIANA (see footnote 12), para. 4 on Art. 28 ICC Rules.

23 Art. 264(1) SCCP; Art. 183(3) SPILA; GIRSBERGER/VOSER (see footnote 12), para. 1090; BOOG (see footnote 16), para. 12 on Art. 183 SPILA. The authority fixes the amount of security to be provided in view of the possible damage that the measure might cause to the counterparty irrespective of the financial standing of the requesting party, BOOG (see footnote 16), para. 17 on Art. 183 SPILA; SPRECHER, in: BaslerKomm, para. 29 on Art. 264 SCCP.

24 OETIKER, in: Swiss Rules Commentary, para. 26 on Art. 26 Swiss Rules; but see e.g. Art. 818 of the Italian Civil Procedure Code prohibiting arbitrators to order interim relief; as a consequence, interim relief must be requested from a state court; see POUDRET/BESSON, Comparative Law of International Arbitration, 2nd edition, London 2007, para. 606; LEW/MISTELIS et al., Comparative International Commercial Arbitration, 2003, para. 23-10 ff.; EHLE, Emergency Arbitration in Practice, in: MÜLLER/RIGOZZI (Eds.), New Developments in International Commercial Arbitration, Zurich/Basel/Geneva 2013, p. 89 ff., p. 99. Also in China, Thailand and Argentina, local legislation exclusively reserves the power to grant interim measures for the local courts,

of the arbitral tribunal the jurisdiction of state courts and arbitral tribunals concerning interim measures is concurrent.[25] The parties basically have the choice to request interim relief from either authority because applying to a state court does not constitute a waiver of the requesting party's right to resort to arbitration.[26] Likewise, the arbitration agreement does not affect the state courts' jurisdiction to grant interim relief and the opposing party has no valid objection in this respect.[27]

B. The Power of State Courts

10 Swiss state courts derive their (international) jurisdiction to grant interim relief from Art. 10 SPILA.[28] Art. 10 SPILA reads as follows: *'Jurisdiction to order provisional measures lies: a) either with the Swiss courts or authorities having jurisdiction on the merits, or b) with the Swiss courts or authorities at the place where the relevant measure is to be enforced'*[29]. It remains debatable whether for the purpose of arbitration Art. 10(a) SPILA should be con-

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BORN, International Commercial Arbitration, Volume I and II, 2nd edition, London 2014, p. 2439 and fn. 81 referring to Art. 68 of the Chinese Arbitration Law, § 16 of the Thai Arbitration Act and Art. 753 of the Argentine National Code of Civil and Commercial Procedure.

25 BOOG, in: ARROYO (Ed.), Arbitration in Switzerland, The Practitioner's Guide, Biggleswade 2013, para. 70 on Interim Measures in International Arbitration; BERGER/KELLERHALS (see footnote 2), para. 1273; see also MAGLIANA, in: ARROYO (Ed.), Arbitration in Switzerland, The Practitioner's Guide, Biggleswade 2013, para. 42 on Art. 26 Swiss Rules; EHLE (see footnote 24), 89 ff., 98 f.; LEMBO/GUIGNET (see footnote 8), p. 4; VON SEGESSER/KURTH (see footnote 12), 69, 84; VON SEGESSER/GEORGE, Swiss Private International Law Act (Chapter 12), Article 183, in: MISTELIS (Ed.), Concise International Arbitration, 2nd edition, London 2015, para. 2 on Art. 183 SPILA; BORN (see footnote 24), p. 2456; GAILLARD/SAVAGE (Eds.), Fouchard, Gaillard, Goldman on International Commercial Arbitration, The Hague 1999, para. 1306; JOLLES/LEIMGRUBER, in: JORGENSEN (Ed.), Finding, Freezing and Attaching Assets: A Multi-Jurisdictional Handbook, 2016, p. 271 ff., p. 280.

26 EHLE (see footnote 5), 157 ff., 159, 163; OETIKER, in: Swiss Rules Commentary, para. 27a on Art. 26 Swiss Rules; KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.96.

27 EHLE (see footnote 5), p. 157 ff., p. 159; GÖKSU (see footnote 13), para. 1909.

28 BOOG (see footnote 25), para. 60 on Interim Measures in International Arbitration; MABILLARD, in: BaslerKomm, para. 5 on Art. 183 SPILA; dissenting BERGER/KELLERHALS (see footnote 2), para. 1280 who take the view that the Swiss state courts' international jurisdiction is based on Art. 183(2) SPILA.

29 Translation by KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.98 fn. 105.

strued by analogy as referring to the state courts at the place of arbitration.[30] Considering the state courts at the seat of the arbitral tribunal entitled to grant interim relief seems sensible to ensure an effective protection of the requesting party's rights – even more so since the state courts' jurisdiction may also be derived from Art. 185 SPILA.[31]

Art. 183(1) and (2) SPILA do not restrict or exclude the state courts' jurisdiction to grant interim relief. However, some scholars view the intent to arbitrate as frustrated if a dispute concerning interim relief is brought before a state court, after the arbitral tribunal has been constituted.[32] It might indeed be reasonable if a state court, seized with a request for interim relief concerning an ongoing arbitration, exercises some restraint. In particular, if the (already constituted) arbitral tribunal has jurisdiction to grant the requested interim measure and the measure would have the intended effect.[33] 11

The parties may limit or even exclude the state courts' jurisdiction to order interim relief by an express agreement.[34] However, if such agreement led to a party being effectively denied access to justice, e.g. because the arbitral tribunal lacks the power to grant the requested type of relief, the total exclusion of the state courts' concurrent jurisdiction may be void.[35] If the parties exclude the state courts' competence to assist with the enforcement of tribunal-ordered interim measures, the same issue, i.e., the denial of effective protection through interim relief, may arise because the arbitral tribunal lacks the power to enforce the measures it ordered.[36] 12

30 BOOG (see footnote 25), para. 60 on Interim Measures in International Arbitration; KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.98 fn. 105.

31 Ibid.

32 Ibid., para. 6.100; LEW/MISTELLIS (see footnote 24), para.23-121 f.

33 KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.100.

34 See WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 40 ff.; LEMBO/GUIGNET (see footnote 8), p. 7; BORN (see footnote 24), p. 2546 ff.; MABILLARD in: BaslerKomm, para. 5 on Art. 183 SPILA.

35 MAGLIANA (see footnote 12), para. 20 on Art. 28 ICC Rules; BERGER/KELLERHALS (see footnote 2), para. 1276; MAGLIANA (see footnote 25), para. 46 on Art. 26 Swiss Rules; LEMBO/GUIGNET (see footnote 8), p. 7; according to VON SEGESSER/BOOG (see footnote 12), 107, 125, the parties are able to validly exclude the state courts' jurisdiction to grant interim relief provided that such exclusion is explicit and specific and provided that the arbitral tribunal or another authority is entitled to grant interim relief.

36 See below para. 50; WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 41.

C. The Power of Arbitral Tribunals

1. Party Autonomy

13 A core element of international arbitration is party autonomy.[37] The arbitral tribunal derives its jurisdiction from the parties' agreement to refer their dispute to arbitration.[38] The parties may expressly empower the arbitral tribunal to order interim measures.[39] Alternatively, the parties may also vest the arbitral tribunal with the power to grant interim relief by declaring arbitration rules applicable, which provide for interim measures ordered by the arbitral tribunal, such as the Swiss Rules and the ICC Rules.[40] Finally, if the arbitration agreement – and any other agreements between the parties – do not address the issue of interim relief, Art. 183(1) SPILA provides as *lex arbitri* the legal basis for an arbitral tribunal having its seat in Switzerland to order interim measures:[41]

'Unless the parties have otherwise agreed, the arbitral tribunal may, on motion of one party, order provisional or conservatory measures.'

14 Art. 183(1) SPILA clearly reflects the notion of concurrent jurisdiction, neither restricting nor excluding the state courts' jurisdiction to grant interim measures.[42] The provision entitles arbitral tribunals to order interim measures as long as the parties refrain from opting out. Due to party autonomy, the parties may consensually restrict or exclude the arbitral tribunal's power to grant interim relief or exclude certain types of interim relief.[43] The parties may enter into such agreement formally or informally, expressly or impliedly by subjecting their dispute to arbitration rules or procedural law that vest

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37 BOOG (see footnote 25), para.6 on Interim Measures in International Arbitration.

38 BOOG, Die Durchsetzung einstweiliger Massnahmen in internationalen Schiedsverfahren – Aus schweizerischer Sicht mit rechtsvergleichenden Aspekten, Zurich/Basel/Geneva 2011, para. 53; BORN (see footnote 14), p. 2454.

39 BOOG (see footnote 25), para. 6 on Interim Measures in International Arbitration.

40 BOOG (see footnote 25), para. 7 on Interim Measures in International Arbitration; BOOG (see footnote 38), para. 53; Art. 26(1) Swiss Rules; Art. 28(1) ICC Rules.

41 BOOG (see footnote 25), para. 9 on Interim Measures in International Arbitration; Art. 183(1) SPILA.

42 KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.95; MABILLARD, in: BaslerKomm, para. 5 on Art. 183 SPILA.

43 See e.g. Art. 28(1) ICC Rules; MAGLIANA (see footnote 12), para. 9 on Art. 28 ICC Rules; MAGLIANA (see footnote 25), para. 5, 7 on Art. 26 Swiss Rules.

exclusive power to rule on interim measures in the state courts, and they may do so before or after their dispute has come into existence.[44]

2. The Swiss Rules and the ICC Rules

The Swiss Rules expressly vest the arbitral tribunal with the power to order interim relief[45] while clearly reflecting the notion of concurrent jurisdiction in Art. 26(5), which reads as follows: 15

'*By submitting their dispute to arbitration under these Rules, the parties do not waive any right that they may have under the applicable laws to submit a request for interim measures to a judicial authority. A request for interim measures addressed by any party to a judicial authority shall not be deemed to be incompatible with the agreement to arbitrate, or to constitute a waiver of that agreement*.'

Likewise, the ICC Rules explicitly entitle the arbitral tribunal to grant interim relief.[46] Concurrent jurisdiction is allowed pursuant to Art. 28(2) but the ICC Rules seem to favour the jurisdiction of the arbitral tribunal once it has been constituted: 16

'*Before the file is transmitted to the arbitral tribunal, and* in appropriate circumstances even thereafter*, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal*.' (emphasis added)

The wording of Art. 28(2) ICC Rules establishes the presumption that the parties should approach the arbitral tribunal once the file has been transmitted and may in appropriate circumstances only request interim measures from a 17

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44 BERGER/KELLERHALS (see footnote 2), para. 1242; KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.91; differentiating MAGLIANA (see footnote 25), para. 5 on Art. 26 Swiss Rules, who emphasizes that such exclusion needs to be unambiguous and who considers the choice of arbitration rules that do not expressly deal with this issue not sufficient for an effective exclusion of the arbitral tribunal's respective power. See further VON SEGESSER/BOOG (see footnote 12), 107, 108; BORN (see footnote 14), p. 2455 emphasizing that an arbitration agreement referring to arbitration rules that refrain from expressly empowering the arbitral tribunal to grant interim relief should not be considered an exclusion of such power.

45 Art. 26(1) Swiss Rules.

46 Art. 28(1) ICC Rules.

state court.[47] This provision, thus, limits the parties' choice to freely decide whether to request interim relief from the arbitral tribunal or a state court.[48] The Rules do not provide any guidance on what circumstances are considered appropriate and leave this for the arbitral tribunal to decide in case one party alleges that the other party's request for interim relief before a state court lacks the required appropriateness.[49] In general, circumstances are regarded as appropriate if the arbitral tribunal is not able to grant effective interim relief, e.g. if third parties are involved, if an attachment is requested, if *ex parte* measures are required, if the arbitral tribunal is not able to act or if it can be reasonably anticipated that the affected party will not voluntarily comply with the ordered measure and prompt enforcement by a state court is required.[50]

3. Broad Discretion of Arbitral Tribunals

18 Arbitral tribunals have a broad discretion regarding interim measures since they do not have to comply with the procedural rules applicable to state court proceedings at the seat of the arbitration or with the procedural rules of the substantive law applicable to the dispute.[51] Still, with regard to possibly necessary enforcement proceedings, arbitral tribunals might be hesitant to grant interim relief that is unobtainable under the laws of the place where enforcement will be sought.[52]

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47 MAGLIANA (see footnote 12), para. 17 on Art. 28 ICC Rules; see also GRIERSON/VAN HOOFT (see footnote 12), p. 158; YESILIRMAK (see footnote 7), ICC Bull. 2011, p. 5 ff., p. 11.

48 MAGLIANA (see footnote 12), para. 17 on Art. 28 ICC Rules.

49 KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.103; FRY/GREENBERG/MAZZA, The Secretariat's Guide to ICC Arbitration, Paris 2012, para. 3-1049; MAGLIANA (see footnote 12), para. 18 on Art. 28 ICC Rules.

50 KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.103; FRY/GREENBERG/MAZZA (see footnote 49), para. 3-1049; MAGLIANA (see footnote 12), para. 18 f. on Art. 28 ICC Rules; GRIERSON/VAN HOOFT (see footnote 12), p. 158 f. See also SCHWARTZ/DERAINS, Guide to the ICC Rules of Arbitration, 2nd edition, 2005, p. 300 with regard to the 1998 ICC Rules.

51 KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.113; MAGLIANA (see footnote 25), para. 8 on Art. 26 Swiss Rules.

52 MAGLIANA (see footnote 25), para. 8 on Art. 26 Swiss Rules; WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 33.

D. Situation Before the Constitution of the Arbitral Tribunal

Art. 183(1) SPILA, Art. 26(1) Swiss Rules and Art. 28(1) ICC Rules necessitate that the arbitral tribunal has been constituted and is able to handle a request for interim measures.[53] Accordingly, prior to the constitution of the arbitral tribunal and the transmission of the file, the parties are completely unrestricted from approaching a state court.[54] Further, they may agree that a "private instance" shall be entitled to decide on requests for interim relief even before the arbitral tribunal has been constituted.[55] The parties may do so by subjecting their dispute to arbitration rules like the ICC Rules or the Swiss Rules that provide for emergency arbitration.[56] In this case, the emergency arbitration provisions are applicable except where expressly excluded by the parties.[57] 19

With regard to arbitration seated in Switzerland, the jurisdiction of the emergency arbitrator and the state courts concerning interim measures is considered concurrent.[58] Accordingly, the parties are still free to request interim relief from a state court instead of initiating an emergency arbitration.[59] 20

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53 BERGER/KELLERHALS (see footnote 2), para. 1241.

54 See Art. 28(2) ICC Rules; MAGLIANA (see footnote 12), para. 15 on Art. 28 ICC Rules.

55 BERGER/KELLERHALS (see footnote 2), para. 1241, 1258; see also BOOG (see footnote 25), para. 73 on Interim Measures in International Arbitration.

56 Art. 43 Swiss Rules; Art. 29 ICC Rules and Appendix V Emergency Arbitration Rules. In the context of Art. 183(1) SPILA, the emergency arbitrator is considered on par with the arbitral tribunal, since he has – at least under the Swiss Rules and the ICC Rules – the same core obligations of independence and impartiality as any regular arbitrator, a judicial role and is appointed as the case arises; KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.93; impliedly BOOG (see footnote 25), para. 73 on Interim Measures in International Arbitration; BERGER/KELLERHALS (see footnote 2), para. 1290; BOOG/STOFFEL, Panel 3: Key Features of the Swiss Rules, Part II: Preliminary Orders and Emergency Arbitrator: Urgent Interim Relief by an Arbitral Decision Maker in Exceptional Circumstances, ASA Special Series 2014, p. 71 ff., p. 78; VOSER/BOOG, ICC Emergency Arbitrator Proceedings: An Overview, ICC Bull. 2011, Special Supplement, p. 81 ff., p. 89 ff.; Art. 2(4), Art. 3 Appendix V to the ICC Rules; Art. 43(4), Art. 9 – 12 Swiss Rules; disagreeing BAIGEL, The Emergency Arbitration Procedure under the 2012 ICC Rules: A Judicial Analysis, Journal of International Arbitration 2014, p. 1 ff., p. 16, 18.

57 BERGER/KELLERHALS (see footnote 2), para. 1285; Art. 43(1) Swiss Rules; Art. 29(6) ICC Rules; GRIERSON/VAN HOOFT (see footnote 12), p. 65.

58 BERGER/KELLERHALS (see footnote 2), para. 1286.

59 HABEGGER, in: ARROYO (Ed.), Arbitration in Switzerland, The Practitioner's Guide, Biggleswade 2013, para. 4 on Art. 43 Swiss Rules; BAIGEL (see footnote 56), Journal

IV. Issues to Consider when Deciding from which Authority to Seek Interim Measures

A. In General

21 Due to the concurrent jurisdiction of arbitral tribunals and state courts, a party needs to carefully consider with which authority it should file its application for interim relief. In particular, the following issues should be taken into consideration before making a decision:

B. Type of Relief Requested

22 Depending on the type of relief sought, it might be beneficial to request interim relief from a state court or the arbitral tribunal. An arbitral tribunal's competence to grant interim relief is greater than the competence of a Swiss state court[60], as it has broader discretion in this regard.[61] Because arbitral tribunals are not bound by the civil procedure law of the *lex arbitri*, an arbitral tribunal having its seat in Switzerland is entitled to order measures that a Swiss state court would not be allowed to grant, such as a Mareva injunction under English law.[62] However, arbitral tribunals do well to consider where the measure to be ordered will be enforced and to refrain from ordering interim measures that are prohibited or unknown under Swiss law if enforcement of such measure is sought in Switzerland.[63]

23 Although the arbitral tribunal's discretion to order interim relief is wider than a state court's, it does not have the authority to grant all the interim measures

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of International Arbitration 2014, p. 1 ff., p. 2 ff.; VOSER/BOOG (see footnote 56), ICC Bull. 2011, Special Supplement, p. 81 ff., p. 87; BERGER/KELLERHALS (see footnote 2), para. 1286.

60 WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 33; BOOG (see footnote 16), para. 9 on Art. 183 SPILA.

61 See above para. 18.

62 KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.116; BERGER/KELLERHALS (see footnote 2), para. 1258; GIRSBERGER/VOSER (see footnote 12), para. 1147; BOOG (see footnote 25), para. 20 on Interim Measures in International Arbitration; LEMBO/GUIGNET (see footnote 8), p. 10; VON SEGESSER/GEORGE (see footnote 25), para. 5 on Art. 183 SPILA; GÖKSU (see footnote 13), para. 1907, 1944.

63 WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 33; see also BERGER/KELLERHALS (see footnote 2), para. 1258 f.; LEMBO/GUIGNET (see footnote 8), p. 10; see also above para. 18.

that a state court has the power to order.[64] This applies, for example, to measures intended to secure the enforcement of monetary claims:[65] Under Swiss law, it is controversial whether an arbitral tribunal has the power to grant an attachment in the sense of Art. 271 of the Swiss Debt Enforcement Act ("**DEBA**").[66] The majority of legal authors take the view that an arbitral tribunal lacks such power.[67] The exclusive jurisdiction to order interim measures to secure enforcement of monetary claims in accordance with the DEBA lies with the state courts.[68] Even if an arbitral tribunal ordered an attachment, the value and effectiveness of such order would be limited:[69] due to the fact that the order is not self-executing and the arbitral tribunal lacks the power to enforce it, the assistance of the state court and the respective competent authorities is necessary.[70] However, it is rather unlikely that they take the necessary actions for enforcement solely based on such an arbitral order.[71] Yet, an arbitral tribunal may order other forms of interim relief to secure monetary claims, such as interim payment orders, freezing orders, a bank guarantee or ordering the amount claimed to be deposited in an escrow.[72] Again, it needs to be considered that the arbitral tribunal's power to enforce

64 GIRSBERGER/VOSER (see footnote 12), para. 1104.

65 Ibid.

66 BOOG (see footnote 25), para. 23 on Interim Measures in International Arbitration; MAGLIANA (see footnote 25), para. 10 on Art. 26 Swiss Rules.

67 GIRSBERGER/VOSER (see footnote 12), para. 1147; FURRER/GIRSBERGER/AMBAUEN, in: CHK Handkommentar zum Schweizer Privatrecht IPRG, FURRER/GIRSBERGER/MÜLLER-CHEN (Eds.), para. 17 on Art. 182-186 SPILA; KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.116; BERGER/KELLERHALS (see footnote 2), para. 1248; VON SEGESSER/BOOG (see footnote 12), 107, 113; BOOG (see footnote 38), para. 99; MAGLIANA (see footnote 12), para. 3 on Art. 28 ICC Rules; MAGLIANA (see footnote 25), para. 10 on Art. 26 Swiss Rules; WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 34; JOLLES/LEIMGRUBER (see footnote 25), 271 ff., 280; disagreeing: GÖKSU (see footnote 13), para. 1902; MABILLARD, in: BaslerKomm, para. 7a on Art. 183 SPILA.

68 GIRSBERGER/VOSER (see footnote 12), para. 1147; VISCHER, in: ZürcherKomm, para. 6 on Art. 183 SPILA.

69 BOOG (see footnote 25), para. 23 on Interim Measures in International Arbitration.

70 Ibid.

71 Ibid.

72 BOOG (see footnote 25), para. 23 on Interim Measures in International Arbitration; BOOG (see footnote 38), para. 101 f., GÖKSU (see footnote 13), para. 1902; GIRSBERGER/VOSER (see footnote 12), para. 1147; BERGER/KELLERHALS (see footnote 2), para. 1258; VON SEGESSER/BOOG (see footnote 12), 107, 113. With regard to security for costs see BOOG (see footnote 25), para. 25 f. on Interim Measures in International Arbitration; BERGER, Security for Costs: Trends and Developments in Swiss Arbitral Case Law, ASA Bull. 2010, p. 7 ff., p. 7 ff.

those measures is limited.[73] A party who immediately needs to secure the enforceability of a monetary claim is best advised to directly seek interim relief from the state court at the location of the relevant assets.[74]

C. Urgency

24 If time is of the essence and interim relief is needed as quickly as possible, it seems advisable to request interim relief from a state court, particularly if the arbitral tribunal has not yet been constituted.[75]

25 Even though the Swiss Rules and the ICC Rules provide for emergency arbitration, if interim relief is needed on an emergency basis before the constitution of the arbitral tribunal, a state court might nonetheless be faster in ordering (and also enforcing) the requested relief:

26 According to Art. 43(2) Swiss Rules, the court shall appoint and transmit the file to the emergency arbitrator 'as soon as possible' after the receipt of the application, the registration fee and the deposit for the emergency relief proceedings. This will usually not take more than two business days.[76] The decision shall be made within fifteen days from the date on which the secretariat transmitted the file to the emergency arbitrator.[77] If emergency arbitral proceedings are conducted under the ICC Rules, the emergency arbitrator is appointed within as short time as possible, normally within two days of the secretariat's receipt of the application.[78] The ICC Rules envisage that the emergency arbitrator shall render its order no later than fifteen days after the transmission of the file.[79] Accordingly, under the Swiss Rules and the ICC Rules, it might take up to *seventeen days* after the filing of the request until

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73 BERGER/KELLERHALS (see footnote 2), para. 1258; MAGLIANA (see footnote 25), para. 11 on Art. 26 Swiss Rules.

74 MAGLIANA (see footnote 25), para. 12 on Art. 26 Swiss Rules; VON SEGESSER/KURTH (see footnote 12), 69, 83 ff.

75 EHLE (see footnote 5), 157 ff., 167.

76 MEIER, in: Swiss Rules Commentary, para. 22 on Art. 43 Swiss Rules; HABEGGER (see footnote 59) para.18 on Art. 43 Swiss Rules.

77 Art. 43(7) Swiss Rules. MÜLLER/PEARSON, Waving the Green Flag to Emergency Arbitration under the Swiss Rules: the Sauber Saga, ASA Bull. 2015, p. 808 ff., p. 818 pointing out that under the Swiss Rules the decisions have so far been rendered on average 8.5 days after the hearing.

78 Art. 5(1) Appendix V to the ICC Rules; BAIGEL (see footnote 56), Journal of International Arbitration 2014, p. 2.

79 Art. 6(4) Appendix V to the ICC Rules.

the emergency arbitrator renders a decision or even longer if an extension of time has been granted.

Even if the arbitral tribunal is already in place when interim relief is requested, it needs to be taken into account that arbitral tribunals are not permanent bodies.[80] In particular if there is a panel of arbitrators, the decision making process may be rather time-consuming.[81] Further, the ICC Rules entitle the arbitral tribunal to grant interim relief in the form of an order or an award.[82] If the arbitral tribunal opts for the form of an award, such award needs to be scrutinized by the Court of the ICC which most likely will lead to some further delay.[83] Also, arbitral tribunals are not as familiar with granting interim relief as state courts.[84] Accordingly, state courts are generally faster and more efficient in dealing with requests for interim relief.[85] If time is of the essence, it thus seems advisable to seek interim relief before a state court. 27

D. *Ex Parte* Decisions

A party to an arbitration may want to obtain *ex parte* interim relief, i.e., relief that is granted without the affected party having been notified or heard beforehand.[86] 28

Swiss state courts have the power to grant *ex parte* relief if the statutory provisions are met, i.e., in case of extraordinary urgency and, particularly, if there is a risk that the effect of the measure will be frustrated if the affected party is notified beforehand.[87] Such – written or oral[88] – requests are quite frequent and Swiss state courts are used to them and, therefore, they are generally able to act quickly. For example, before the Civil Court of Basel City, it is common practice that the requesting party appears before the presiding judge on duty (or, if the proceedings are already pending, before the sitting judge) without prior appointment and presents its case orally. The judge de- 29

80 EHLE (see footnote 5), 157 ff., 167; MAGLIANA (see footnote 12), para. 13 on Art. 28 ICC Rules.

81 EHLE (see footnote 5), 157 ff., 167.

82 Art. 28(1) ICC Rules.

83 GRIERSON/VAN HOOFT (see footnote 12), p. 161 f.

84 EHLE (see footnote 5), 157 ff., 167.

85 Ibid.

86 BOOG (see footnote 25), para. 38 on Interim Measures in International Arbitration; BOOG/STOFFEL (see footnote 56), ASA Special Series 2014, p. 71 ff., p. 71 f.

87 Art. 265 SCCP.

88 HUBER, in: Kommentar zur Schweizerischen Zivilprozessordnung (ZPO), SUTTER-SOMM/HASENBÖHLER/LEUENBERGER (Eds.), para. 6 on Art. 265 SCCP.

cides on the party's request for *ex parte* interim relief on the same day or the following day at the latest.

30 In international arbitration it is controversial whether arbitral tribunals have the power to order *ex parte* relief because arbitration is based on the parties' agreement and the equal treatment of the parties constitutes one of its core principles.[89] Therefore, it seems illegitimate to allow one party to address the tribunal without the opposing party having the possibility to comment.[90] In Switzerland, arbitral tribunals to which Chapter 12 SPILA applies are generally considered entitled to order *ex parte* relief in the absence of an express agreement by the parties providing for the contrary.[91] Like before state courts, typical situations where *ex parte* relief is normally granted are cases of great urgency or if communicating the request to the opposing party would most likely jeopardize or foil the effectiveness of the measure altogether.[92] Nevertheless, the prevailing view is that granting *ex parte* relief should remain the exception.[93] If *ex parte* interim relief is permitted, the affected party must be provided with a chance to comment and object to the measure ordered at the earliest possible opportunity.[94] This also applies to the proceedings before state courts.[95]

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89 BOOG (see footnote 38), para.905 f.; POUDRET/BESSON (see footnote 24), para. 626; BOOG/STOFFEL (see footnote 56), ASA Special Series 2014, p. 71 ff., p. 72 f.; see also BLACKABY/PARTASIDES (see footnote 12), para. 5.33; VON SEGESSER/KURTH (see footnote 12), 69, 78; BORN (see footnote 24), p. 2507 f.

90 BOOG (see footnote 38), para. 906.

91 BOOG (see footnote 25), para. 38 on Interim Measures in International Arbitration; BERGER/KELLERHALS (see footnote 2), para. 1260; BOOG (see footnote 38), para. 907; BOOG/STOFFEL (see footnote 56), ASA Special Series 2014, p. 71 ff., p. 73; WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 38; KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.124; VON SEGESSER/GEORGE (see footnote 25), para. 4 on Art. 183 SPILA.

92 OETIKER, in: Swiss Rules Commentary, para. 14 f. on Art. 26 Swiss Rules; BOOG (see footnote 25), para. 40 on Interim Measures in International Arbitration; BERGER/KELLERHALS (see footnote 2), para. 1260; MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 815; BOOG/STOFFEL (see footnote 56), ASA Special Series 2014, p. 71 ff., p. 75; VON SEGESSER/BOOG (see footnote 12), 107, 116.

93 BOOG (see footnote 38), para. 907; POUDRET/BESSON (see footnote 24), para. 626; GIRSBERGER/VOSER (see footnote 12), para. 1091.

94 GIRSBERGER/VOSER (see footnote 12), para. 1093; BERGER/KELLERHALS (see footnote 2), para. 1260; MAGLIANA (see footnote 25), para. 36 on Art. 26 Swiss Rules; VON SEGESSER/BOOG (see footnote 12), 107, 117.

95 Art. 265(2) SCCP.

The Swiss Rules provide for *ex parte* relief in exceptional circumstances.[96] Even in emergency arbitration proceedings *ex parte* relief is admissible if the requirements of Art. 26(3) Swiss Rules are met.[97] Contrarily, the ICC Rules do not provide for *ex parte* relief: The Secretariat's Guide states that '*there is no place for purely ex parte interim relief in ICC arbitration*'[98]. Yet, it also points out that '*ex parte interim relief from arbitral tribunals is very rarely granted and may be contrary to the Rules*'[99]. This implies that *ex parte* relief may very infrequently be allowed under the ICC Rules and may not be absolutely impermissible.[100] Arbitral tribunals constituted under the ICC Rules will, thus, most likely deny *ex parte* relief. Arbitral tribunals constituted under the Swiss Rules might grant such relief but might do so more reluctantly than state courts that are more familiar with this type of relief. 31

In the field, *ex parte* interim relief is only infrequently ordered in commercial arbitration and provided that exceptional circumstances exist, i.e., the requested measure will only have effect if ordered on an *ex parte* basis.[101] A reason for the arbitral tribunals' general reluctance to order *ex parte* relief is the fear of the affected party losing its confidence in the arbitration, in particular if an *ex parte* measure is ordered at a very early stage of the proceedings.[102] Further, they may also be wary of creating the impression of being biased due to their interaction with one party without the counterparty's knowledge.[103] 32

Arbitral tribunals lack the authority to effectively enforce their orders and their jurisdiction is limited to the parties who are bound by the arbitration 33

96 Art. 26(3) Swiss Rules; OETIKER, in: Swiss Rules Commentary, para. 12 on Art. 26 Swiss Rules; MAGLIANA (see footnote 25), para. 35 on Art. 26 Swiss Rules.

97 MEIER, in: Swiss Rules Commentary, para. 50 on Art. 43 Swiss Rules; MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 815 who consider this a unique possibility and distinctive feature under the Swiss Rules; see also EHLE (see footnote 24), 89 ff., 98.

98 FRY/GREENBERG/MAZZA (see footnote 49), para. 3-1040, pointing out that arbitral tribunals have sometimes rendered an order maintaining the *status quo* until the affected party has been heard. See also GRIERSON/VAN HOOFT (see footnote 12), p. 64 f.; SCHWARTZ/DERAINS (see footnote 50), p. 299 with regard to the 1998 ICC Rules.

99 FRY/GREENBERG/MAZZA (see footnote 49), para. 3-1046; MAGLIANA (see footnote 12), para. 7 fn. 23 on Art. 28 ICC Rules.

100 MAGLIANA (see footnote 12), para. 7 fn. 23 on Art. 28 ICC Rules.

101 VON SEGESSER/BOOG (see footnote 12), 107, 117; BOOG/STOFFEL (see footnote 56), ASA Special Series 2014, p. 71 ff., p. 74.

102 VON SEGESSER/BOOG (see footnote 12), 107, 117 f.; VON SEGESSER/KURTH (see footnote 12), 69, 78 f.

103 KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.124.

agreement.[104] Therefore, a party in pressing need of *ex parte* interim relief is, in most cases, well advised to address its request directly to a state court, regardless of whether the arbitral tribunal has already been constituted or not.[105]

E. Knowledge of the File

34 If the arbitral proceedings are ongoing and the arbitral tribunal has already been extensively involved in the case, concerned with the facts and the relevant issues and, thus, has a broad knowledge of the file already, a party may do well to request interim relief from the arbitral tribunal.[106] Under those circumstances the arbitrator(s) is/are much more familiar with the case than a state court judge who has no prior knowledge of the facts.[107] Further, in this case, addressing such request to the arbitral tribunal also reduces the risk of interim measures being ordered that afterwards appear irreconcilable with the final award.[108]

F. Arbitrators' Know-how

35 Another factor in deciding whether interim relief should be requested from a state court or the arbitral tribunal is the complexity of the case. If the facts or legal issues are very complex, if sophisticated technical or scientific questions are involved, or if a law applies to the dispute that is not the law of the state court before which interim relief would be sought, it seems advisable to apply to the arbitral tribunal for interim relief.[109] Arbitrators are generally chosen with care and with respect to their specific legal background, industry knowledge and experience, so that they are well-suited to render an appropri-

104 See below paras. 46, 50.

105 MAGLIANA (see footnote 12), para. 7, 13 on Art. 28 ICC Rules; see also BLACKABY/PARTASIDES (see footnote 12), para. 7.21.

106 EHLE (see footnote 5), 157 ff., 168; WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 44 f.; LEMBO/GUIGNET (see footnote 8), p. 4, 8.

107 EHLE (see footnote 5), 157 ff., 168; LEMBO/GUIGNET (see footnote 8), p. 4.

108 WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 45.

109 EHLE (see footnote 5), 157 ff., 168; WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 44; LEMBO/GUIGNET (see footnote 8), p. 8.

ate decision on the merits.[110] Due to their case-specific skills, they are also likely to grant appropriate interim relief.[111]

Further, if the language of the dispute is foreign, or if the contract and the supporting documents are not written in the language of the state court, it might be favourable to request interim relief from the arbitral tribunal, which consists of arbitrators (or a sole arbitrator) who were chosen taking into account their language skills and the languages applicable to the case.[112] 36

G. Confidentiality

If it is crucial to the parties that their dispute and its content remain confidential, it is advisable to involve as few authorities as possible and, thus, to ensure that the arbitral tribunal is the sole authority dealing with the dispute.[113] Accordingly, it seems advantageous to request interim relief from the arbitral tribunal and to refrain from involving a state court. 37

H. Compliance

While considering whether interim relief should be requested from an arbitral tribunal or a state court, the likelihood of the opposing party's compliance should be taken into account. If the opposing party is unlikely to voluntarily obey the arbitral tribunal's order, it seems sensible to request interim relief from a state court.[114] State courts have coercive power, whereas arbitral tribunals lack such power.[115] Further, arbitral tribunals do not have the authority to impose criminal law-based sanctions on the parties for non-compliance.[116] 38

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110 EHLE (see footnote 5), 157 ff., 168; LEMBO/GUIGNET (see footnote 8), p. 8.

111 EHLE (see footnote 5), 157 ff., 168.

112 See BLACKABY/PARTASIDES (see footnote 12), para. 7.30.

113 EHLE (see footnote 5), 157 ff., 168; WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 44; LEMBO/GUIGNET (see footnote 8), p. 5, 8.

114 EHLE (see footnote 5), 157 ff., 168.

115 KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.131; EHLE (see footnote 5), 157 ff., 168; GÖKSU (see footnote 13), para. 1934; BOOG (see footnote 25), para. 4 on Interim Measures in International Arbitration; BOOG (see footnote 38), para. 128; MAGLIANA (see footnote 12), para. 13 on Art. 28 ICC Rules; YESILIRMAK (see footnote 7), ICC Bull. 2011, p. 5 ff., p. 10; BUCHER/TSCHANZ, International Arbitration in Switzerland, Basel 1988, para. 171.

116 BERGER/KELLERHALS (see footnote 2), para. 1262; KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.131; BOOG (see footnote 25), para. 49 on Interim Measures in In-

39 Still, arbitral tribunals have some – limited – means to compel the parties to comply with their orders and to sanction non-compliance:

40 Arbitral tribunals are able to sanction non-compliance by imposing private sanctions such as attaching penalties to their orders.[117] The penalties can be defined as '*private fines, payable to the opposing party in case of non-compliance*'[118]. Such payments, consisting of a certain amount to be paid per day of non-compliance, are called "*astreintes*" and are known under French, Dutch and Belgian law.[119] In Switzerland, it is controversial whether *astreintes* are admissible.[120] Some legal authors affirm their admissibility if either the law applicable to the merits of the dispute provides for this type of sanction or if the arbitral tribunal has been expressly entitled by the parties to order them.[121] Others consider the arbitral tribunal entitled to order *astreintes* as long as the language of the arbitration agreement is broad enough to comprise such competence.[122]

41 Another means to "encourage" a party's compliance with its order is the arbitral tribunal's power to draw negative or adverse inferences from a party's

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ternational Arbitration; BOOG (see footnote 38), para. 129, 131 ff.; MAGLIANA (see footnote 25), para. 21 on Art. 26 Swiss Rules.

117 GIRSBERGER/VOSER (see footnote 12), para. 1108 ff.; BERGER/KELLERHALS (see footnote 2), para. 1263.

118 GIRSBERGER/VOSER (see footnote 12), para. 1109; BOOG (see footnote 38), para. 141; MAGLIANA (see footnote 25), para. 21 on Art. 26 Swiss Rules.

119 GIRSBERGER/VOSER (see footnote 12), para. 1109 f.; BERGER/KELLERHALS (see footnote 2), para. 1263; KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.133; BOOG (see footnote 38), para. 139 fn. 426; LÉVY, Les astreintes et l'arbitrage international en Suisse, ASA Bull. 2001, p. 21 ff., p. 21; POUDRET/BESSON (see footnote 24), para. 540; VON SEGESSER/BOOG (see footnote 12), 107, 120.

120 GIRSBERGER/VOSER (see footnote 12), para. 1109, 1149; BERGER/KELLERHALS (see footnote 2), para. 1263; OETIKER, in: Swiss Rules Commentary, para. 18 on Art. 26 Swiss Rules; BOOG (see footnote 38), para. 143 ff.; POUDRET/BESSON (see footnote 24), para. 540; LÉVY (see footnote 119), ASA Bull. 2001, p. 21 ff., p. 21-36; VON SEGESSER/BOOG (see footnote 12), 107, 120.

121 BERGER/KELLERHALS (see footnote 2), para. 1263; HABEGGER, in: BaslerKomm, para. 30 on Art. 374 SCCP; MAGLIANA (see footnote 25), para. 21 on Art. 26 Swiss Rules; POUDRET/BESSON (see footnote 24), para. 540.

122 BOOG (see footnote 25), para. 50 on Interim Measures in International Arbitration; BOOG (see footnote 38), para. 151 ff.; see LÉVY (see footnote 119), ASA Bull. 2001, p. 21 ff., p. 29 claiming that the parties may even tacitly empower the arbitral tribunal to order astreintes.

obstructive conduct, provided that causality exists between the party's non-compliance and the outcome of the dispute.[123]

Further, arbitral tribunals may consider a party's non-compliance when allocating the costs of the arbitration and, thus, impose costs and/or damages on the disobedient party.[124] MAGLIANA stresses, however, that a party's disobedience should only be sanctioned in such a manner if the incurred costs are related to the proceedings for interim relief or to the affected party's non-compliance with the measures ordered.[125] 42

BOOG holds that the tribunal may order the execution of a performance measure by way of substitution.[126] Yet, this issue remains controversial.[127] 43

Arbitral tribunals may also promote compliance with their orders by fixing precise time limits for compliance and by sending reminders.[128] 44

Generally, the parties are rather reluctant to disobey an order issued by the arbitral tribunal.[129] Some parties voluntarily obey the tribunal's order before it 45

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123 GIRSBERGER/VOSER (see footnote 12), para. 1106; BOOG (see footnote 25), para. 51 on Interim Measures in International Arbitration; BOOG (see footnote 38), para. 162 ff.; MAGLIANA (see footnote 25), para. 22 on Art. 26 Swiss Rules; VON SEGESSER/BOOG (see footnote 12), 107, 121.

124 BOOG (see footnote 25), para. 52 on Interim Measures in International Arbitration; GIRSBERGER/VOSER (see footnote 12), para. 1106, who stress that disobeying a procedural order of the arbitral tribunal cannot be sanctioned in the final award unless causality exists between the non-compliance and the outcome of the dispute. BOOG (see footnote 38), para. 168.

125 MAGLIANA (see footnote 25), para. 22 on Art. 26 Swiss Rules.

126 BOOG (see footnote 25), para. 52 on Interim Measures in International Arbitration; BOOG (see footnote 38), para. 177 ff.

127 For more detail see BOOG (see footnote 38), para. 177 ff.

128 BOOG (see footnote 25), para. 52 on Interim Measures in International Arbitration; BOOG (see footnote 38), para. 186.

129 EHLE (see footnote 5), 157 ff., 168; BOOG (see footnote 25), para. 46 on Interim Measures in International Arbitration; VON SEGESSER/KURTH (see footnote 12), 69, 70; CHAN, Practical and Strategic Decisions in Arbitration, Asian Dispute Review 2017, p. 119 ff., p. 122; see also MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 818 pointing out that the parties mostly voluntarily comply with the decisions of an emergency arbitrator. See also GHAFFARI/WALTERS, The Emergency Arbitrator: The Dawn of a New Age, Arbitration International 2014, p. 153 ff., p. 164 f. reflecting on the reasons for the parties' voluntary compliance; GRIERSON/VAN HOOFT (see footnote 12), p. 162; POUDRET/BESSON (see footnote 24), para. 630; EHLE (see footnote 24), 89 ff., 101; BOND/PARALIKA/SECOMB, ICC Rules of Arbitration, The Arbitral Proceedings, Articles 28, in: MISTELIS (Ed.), Concise International Arbitration, 2nd edition, London 2015, para. 2.

has formed a view on the merits of the case[130] to prevent an increase of the damages, which they might ultimately become obligated to compensate.[131]

I. Third Parties

46 The arbitral tribunal derives its jurisdiction from the parties' agreement to arbitrate. Thus, its jurisdiction is generally limited to the parties who are bound by the arbitration agreement[132] and it lacks the power to render orders addressed to or involving third parties.[133] If third parties are involved or a request is directed against a third party, interim relief should, therefore be requested from a state court that has jurisdiction over third parties and the power to render effective relief.[134]

J. Appeal

47 A party seeking legal protection by interim relief should also take into account the possibility of appeal: If interim relief is requested from a Swiss state court, its decision is subject to an appeal or an objection depending on the amount in dispute.[135] Unless the appellate court suspends the enforceability, the state court's decision is generally enforceable regardless of whether an appeal or objection has been filed.[136]

48 In contrast, in Switzerland it is established that a decision concerning interim relief rendered by an arbitral tribunal does not constitute an award in the sense of the SPILA.[137] The Swiss Federal Supreme Court held that such decisions rendered by arbitral tribunals having their seat in Switzerland are not

130 GRIERSON/VAN HOOFT (see footnote 12), p. 162.
131 KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 6.132.
132 BOOG (see footnote 25), para. 4 on Interim Measures in International Arbitration; MAGLIANA (see footnote 12), para. 13 on Art. 28 ICC Rules; MAGLIANA (see footnote 25), para. 40 on Art. 26 Swiss Rules; BLACKABY/PARTASIDES (see footnote 12), para. 7.18; BORN (see footnote 14), p. 2444.
133 BOOG, (see footnote 25), para. 4 on Interim Measures in International Arbitration; EHLE (see footnote 5), 157 ff., 168; LEMBO/GUIGNET (see footnote 8), p. 4; BORN (see footnote 14), p. 2444.
134 EHLE (see footnote 5), 157 ff., 168.
135 Art. 308(1)(b), Art. 308(2), Art. 319(a) SCCP.
136 Art. 315(4)(b), Art. 325(1), (2) SCCP.
137 BGE 136 III 200, Rec. 2.3, p. 203; MAGLIANA (see footnote 25), para. 30 on Art. 26 Swiss Rules; BERGER/KELLERHALS (see footnote 2), para. 1697.

subject to appeal pursuant to Art. 190 SPILA.[138] This corresponds with the prevailing view in Switzerland.[139] Consequently, there is no judicial control or review of such decisions by Swiss courts.[140] Yet, a party is entitled to request that the arbitral tribunal reconsider its order.[141] The Swiss Supreme Court considered an appeal admissible provided that the arbitral tribunal renders, upon a request for interim relief, an award in the proper sense,[142] i.e., a binding decision that cannot be altered during the arbitral proceedings.[143] Finally, Swiss state courts' orders enforcing arbitral decisions on interim relief are subject to appeal pursuant to Art. 308 ff. SCCP.[144]

K. Enforceability/Geographical Reach

Before approaching the arbitral tribunal or a state court with a request for interim relief, the requesting party should consider whether the needed interim measure requires enforcement to be effective and whether the affected 49

138 BGE 136 III 200, Rec. 2.3, p. 203; with regard to the annullability of orders rendered by an arbitral tribunal having its seat in Switzerland see KAUFMANN-KOHLER/RIGOZZI (see footnote 8), para. 8.27.

139 BOOG (see footnote 38), para. 688, 950, fn. 643 with further references; BERGER/KELLERHALS (see footnote 2), para. 1697; VON SEGESSER/BOOG (see footnote 12), 107, 120, 129; POUDRET/BESSON (see footnote 24), para. 622; BUCHER/TSCHANZ (see footnote 115), para. 176; BERGER/KELLERHALS (see footnote 2), para. 1698, however, are of the view that the arbitral tribunal's decision should be subject to appeal on the basis of Art. 190(2)(b) SPILA if the arbitral tribunal denies its jurisdiction to grant interim relief or if the affected party disputes the arbitral tribunal's jurisdiction and has timely raised the plea of lack of jurisdiction in the arbitral proceedings in accordance with Art. 186(2) SPILA. See also BOOG (see footnote 38), para. 230 fn. 643.

140 BERGER/KELLERHALS (see footnote 2), para. 1264.

141 VON SEGESSER/KURTH (see footnote 12), 69, 86.

142 BGE 136 III 200, Rec. 2.3.1, p. 203 f.; see also OETIKER, in: Swiss Rules Commentary, para. 22 on Art. 26 Swiss Rules.

143 OETIKER, in: Swiss Rules Commentary, para. 22 on Art. 26 Swiss Rules; WIRTH, Enforceability of a Foreign Security Award in Switzerland, ASA Special Series 1996, p. 245 ff., p. 251 f.

144 VON SEGESSER/BOOG (see footnote 12), 107, 129; SCHNEIDER, Funktionen des staatlichen Richters am Sitz des internationalen Schiedsgerichts gemäss 12. Kapitel des IPRG, Zurich/St. Gallen 2009, p. 45. Provided that the requirements set out by legal statute are met, an appeal to the Swiss Federal Supreme Court is allowed; however, the only ground for challenge admitted is the violation of constitutional rights; Art. 98 Swiss Supreme Court Act; VON SEGESSER/GEORGE (see footnote 25), para. 9 on Art. 183 SPILA; BOOG (see footnote 16), para. 46 on Art. 183 SPILA.

party is likely to voluntarily comply with the measures ordered. Further, the requesting party also needs to consider where enforcement will need to be sought.

50 Although the parties are bound by interim measures ordered by an arbitral tribunal, such measures constitute *leges imperfectae* because the arbitral tribunal lacks the power to effectively enforce them.[145] Pursuant to Art. 183(2) SPILA, arbitral tribunals having their seat in Switzerland may request the assistance of the state courts with regard to enforcement.[146] Whether the parties are also entitled to do so is controversial.[147] Some scholars take the view that the state courts refrain from directly enforcing the tribunal's order: They issue a decision that corresponds with the tribunal's order and that is directly enforceable under Swiss law.[148] Others stress that today the state courts' assis-

145 OETIKER, in: Swiss Rules Commentary, para. 18 on Art. 26 Swiss Rules; BOOG (see footnote 38), para. 127 ff.; WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 39; MÜLLER, International Arbitration, A Guide to the Complete Swiss Case Law (Unreported and Reported), Zurich/Basel/Geneva 2004, p. 107; LEMBO/GUIGNET (see footnote 8), p. 11; VON SEGESSER/KURTH (see footnote 12), 69, 80; BORN (see footnote 14), p. 2445; EHLE (see footnote 5), 157 ff., 168.

146 Whether this also applies to decisions rendered by an emergency arbitrator is not completely clear yet, see GHAFFARI/WALTERS (see footnote 129), Arbitration International 2014, p. 153 ff., p. 160; affirmatively MEIER, in: Swiss Rules Commentary, para. 53 on Art. 43 Swiss Rules.

147 VON SEGESSER/GEORGE (see footnote 25), para. 6 on Art. 183 SPILA; negative: MAGLIANA (see footnote 25), para. 24 on Art. 26 Swiss Rules; BERGER/KELLERHALS (see footnote 2), para. 1267; affirmative: WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 39; VON SEGESSER/KURTH (see footnote 12), 69, 81; LEMBO/GUIGNET (see footnote 8), p. 12; FAVALLI/SCHMIDGALL, The Enforcement of Foreign Arbitral Awards in Switzerland under the New Code of Civil Procedure and Debt Enforcement Act, in: MÜLLER/RIGOZZI (Eds.), New Developments in International Commercial Arbitration, Zurich/Basel/Geneva, p. 65 ff., p. 82 f.; MABILLARD, in: BaslerKomm, para. 16 on Art. 183 SPILA; BOOG (see footnote 16), para. 36 on Art. 183 SPILA, stressing that for a party application it is necessary that the arbitral tribunal agrees to such application beforehand. According to VON SEGESSER/BOOG (see footnote 12), 107, 121, it is contentious whether the parties are entitled to directly apply to the state court for assistance. The authors further state at p. 121 f. that if enforcement is not sought at the seat of the arbitration but outside of Switzerland at the location of the assets or goods in question, Art. 183(2) SPILA does not help much and the requesting party, thus, does well to immediately apply to the foreign state court for assistance in the enforcement of the arbitral tribunal's order.

148 MAGLIANA (see footnote 25), para. 25 on Art. 26 Swiss Rules; LEMBO/GUIGNET (see footnote 8), p. 12; disagreeing VON SEGESSER/BOOG (see footnote 12), 107, 122.

tance is considered an "enforcement procedure *sui generis*".[149] If the type of interim relief granted by the arbitral tribunal is unknown under Swiss law, the courts have to adjust the measure accordingly, to the most alike admissible measure[150], which, again, might be a time-consuming undertaking.[151] State courts only refuse enforcement of interim measures if they cannot be converted into Swiss law, e.g. due to their inconsistency with Swiss public policy.[152]

In Switzerland, a decision concerning interim relief is – regardless whether the tribunal issued an order or an award[153] – not considered an "award" in the 51

149 VON SEGESSER/BOOG (see footnote 12), 107, 122, according to whom the state court does not render a decision but only facilitates the enforcement by taking the respective steps necessary.

150 MAGLIANA (see footnote 25), para. 25 on Art. 26 Swiss Rules; WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 40; LEMBO/GUIGNET (see footnote 8), p. 12; VON SEGESSER/GEORGE (see footnote 25), para. 6 on Art. 183 SPILA.

151 GIRSBERGER/VOSER (see footnote 12), para. 1147.

152 MAGLIANA (see footnote 25), para. 25 on Art. 26 Swiss Rules; see also VON SEGESSER/BOOG (see footnote 12), 107, 122.

153 Art. 26(2) Swiss Rules allows the arbitral tribunal to render its decision in the form of an interim award. Art. 28(1) ICC Rules entitles the arbitral tribunal to issue an order or an award. With regard to *ex parte* decisions, Art. 26(3) Swiss Rules provides that the arbitral tribunal may only render its decision in the form of a preliminary order; OETIKER, in: Swiss Rules Commentary, para. 16a on Art. 26 Swiss Rules. Decisions rendered by an emergency arbitrator under the Swiss Rules may be issued in the form of an interim award or an order as Art. 26(2) Swiss Rules is applied accordingly; Art. 43(8) Swiss Rules; MEIER, in: Swiss Rules Commentary, para. 56 on Art. 43 Swiss Rules; MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 816; GHAFFARI/WALTERS (see footnote 129), Arbitration International 2014, p. 153 ff., p. 162. *Ex parte* decisions rendered by an emergency arbitrator, however, must be issued in the form of a preliminary order; Art. 43(8), Art. 26(3) Swiss Rules; OETIKER, in: Swiss Rules Commentary, para. 16a on Art. 26 Swiss Rules; MEIER, in: Swiss Rules Commentary, para. 50 on Art. 43 Swiss Rules. Under the ICC Rules, the emergency arbitrator's decision must be issued in the form of an order; Art. 29(2) ICC Rules and Art. 6(1) Appendix V to the ICC Rules; MEIER, in: Swiss Rules Commentary, para. 56 on Art. 43 Swiss Rules; FRY/GREENBERG/MAZZA (see footnote 49), para. 3-1056 lit. h; GHAFFARI/WALTERS (see footnote 129), Arbitration International 2014, p. 153 ff., p. 162; GRIERSON/VAN HOOFT (see footnote 12), p. 70; VOSER/BOOG (see footnote 56), ICC Bull. 2011, Special Supplement, p. 81 ff., p. 86, stating that the reason why the ICC Rules provide that the emergency arbitrator has to render his decision in the form of an order is that awards issued under the ICC Rules have to be scrutinized (see Art. 34 ICC Rules). The scrutiny procedure can be time-consuming and is, thus, irreconcilable with the urgency that is typical for emergency arbitration proceedings. See also BORN (see footnote 24), p. 2505; SANTENS/KUDRNA, The State of Play of Enforcement of Emergency Arbitrator decisions, Journal of International Arbitration 2017, p. 1 ff., p. 13, pointing out that it might be sensible for

sense of the SPILA. The prevailing view is that such decisions do not qualify as awards under the New York Convention and are thus not recognisable and enforceable under this Convention.[154] However, the Swiss courts are required to render assistance in enforcing the arbitral tribunal's decision irrespective of its form based on Art. 183(2) SPILA.[155] Some legal authors are of the opinion that under exceptional circumstances this even applies to *ex parte* measures ordered by an arbitral tribunal.[156] If enforcement is sought abroad, it might be advantageous to render the decision in the form of an award.[157] The laws of the place of enforcement are decisive with regard to whether, and to what degree, the arbitral tribunal's order is enforceable.[158]

52 Swiss state courts, on the other hand, are able to render decisions that are directly enforceable within Switzerland and that might, thus, have more effect.[159] If enforcement of the decision is sought abroad, the law of the state where enforcement is sought is decisive with regard to the extent that recognition and enforcement is admissible.[160] Since state court decisions do not qualify as "arbitral awards", the New York Convention is not applicable.[161] However, within the territorial scope of application of the Lugano Conven-

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the ICC to allow emergency arbitrators to issue awards but to exempt these awards from the Court's scrutiny.

154 MAGLIANA (see footnote 25), para. 30 on Art. 26 Swiss Rules; OETIKER, in: Swiss Rules Commentary, para. 19 on Art. 26 Swiss Rules; POUDRET/BESSON (see footnote 24), para. 639; VON SEGESSER/BOOG (see footnote 12), 107, 120; FAVALLI/SCHMIDGALL (see footnote 147), 65 ff., 80; BGE 136 III 200, Rec. 2.3.3, p. 205 f. However, OETIKER, in: Swiss Rules Commentary, para. 19 on Art. 26 Swiss Rules, stresses that if interim measures are ordered by way of an interim award, such award may be enforceable under the New York Convention provided that the parties' arbitration agreement encompasses the ordered measure and the arbitral tribunal's decision is binding in the sense that the arbitrators cannot change it during the arbitral proceedings.

155 MAGLIANA (see footnote 25), para. 30 on Art. 26 Swiss Rules; OETIKER, in: Swiss Rules Commentary, para. 21 on Art. 26 Swiss Rules; similar SCHNEIDER (see footnote 144), p. 43.

156 BOOG (see footnote 38), para. 942, 949; LALIVE/POUDRET/REYMOND, in: Le Droit de l'Arbitrage Interne and International en Suisse, Lausanne 1989, para. 3, 9 on Art. 183; SCHNEIDER (see footnote 144), p. 42 f.

157 MAGLIANA (see footnote 25), para. 31 on Art. 26 Swiss Rules; MAGLIANA (see footnote 12), para. 12 on Art. 28 ICC Rules; BLACKABY/PARTASIDES (see footnote 12), para. 7.20; FRY/GREENBERG/MAZZA (see footnote 49), para. 3-1041; GRIERSON/VAN HOOFT (see footnote 12), p. 161 f.

158 MAGLIANA (see footnote 25), para. 26 on Art. 26 Swiss Rules.

159 VON SEGESSER/GEORGE (see footnote 25), para. 2 on Art. 183 SPILA.

160 POUDRET/BESSON (see footnote 24), para. 641.

161 POUDRET/BESSON (see footnote 24), para. 641.

tion, state court decisions granting interim relief in cases where the merits are to be decided by arbitration are enforceable pursuant to the provisions of the Lugano Convention,[162] unless ordered *ex parte*.[163] If a party seeks interim relief that requires enforcement in different states, it may be necessary (and faster) to separately apply to the state courts of each jurisdiction concerned to obtain the requested relief. This, however, leads to multiple proceedings, increased costs and efforts.

If there is a risk that the opposing party will not voluntarily comply with the measures ordered[164] and if time and costs are essential, it might be advisable to seek interim relief from a state court[165] that is in the position to render a decision enforceable within its jurisdiction. If, however, the opposing party is likely to obey the arbitral tribunal's order and various jurisdictions are concerned, it seems sensible to request interim relief from the arbitral tribunal. 53

L. A Practical Example: The *Sauber* Case

The Sauber case is an example of successfully obtaining interim relief under the Swiss Rules, first, from an emergency arbitrator and, thereafter, from a sole arbitrator issuing a partial award in accordance with the expedited procedure provided for in Art. 42 Swiss Rules:[166] 54

In January 2014, the Dutch race car driver Giedo van der Garde and Sauber Motorsport AG ("Sauber") entered into a contract that contained an arbitration agreement subjecting any disputes to arbitration proceedings under the Swiss 55

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162 Ibid.; Art. 1, 33 Lugano Convention; ROHNER/LERCH, in BaslerKomm, para. 109 on Art. 1 Lugano Convention; Court of Justice of the European Union, Judgment of 17 November 1998, *van Uden Maritime BV v Deco-Line*, Case C-391/95, para. 33 f.; VON SEGESSER/KURTH (see footnote 12), 69, 82.

163 BERGER/KELLERHALS (see footnote 2), para. 1304; VON SEGESSER/GEORGE (see footnote 25), para. 7 on Art. 183 SPILA.

164 GRIERSON/VAN HOOFT (see footnote 12), p. 65; the authors also point out that the parties mostly voluntarily obey the arbitral tribunal's order because they do not want to annoy the arbitral tribunal who will eventually decide the case on the merits, p. 162.

165 See WIRTH (see footnote 15), ASA Bull. 2000, p. 31 ff., p. 44.

166 MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 823; THE HON. JUSTICE CLYDE CROFT, Promoting Australia as Leader in International Arbitration, paper prepared for the Institute of Victoria PD Intensive: Commercial Law, Melbourne 26 March 2015, p. 4 f., <http://assets.justice.vic.gov.au//supreme/resources/65a1261c-8bed-4851-b6a4-5f317cec284b/promoting+australia+as+leader+in+international+arbitration.pdf> (accessed on 17.05.2018).

Rules before a sole arbitrator with seat in Geneva, Switzerland.[167] In early November 2014, Sauber informed van der Garde that – despite previously exercising the contractual option nominating him as race driver – the two positions had been given to other drivers.[168] A few days later, van der Garde initiated emergency arbitration proceedings seeking interim injunctive relief to restrain Sauber from taking any action that would deprive him of an opportunity to participate in the 2015 Formula One season.[169] In early December 2014, following an exchange of submissions, the emergency arbitrator granted an interim injunction.[170] Subsequently, the parties consented to an accelerated schedule for the hearing of van der Garde's claim for permanent injunctive relief.[171] A hearing took place on 11 and 12 February 2015 in London and the sole arbitrator rendered his partial award granting the requested relief on 2 March 2015, just under two weeks before the commencement of the 2015 Formula One season in Melbourne.[172] On 5 March 2015, i.e., three days after the partial award had been issued, van der Garde submitted an application to the Australian courts requesting enforcement.[173] A hearing took place on 9 March 2015, an Australian public holiday,[174] and on 11 March 2015, the Supreme Court of Victoria handed down its judgment ordering the enforcement of the partial award, name-

167 For the facts of the case see MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 819 ff.; THE HON. JUSTICE CLYDE CROFT (see footnote 166), p. 3 ff.

168 THE HON. JUSTICE CLYDE CROFT (see footnote 166), p. 4; CLARKE, Arbitration Case Update: Australian F1 Grand Prix – Giedo van der Garde v Sauber Motorsport, 16 March 2015, <https://www.listgbarristers.com.au/publications/arbitration-case-update-australian-f1-grand-prix-giedo-van-der-garde-v-sauber-motorsport> (accessed on 17.05.2018).

169 MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 820; THE HON. JUSTICE CLYDE CROFT (see footnote 166), p. 4 f.

170 MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 821; THE HON. JUSTICE CLYDE CROFT (see footnote 166), p. 5; CLARKE (see footnote 168).

171 MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 821; THE HON. JUSTICE CLYDE CROFT (see footnote 166), p. 5.

172 MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 821; THE HON. JUSTICE CLYDE CROFT (see footnote 166), p. 5 with reference to *Giedo Van Der Garde BV & Giedo Gijsbertus Gerrit Van Der Garde v Sauber Motorsport AG,* SCAI Case No. 300315ER-2014, 2 March 2015, First Partial Award, para.339, cited in Supreme Court of Victoria, Judgment of 11 March 2015, *Giedo van der Garde BV v Sauber Motorsport AG,* [2015] VSC 80, para.4; ENGLAND, KVM Case Note Giedo van der Garde BV V Sauber Motorsport AG, 21 May 2015, <http://www.kwm.com/en/au/knowledge/insights/case-note-giedo-van-der-garde-bv-v-sauber-motorsport-ag-20150520> (accessed on 17.05.2018).

173 MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 822.

174 THE HON. JUSTICE CLYDE CROFT (see footnote 166), p. 7.

ly the prohibitive injunction.[175] Sauber's appeal was dismissed on 12 March 2015.[176] On the same day, shortly before the appeal judgment was handed down, van der Garde initiated contempt proceedings against Sauber on the ground that Sauber had failed to comply with the order of 11 March 2015.[177] A hearing took place on 12 and 13 March 2015 but was adjourned and during the night of 13/14 March 2015 the parties entered into a settlement agreement.[178]

In the Sauber case, the party seeking interim relief opted to request it from the arbitral tribunal rather than a state court, at a time when the arbitral tribunal had not yet been constituted. The emergency arbitration proceedings, the expedited arbitral proceedings and the following enforcement proceedings before the Australian state courts were conducted with utmost speed[179] and the interests of the requesting party were successfully protected. This shows that resorting to arbitration may constitute a sound and valid option to obtain interim relief, even in cases of great urgency and the likelihood of non-compliance of the affected party. 56

V. Evaluation and Recommendation

Convincing arguments exist for seeking interim relief from state courts as well as from arbitral tribunals. The decision must be made on a case-by-case basis, taking into account the specific circumstances of each case. 57

In many cases it seems advisable to seek interim relief from the arbitral tribunal, provided it has already been constituted. This is particularly true if: a specific type of interim relief is needed that is unavailable to the state courts, if the dispute concerns a delicate matter and confidentiality is of the essence, if specific technical issues are at stake requiring e.g. industry knowledge of the deciding authority and if no third parties are involved. Also if the opposing party is likely to voluntarily comply with the measures ordered and enforcement will not be necessary, approaching the arbitral tribunal seems the 58

175 Supreme Court of Victoria, Judgment of 11 March 2015, *Giedo van der Garde BV v Sauber Motorsport AG,* [2015] VSC 80; THE HON. JUSTICE CLYDE CROFT (see footnote 166), p. 9; MÜLLER/ PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 822.

176 MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 822; Supreme Court of Victoria, Judgment of 12 March 2015, *Sauber Motorsport AG v Giedo van der Garde BV & Ors,* [2015] VSCA 37.

177 THE HON. JUSTICE CLYDE CROFT (see footnote 166), p. 12; MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 822.

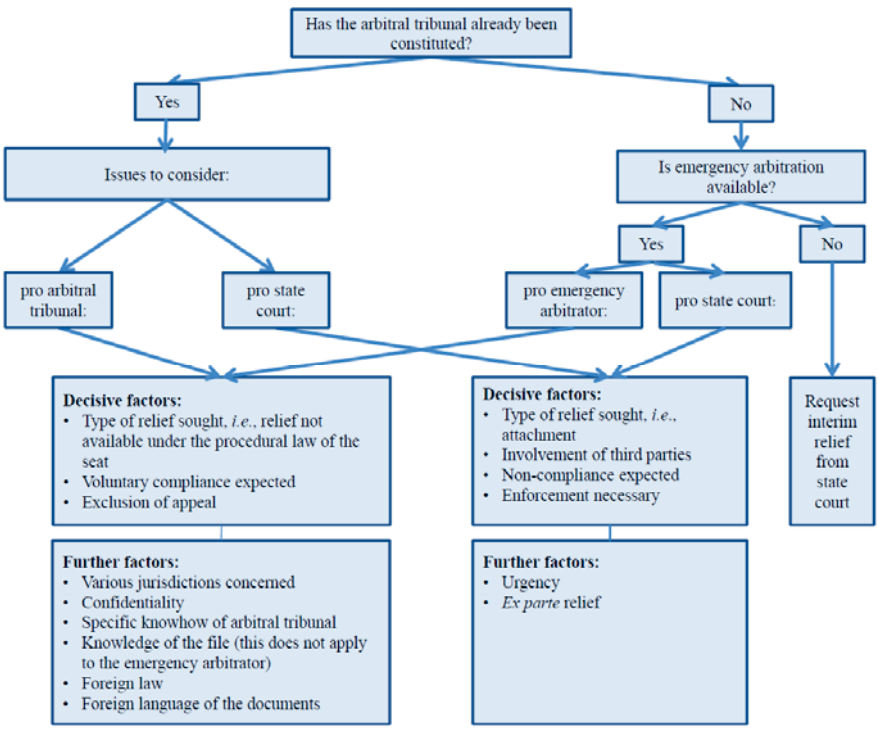
178 MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 822; THE HON. JUSTICE CLYDE CROFT (see footnote 166), p. 13.

179 MÜLLER/PEARSON (see footnote 77), ASA Bull. 2015, p. 808 ff., p. 822.

appropriate choice. This applies all the more since certain logistical difficulties are inherent in requesting interim relief from a state court: foreign law may apply to the merits of the dispute, which the state court is not familiar with, and the language of the dispute, the contract and the supporting documents may differ from the language of the state court.

59 Requesting interim relief from a state court is, however, necessary if third parties are involved or if the arbitral tribunal is not entitled to order the requested type of relief. It also seems recommendable if urgency is of the essence, if *ex parte* relief is requested or if the opposing party will most likely not voluntarily comply with the order and, thus, enforcement becomes an issue. Under those circumstances, the requesting party is generally well advised to seek interim relief from a state court.

60 The following chart shows the factors that should be taken into account when deciding from which authority to request interim relief.



VI. Concluding Remarks

Interim measures are an important procedural tool in dealing with urgent issues that may arise during or before the commencement of proceedings before an arbitral tribunal or a state court. The admissibility of interim measures and their content are governed by the applicable procedural rules and arbitration rules, respectively. While Art. 261 SCCP sets out the legal prerequisites for obtaining interim relief from a Swiss state court, the SPILA as well as the Swiss Rules and the ICC Rules remain silent on this issue. Nevertheless, the requirements that the requesting party has to demonstrate in order that the arbitral tribunal grants the requested interim relief are somewhat similar to those under Art. 261 SCCP. 61

It is generally accepted that the state courts' and the arbitral tribunals' jurisdiction to grant interim relief is concurrent. However, a party in need of interim relief needs to carefully consider whether its request should be addressed to the arbitral tribunal or a state court. The specific circumstances of the case need to be taken into account. There is no general rule as to whether interim relief should be requested from a state court or the arbitral tribunal. However, if third parties are involved, if the arbitral tribunal is not entitled to grant the requested type of relief, if non-compliance of the opposing party is likely and if enforcement will be necessary, a party should address its request to a state court. Requesting interim relief from a state court also seems favourable if the matter is of utmost urgency and if *ex parte* relief is required. Contrarily, if the requested type of relief is not available under the procedural law of the state court, if the decision should not be directly appealable and if enforcement will not be necessary, it is recommended to request interim relief from the arbitral tribunal. This also applies if the voluntary compliance of the opposing party can reasonably be expected, if the arbitral tribunal already has an extensive knowledge of the file at the time when interim relief is needed, if specific know-how is required, if confidentiality is crucial and, finally, if the language applicable to the dispute as well as the language of the contract and the supporting documents are foreign to the state court. 62

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