Preface

This volume contains the written contributions of the speakers at the 11th annual conference on New Developments in International Commercial Arbitration, organized by the CEMAJ (Research Center on Alternative and Judicial Dispute Resolution Methods) of the University of Neuchâtel on 11 November 2016.

The aim of the conference and this book is to provide practitioners, academics and students with an in-depth analysis of some of the latest developments in international commercial arbitration. The conference and this book are therefore not devoted to one specific theme. The common thread running through all the subjects of the contributions contained in this book is their significance and recent appearance in the field of international commercial arbitration.

In the first contribution of this book, TOBIAS ZUBERBÜHLER and ANDREAS SCHREGENBERGER address the issue of corruption in arbitration, focusing in particular on the arbitrator's *sua sponte* duty to investigate and decide on the existence and consequences of corruption. They first of all identify the "red flags" which may indicate an intermediary's involvement in corrupt dealings. They then move on to explore the legal considerations surrounding the issue of whether an arbitrator has the right and duty to investigate circumstances of corruption, arguing that the duty to render an enforceable award and the arbitrator's judicial responsibility militate in favour of such a right and duty. In a final part, the authors discuss the evidential considerations that arise in corruption cases, in particular the problem of a lack of evidence, and argue that adverse inferences should be employed to address missing counter-evidence in such cases. The authors conclude

by advocating for arbitrators to take a pro-active approach in such cases in order to aid the elimination of corruption.

The second contribution authored by PASCAL PICHONNAZ deals with the Swiss approach to some of the contractual issues arising from the arbitration agreement and the *receptum arbitri*. In a first part, he considers the requirements for the validity of an arbitration agreement and the moment when an arbitration agreement becomes effective as well as the specific case of the pathological arbitration clause. In a second part, he examines the consequences of a breach of a multi-tiered clause as well as other hypotheses surrounding the termination of an arbitration agreement. In a third part, he turns to the *receptum arbitri* and discusses the nature of this contract, the obligations arising from this contract and the sanction for the breach of such obligations. Throughout his contribution, PICHONNAZ refers in particular, to recent decisions of the Swiss Federal Supreme Court, underlining the pro-validity approach of the Court, and explores the solutions imposed by the Court in light of the mixed procedural/contractual nature of these contracts.

In the third contribution of this book, SEBASTIANO NESSI delves into the topic of expert witnesses, focusing in particular on party-appointed experts in international arbitration. In the first part of his paper, he provides an overview of the role of expert witnesses in domestic litigation before contrasting this with the role that expert witnesses play in international arbitration. He then outlines the arbitration rules, best practices and professional codes of conduct, which apply to expert witnesses in international arbitration. In the second part of his paper, he discusses the ways in which the independence and impartiality of an expert witness are tested before exploring the sanctions that may be imposed for a violation of the requirement of independence and impartiality. He concludes by advocating for the imposition of a clear duty of independence and impartiality on party-appointed expert

witnesses, as well as calling for a determination on how best to test these duties of independence and impartiality. Finally, he opens the debate on whether arbitral tribunals should be provided with more tools to sanction the appointment of partisan expert witnesses.

The fourth contribution contains a presentation by JONATAN BAIER of the case law of the Swiss Federal Supreme Court on arbitration-related matters rendered between 25 August 2015 and 25 August 2016. BAIER analyses the 29 decisions issued in setting aside proceedings during this period by first addressing the procedural issues raised in these decisions before turning to the substantive grounds for setting aside invoked in these decisions. This review also examines the single decision issued concerning the enforcement of arbitral awards in Switzerland, as well as issues relating to the costs of federal proceedings. Notable developments during this period include: (i) the first fully-fledged decision on investment treaty arbitration (141 III 495); (ii) an indication by the Supreme Court that it may have departed from its long standing practice of taking a restrictive approach when determining whether or not the parties concluded an agreement to arbitrate (142 III 239, 4A_136/2015); (iii) the holding that it is possible, in exceptional circumstances, to conclude an arbitration agreement when exchanging contract drafts (142 III 239); (iv) the decision that, in case of non-compliance with a mandatory contractual pre-arbitral clause, an arbitral tribunal must stay the arbitration until the clause has been complied with (142 III 296); (v) the holding that parties may waive certain aspects of their right to be heard as long as they are aware of the consequences and as long as the very core of the right remains intact (4A_342/2015); and (vi) the confirmation by the Supreme Court that its scope of review with regard to the right to be heard is narrow (4A_202/2016). A useful summary of the holdings in each decision is included at the end of the paper.

In the final contribution of this book, ULRICH HAAS discusses the now infamous Pechstein case, and more specifically its "final point", namely the recent decision of the German Federal Supreme Court. HAAS extensively explores the two main legal issues arising in this decision, specifically (i) whether the CAS is sufficiently independent and neutral to constitute a "true" arbitral tribunal and (ii) whether in a situation of unequal bargaining power the CAS can be imposed on athletes as a prerequisite for participation in organised sport, thereby denying them access to justice before state courts. HAAS thereafter provides a meticulous analysis and commentary on the reasoning of the decision of the German Federal Supreme Court which held that the CAS is considered to be sufficiently independent and neutral to constitute a "true" arbitral tribunal and that an arbitration agreement in favour of the CAS, even if "forced" on an athlete by an international federation, is valid under Swiss law and does not constitute an abuse of a dominant market position.

The variety of the topics covered in this book evidences the dynamic nature of the law and practice of international commercial arbitration, and thus the importance of keeping abreast of significant developments in this field. This is indeed what the *New Developments* conference is all about.

We would like to extend our gratitude to the authors for providing their contributions in advance of the conference, allowing us to distribute a book containing their contributions at the conference itself – one of the hallmarks of this event.

We would also like to thank SABRINA PEARSON-WENGER, teaching assistant and PhD candidate at the University of Neuchâtel Faculty of Law, for her precious support as arbitration expert and English native speaker in the preparation of this book.

We would further like to extend our gratitude to ANOUK GILLABERT of the Secretariat at the University of Neuchâtel

Faculty of Law without whom, the organization of the conference and the timely publication of this book would not have been possible.

Neuchâtel, October 2016

Christoph Müller   Antonio Rigozzi   Sébastien Besson

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Principal Abbreviations

AAA	American Arbitration Association
Art(s).	Article(s)
ASA Bull.	Swiss Arbitration Association Bulletin
BSK	Basler Kommentar
CAS	Court of Arbitration for Sport
CAS Code	Code of Sport-Related Arbitration
CC	Swiss Civil Code 1907, SR 210
CCP	Swiss Code of Civil Procedure 2008, SR 272
cf.	*confer* (see)
CO	Swiss Code of Obligations 1911, SR 220
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
ECHR	European Convention on Human Rights
ed(s).	Editor(s), edition
e.g.	*exempli gratia* (for example)
et seq.	*et sequentes* (and the following)
FIFA	Fédération Internationale de Football Association
FTA	Federal Tribunal Act 2005, SR 173.110
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
ICCA	International Council for Commercial Arbitration
ICC	International Chamber of Commerce, Paris (= CCI)
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
i.e.	*id est* (that is)

LCIA	London Court of International Arbitration
N(s)/No(s).	Number(s)
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in New York on 10 June 1958, RS 0.277.12
op. cit.	in the work already cited
P(p).	page(s)
para. (s)	paragraph (s)
PILA	Swiss Federal Private International Law Act 1987, SR 291 (= LDIP, IPRG)
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Center
SR	*Systematische Sammlung des Bundesrechts* (Systematic Collection of Swiss Federal Law)
Swiss Rules	Swiss Rules of International Arbitration
UNCITRAL	United Nations Commission on International Trade Law
Vol.	Volume
viz	namely
vs	*versus*

Corruption in Arbitration – The Arbitrator's Duty to Investigate

TOBIAS ZUBERBÜHLER & ANDREAS SCHREGENBERGER

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I. Introduction

In today's world, nobody will deny that corruption is a widespread evil with a devastating effect on societies. Corruption paralyses economic development, cripples innovation and, in some extreme cases, kills people.

According to estimates by the World Bank, bribery payments worldwide amount to approx. USD 1 trillion per year,[1] i.e. around 1-2% of the global GDP.[2] While global development aid is estimated to amount to at USD 130 billion per year,[3] 8-9 times this amount (USD 1.1 trillion in 2013[4]) illicitly flows out of emerging markets and developing countries into Western bank accounts at the same time. The breakdown of sources of illicit financial flows is estimated to be 60-65% for tax evasion, 3% for corruption and 30-35% for other criminal activities.[5]

According to a study published in 2012, 40% of all Swiss companies operating abroad had been approached for bribery payments, and 56% of the approached companies actually paid bribes amounting to 5% of their revenue.[6]

Bribery of foreign public officials was first sanctioned under the United States Foreign Corrupt Practices Act of 1977 (FCPA), after the Carter administration detected (in the wake of the Watergate scandal) that U.S. companies, mainly in the defence industry, had systematically bribed government officials abroad to sell their products. Because U.S. companies were unhappy about their competitive disadvantage in relation to competitors from other (Western) countries (who continued to bribe without fear of any sanctions), they lobbied

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1 http://www.worldbank.org/en/topic/governance/brief/anti-corruption.

2 http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.

3 http://www.oecd.org/dac/development-aid-rises-again-in-2015-spending-on-refugees-doubles.htm.

4 Global Financial Integrity (GFI), Illicit Financial Flows from Developing Countries: 2004-2013.

5 THUT, N 11, referring to OECD, Better Policies for Development, Recommendations for Policy Coherence, 2011, p. 30. Various researchers have argued that, despite large volumes of aid and borrowing, Africa is actually a net creditor to the rest of the world, because yearly illicit outflows from African countries to Western bank accounts exceed the amount of incoming development aid for the continent (REED/FONTANA, p. 9 with further references).

6 Hochschule für Technik und Wirtschaft (HTW) Chur, Korruptionsrisiken erfolgreich begegnen – Strategien für international tätige Unternehmen, 2012, p. 17.

the OECD for two decades, until the OECD Anti-Bribery Convention[7] was adopted in 1997. Many other international treaties,[8] guidelines[9] and laws with extraterritorial effect[10] have been introduced since then, gradually broadening the catalogue of criminal conduct to private sector corruption, trading in influence[11] or facilitation payments.[12]

National laws have been adapted accordingly, leading to universal criminalization of public sector bribery and penalization of private sector bribery in most jurisdictions.[13] The prohibition of bribing government officials is considered to have obtained the status of international public policy, i.e. to reflect an international consensus as to universal standards and accepted norms of conduct.[14] Whether the ban on private sector bribery has reached the level of international public policy is not yet entirely clear. Considerable differences

7 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

8 Council of Europe (COE) Criminal Law Convention on Corruption (1999); COE Civil Law Convention on Corruption (1999); United Nations Convention Against Corruption (UNCAC) (2003).

9 ICC Rules on Combating Corruption (1996, 1999, 2005 and 2011); ICC Guidelines on Agents, Intermediaries and Other Third Parties (2010).

10 Most importantly the UK Bribery Act (2010), which sanctions extraterritorial private sector bribery and imposes liability for mandating corrupt third party intermediaries.

11 Trading in influence is a form of corruption which is difficult understand. By trading in influence, or influence peddling, a person misuses his or her influence over a decision-maker (typically a public official) for a third party in return for money or any other material or immaterial undue advantage (cf. Article 12 of the COE Criminal Law Convention on Corruption).

12 Smaller payments made to public officials for services which would otherwise be free.

13 HWANG/LIM, pp. 6-7 fn. 21.

14 BORN, pp. 2717-2718; BANIFATEMI, p. 21 N 31; DOUGLAS, p. 181; SCHERER, p. 29; KHVALEI, Standards of Proof, p. 75; HAHN, p. 432; NUEBER, p. 12. It should be noted in this connection that the United Nations Convention Against Corruption has been ratified by 178 states.

between national laws remain, in particular, in the areas of facilitation payments and trading in influence.[15]

Despite the universal condemnation and increased prosecution of corruption and other business crimes, illegal conduct in international trade still appears to be on the rise. It is estimated that illicit financial flows out of developing countries are increasing by 6.5% every year.[16]

Considering the growing global efforts to combat corruption, we feel a strong moral impetus to expose corruption since it subverts the fundamental legal principle that contracts should

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15 Under Swiss law, for example, it is argued that facilitation payments are covered by the anti-corruption provisions of Articles 322ter et seqq. of the Swiss Criminal Code; cf. Explanatory Report by the government on the revision of the Swiss Criminal Code (Botschaft) of 30 April 2014, BBl 2014 3591. The FCPA, on the other hand, states that its anti-bribery prohibition "*shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or secure the performance of a routine governmental action*" (15 U.S.C. § 78dd-2B). Because trading in influence is difficult to distinguish from legitimate lobbying, most member states of the COE Criminal Law Convention on Corruption have not implemented any corresponding criminal sanctions in their national laws (cf. Pieth, Vor Art. 322ter N 7, with respect to Swiss law). On the other hand, some jurisdictions (such as Algeria) have categorically prohibited the use of intermediaries for the procurement of government contracts, whereas others (e.g. Jordan or Saudi Arabia) have introduced sector-specific prohibitions, primarily for defence contracts (cf. MENA-OECD Investment Programme, Business Ethics and Anti-Bribery Policies in Selected Middle East and North African Countries, pp. 10-13). Many countries subject intermediaries to licensing requirements. In regions prone to corruption such as the Middle East and Northern Africa, one might question whether restrictions on intermediaries only serve to get rid of rivals and channel the full bribery payments directly into the pockets of corrupt government officials. In a similar vein, the Swiss Federal Supreme Court argued in its famous Hilmarton decision that Algerian legislation prohibiting intermediaries had a protectionist background and thus could not pertain to Swiss public policy (decision of 17 April 1990, ASA Bull 2/1993, pp. 253-254, at p. 254).

16 GFI (fn. 4), pp. 5-9. The "top ten" countries with the highest illicit outflows for the time period 2004-2013 are (in this order): China, Russia, Mexico, India, Malaysia, Brazil, South Africa, Thailand, Indonesia and Nigeria.

be negotiated and entered into by an open competition of *bona fide* participants in a free market.[17]

At the same time, the immoral actors who manipulate the market in their favour should not be able to ultimately benefit by invalidating the underlying contracts and thus capitalising on their own illegal conduct. After all, the payer, the (intermediary) agent and the complicit recipient of bribery payments are all operating with unclean hands.

These paradox elements of corruption cases create various challenges for arbitrators: Why should corrupt parties be assisted at all in uncovering their corrupt conduct? Why should they get away with it? And if corruption is sanctioned by declaring the contract as void, doesn't this ultimately motivate states, state-owned entities or private companies in corrupt countries to accept more bribes, only to subsequently resist payment by invoking a corruption defence?

This is the inherent tension we are operating in as arbitrators confronted with suspicions of corruption.

The task in these situations is further complicated by the fact that allegations of bribery are easily raised, but difficult to prove. Since the most common business sectors in international arbitration are also those most exposed to corruption (infrastructure, defence and natural resources),[18] arbitrators may be inclined to subject the corresponding transactions to a blanket suspicion of corruption, particularly when the recipient of suspicious payments operates in a country where bribery is endemic.

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[17] As one commentator has remarked sarcastically: "*We don't get upset representing states with terrible human rights records. We don't get upset about representing companies that make clearly harmful products. But we do get upset about corruption. This [is] because corruption is a deviation from the due process of law, which strikes to the heart of a lawyer's craft.*" Paul Cohen in GAR Live Paris; reported by Douglas Thomson on 11 February 2014.

[18] Cf. CREMADES/CAIRNS, p. 70.

Such a predisposition might (i) incite certain parties to invoke a corruption defence without any grounds or (ii) send certain arbitrators on an anti-corruption crusade without sufficient justification.

At the same time, arbitrators certainly do not want to be seen as accomplices to corrupt parties in this day and age. They should work against the public perception that arbitrators are rubber-stamping clandestine criminal activities of corrupt public officials and complicit private actors in confidential arbitration proceedings.[19]

Against this background, the arbitrator's dilemma is already quite acute when a party raises a corruption defence, but the real challenge presents itself in situations where none of the parties clearly invokes criminal conduct. For instance, it may appear during the proceedings that the respondent's defence to the claim is surprisingly weak, or that only little evidence of performed work is produced.[20] The following analysis will focus on the latter situation, i.e. on the question whether arbitral tribunals should engage in investigations on their own motion *(sua sponte)* if any suspicion of corruption arises in the course of the proceedings.

II. Red Flags

A. Overview

Since the parties involved in bribery schemes understandably try to hide their transactions, direct evidence of bribery is inherently rare. Unless corruption is clearly proven and/or admitted, arbitral tribunals will be left with circumstantial

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[19] Cf. KHVALEI, Standards of Proof, p. 75.

[20] MOURRE, pp. 101 and 112-113 in respect of simulated arbitrations; cf. also KURKELA, pp. 287-288.

evidence and, based on such indirect evidence, will need to decide whether to follow a "bad smell" or not.

Governmental (anti-corruption) agencies and NGOs have developed lists of "red flags" to identify circumstantial evidence which may indicate an intermediary's involvement in corrupt dealings,[21] and some arbitral tribunals have implemented and ruled on the basis of these criteria.[22] Although various red flag lists exist, they essentially have the same content.[23] The most commonly stated red flags are the following:

- main connection of the contract to states with a high level of corruption;

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[21] U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC): A Resource Guide to the U.S. Foreign Corrupt Practices Act (FCPA), November 14, 2012 (rev. January 16, 2015), pp. 22-23; Woolf Committee Report: Ethical business conduct in BAE Systems plc – the way forward, May 2008, pp. 25-26; World Compliance: Navigating Through the FCPA Minefield, Debunking Myths, and Addressing Red Flags (2010), pp. 13-15; TRACE Due Diligence Guidebook: Doing Business with Intermediaries Internationally (2010), p. 19; Financial Action Task Force (FATF): FATF Guidance on Politically Exposed Persons (Recommendations 12 and 22), June 2013, Annex 1.

[22] Recently in *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3 (Award of 4 October 2013), para. 293, where the arbitral tribunal considered the following elements as sufficient to establish corruption: the consultants (1) were not qualified for the contractual business; (2) had family ties to the Prime Minister of Uzbekistan; (3) received a very high remuneration of USD 4 Mio. which constituted (4) 20% of the entire contract volume; cf. NAPPERT, pp. 179-182. Cf. also ICC Case No. 8891 (1998), Collection of ICC Arbitral Awards IV (1996-2000), pp. 561-569, at pp. 565-566, where the tribunal held an intermediary agreement to be void on the following basis: (1) inability of the intermediary to sufficiently prove the execution of the agreed services; (2) excessively high remuneration; and (3) remuneration based on a percentage of the awarded contract. For an in-depth discussion on red flags in general, see HWANG/LIM, pp. 31-34; SCHERER, pp. 31-36; KHVALEI, Red Flags, pp. 21-23.

[23] Cf. *Metal-Tech* (fn. 22), para. 293 fn. 340, where the tribunal specified that red flag lists merely assemble a number of factors which any adjudicator with good common sense would consider when assessing facts in relation to a corruption issue.

- principal contract relates to industries prone to corruption (infrastructure, defence industry, oil & gas, commodities);
- large contract volume / short negotiations;
- very high compensation, both in absolute figures and in relation to the contract volume;
- proportional (success-based) fee;[24]
- intermediary recommended by the other contracting party;[25]
- intermediary lacks qualification or experience for the contractually agreed task;
- lacking or insufficient description of an intermediary's services;
- payments to off-shore accounts or accounts in third countries than the recipient's domicile, or to some other person or entity;
- intermediary requests "urgent" payments or cash payments, or a corporate vehicle such as equity is used for the purpose of remuneration;
- general lack of transparency / sketchy accounting; and
- missing evidence in general.

As to the relative significance of red flags, there are obviously no clear-cut rules, and every case will have to be assessed individually. Nonetheless, certain fact patterns will deserve a closer look. For example, a contract for the delivery of

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[24] It should be noted, however, that success-based fees appear to be the standard form of remuneration in contracts with intermediaries. Therefore, this red flag alone is probably not enough to trigger further investigations.

[25] Corrupt governments often recommend (or even prescribe) "trusted" intermediaries to foreign companies bidding for public contracts.

100 tanks with a total value of USD 800 Mio. to the governments of e.g. Angola, Afghanistan, Iraq or Venezuela[26] will most likely raise questions from the outset because of the high contract volume, the concerned industry and the fact that corruption is known to be endemic in these countries.

B. Level of Fees in particular

As to the level of compensation, some authors have suggested that success fees above a certain threshold are conclusive evidence of the payment of bribes.[27] While it would be inadequate in our view to set rigid upper limits, one could try to look at comparable benchmarks for success-based fees in other industries. M&A advisors for acquiring (or selling) businesses in investment banking, for example,[28] appear to be charging average success fees of approx. 2-4% for high-end transactions (USD 100 Mio. upwards). Because of the amount of work involved in smaller transactions, the success fees tend to be higher (approx. 10-12% for USD 5 Mio. transactions).[29] Further elements influencing M&A advisory

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[26] These countries are ranked No. 166 (Afghanistan), 163 (Angola), 161 (Iraq) and 158 (Venezuela) in the Corruption Perceptions Index 2015 of Transparency International. North Korea and Somalia share the bottom rank (No. 167). The most corrupt OECD countries are Mexico (No. 95), Turkey (No. 66), Italy (No. 61), Greece (No. 58), Slovakia and Hungary (shared No. 50). Russia is No. 119, China No. 83.

[27] SCHERER, fn. 33, referring to Didier Lamethe, L'illicéité en matière de services liés au commerce international, in: L'illicéité dans le commerce international (Kahn/Kessedjian [eds.]), Paris 1996, p. 189 (commission above 3-5%); a clear case of excessive remuneration was found in *Consultant v. Contractor*, ICC Case No. 6497 (1994), Collection of ICC Arbitral Awards IV (1996-2000), pp. 232-240, at p. 236 para. 17, where the tribunal held that the *"extremely unusual fee"* of 33.33% gave rise to a *"high degree of probability"* that the intention of the intermediary agreement was to bribe government officials.

[28] Arguably a more complex and time-consuming task in general than the typical mandate of an intermediary for international construction, defence or extraction contracts.

[29] Strategic Exits, M&A Advisor Fees for Selling Business, http://www.exits.com/blog/ma-advisor-fees-selling-business (visited 8 August 2016).

fees are business overheads (of large investment banking teams vs. boutique firms), competition, prestige and service levels (marketing efforts and number of targeted companies).

Other fairly transparent and established benchmarks can be found for intermediaries in the real estate industry. For the Swiss real estate market, case law of the Federal Supreme Court suggests that commissions tend to be in a range of 1-3% for developed properties and 3-5% for undeveloped land.[30] A commission of 11% has been held to be excessive in a case where the average commission for the same geographical area was 2%.[31]

It has been argued that special circumstances may justify very high consultancy fees, based e.g. on the difficulty of entering into a new market, the long-term benefit of a project, potentially lucrative follow-up contracts, tough competition among bidders or even greed and excellent bargaining power of an agent.[32] While some consultants may indeed be particularly skilled negotiators – it is after all their job – and some markets hard to break, it is difficult in our view to justify a success fee above 5%, at least for high-value contracts. The benchmarks are known in the industry, and there is typically a good reason why certain markets are a challenge to enter into. Transparency and competition should lower the costs of market entry, and not lead to an increase in consultancy fees. In transparent and open international public biddings for government contracts, intermediaries will rarely be necessary in the first place.

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30 Decision of the Federal Supreme Court of 26 September 2012, BGE 138 III 669, cons. 3.1; AMMANN, Art. 417 N 5.

31 Federal Supreme Court decision of 11 June 1957, BGE 83 II 151, cons. 4c.

32 Cf. SCHERER, pp. 32-34.

C. Background of the Intermediary

Another significant and symptomatic red flag is a lack of qualification of the intermediary to perform the contractually agreed work. Closely connected to this element is an insufficient description of the purported services in the consultancy agreement, or the case where the parties have agreed on a number of services to be rendered by the intermediary, but their true intention seems to concentrate only on the successful obtaining of the main contract for the principal. If the only qualification of an intermediary is to have family ties to the prime minister of a country,[33] this fact alone should be sufficient to trigger further investigations.

Whether a close personal relationship between the (qualified) intermediary and a public official (or decision-maker in a private company) constitutes a red flag *per se* is however doubtful.[34] After all, the task of an intermediary would be rather difficult without some personal connection to the people awarding a contract.[35] Moreover, some consultancy agreements may expressly require the intermediary to exercise his or her personal influence over public officials in order to procure a contract or government approval for the principal on the best possible terms.[36] It should also be taken into account in this connection that the entire political lobbying industry is built upon personal relationships between

[33] As was the case in *Metal-Tech* (fn. 22).

[34] Cf. SCHERER, pp. 34-35.

[35] Cf. SCHERER, p. 30.

[36] Cf. HWANG/LIM, p. 27. As an illustrative example, the lobbying industry in Kuwait has been described as follows: "[L]et me explain you that Kuwait is a small community, and the people who work in the Ministry of Defense or Ministry of Finance, those are officers, and some of them, we go together to the beach, we are friends, we went to school together, they come to our house, we go to their house. We are a small community [...]." (Westacre Investments Inc. v Jugoimport-SDPR Holdings Co. Ltd., ICC Case No. 7047 (1994), Collection of ICC Arbitral Awards IV (1996-2000), pp. 32-51; a full version of the award is reprinted in ASA Bull 2/1995, pp. 301-357 [cited quote at pp. 339-340]). For an in-depth discussion, see HWANG/LIM, pp. 27-28.

lobbyists and politicians. Despite the considerable sums earned by political lobbyists, nobody would dispute that their work continues to be legal. Accordingly, arbitral tribunals operating under Swiss law have decided that lobbying as such is not an illegal activity.[37]

D. Other Key Red Flags

Additional red flags to consider are (i) a lack of serious negotiations (i.e. a short period of time between the engagement of an intermediary and conclusion of a contract), (ii) inconsistencies in the timeline between the alleged services of the intermediary on one hand and the schedule of the connected (public) tender procedure on the other, (iii) an opaque corporate structure or domicile of the intermediary (possibly set up to hide a beneficial owner in the background), or (iv) the fact that the intermediary has been proposed by the party awarding the contract.

Payments to off-shore accounts or accounts in other jurisdictions than the country of performance are also a typical feature of bribery schemes. While one can imagine other reasons for an intermediary to hide payments off shore, such as tax evasion, this should not prevent a further investigation into the matter. More often than not, the transfer of bribery payments to foreign accounts will result in subsequent tax evasion, since nobody will want any corresponding transfers to appear in accounting or tax records.

Last but not least, existing criminal investigations might, but do not necessarily, constitute an indication of corruption. In states with a high level of corruption, criminal investigations are often initiated by a ruling party to discredit and neutralize

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[37] *Westacre* (fn. 36), p. 339 para. a); for an in-depth discussion, see HWANG/LIM, pp. 41-42.

political opponents (and thereby secure the ruling elite's privileges).[38]

III. Legal Considerations regarding the Arbitrator's Duty to Investigate

While red flags describe fact patterns which may be relevant to identify circumstantial evidence in a straightforward fashion, the legal framework for arbitrators to investigate and rule upon indications of corruption is more complex. In a nutshell, the arbitrator's right and duty to investigate touch upon delicate tensions between key principles in international arbitration: party autonomy, the *ultra petita* principle, equal treatment of the parties, the parties' right to be heard as well as the postulate of time- and cost-efficiency on one hand, and international public policy, the arbitrators' duty to render an enforceable award as well as the discretionary power of tribunals to conduct the proceedings as they see fit on the other. Ultimately, the question is also connected to whether arbitral tribunals, vested with competences of a public authority, shall have a corresponding responsibility beyond the mere settlement of the parties' dispute.

A. General Right and Duty to Investigate

Most arbitration rules and arbitration laws provide arbitrators with a wide discretion with respect to the conduct of the proceedings.[39] This is particularly important against the background that under most arbitration laws, the arbitral tribunal is the only instance establishing the facts of the case.

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[38] Cf. BESSON, p. 106 Ns. 18-19.

[39] E.g. Articles 15(2) and 20(1) ICC Rules; Article 14.1 LCIA Rules; Article 15(1) Swiss Rules; Article 20(1) Vienna Rules; Articles 15(1), 24 and 27(1) DIS-Rules; Article 19(1) SCC Rules; Article 19(1) SIAC Rules 2016; Article 16.1 AAA Rules; Articles 34(2), 35(1) and 36(b) ICSID Rules of Arbitration; Article 17(1) UNCITRAL Rules.

When entering into an arbitration agreement, the parties will normally expect a comprehensive (and truthful) determination of the facts by the tribunal.[40]

Where corruption is alleged by a party, arbitrators are clearly obliged to investigate fact patterns indicating one (or more) party's corrupt dealings.[41]

If neither party alleges corruption, but the (circumstantial) evidence on record leads the tribunal to suspect that corrupt activities may have taken place, some authors and isolated arbitral tribunals have been hesitant in the past to postulate a right and duty of the arbitrator to investigate these activities.[42] In accordance with the modern doctrine and case law,[43] however, we are of the view that *sua sponte* investigations should be initiated if arbitrators become aware of red flags suggesting that corrupt acts have taken place, as arbitrators would otherwise not be in a position to issue a "correct" award on the basis of all relevant facts.

B. Conceptual Challenges against a Right and Duty to Investigate

One of the main arguments against the arbitrator's right and duty to investigate *sua sponte* may be seen in a potential

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40 Cf. Article 25(1) ICC Rules.

41 HWANG/LIM, p. 14; cf. also BORN, pp. 2705-2706.

42 MOURRE, pp. 109-110 with reference to Redfern/Hunter, Law and Practice of International Commercial Arbitration, 3rd ed., London 1999, p. 153: *"[…] it is not the duty of an arbitral tribunal to assume an inquisitorial role and to search officiously for evidence of corruption where none is alleged."* In the current 6th edition, BLACKABY/PARTASIDES/REDFERN/HUNTER do not take a clear position any more (at N 2.153): *"For now, the extent of an arbitral tribunal's duty – if any – to probe matters of illegality of its own motion remains unclear."* As to arbitral tribunals rejecting a duty to investigate *sua sponte*, see *Westacre* (fn. 36), p. 46 para. 54; *Consultant v. Contractor* (fn. 27), pp. 233-234 para. 3.

43 HWANG/LIM, pp. 14-22; KHVALEI, Standards of Proof, p. 75; MARCENARO, pp. 144-145; NAPPERT, pp. 179-182; STACHER, pp. 1564-1565; NUEBER, pp. 5-6; *Metal-Tech* (fn. 22); ICC Case No. 8891 (fn. 22).

violation of the universally applicable *ultra petita* principle.[44] This argument is not compelling in our view. First of all, under most (if not all) substantive laws, a contract to corrupt (i.e. in particular consultancy agreements concluded for the purpose of bribery) is sanctioned by declaring the involved agreement as void. Therefore, corruption must be considered *ex officio* by the competent judicial authority in these cases. The tribunal's competence to raise this issue is ultimately based on the arbitrators' general authority to apply the (governing) law as chosen by the parties, or determined by the arbitrators.[45]

The tribunal may invoke the potential nullity of the contract even if no formal request is made by the parties.[46] Arbitrators may regularly be confronted with a scenario in which the parties carefully "dance around" the issue of bribery. Defaulting respondents could, for instance, claim that they have obtained a contract solely through their own efforts (and thus do not have to remunerate the intermediary). As a first line of defence, this approach might serve a valid purpose, especially as it avoids the risk of presenting one's own business as "ready to use bribery for convenience, but not ready to foot its bill."[47] Against this background, the invocation of nullity by the tribunal may result from a party's mere allusion, short of an outright claim of nullity, that the

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44 Cf. Article V(1)(c) New York Convention and Article 34(2)(a)(iii) UNCITRAL Model Law.

45 SAYED, p. 361, with further references; BORN, p. 2705; cf. MARCENARO, p. 146, with reference to the *iura novit curia* principle; similarly KHVALEI, Standards of Proof, p. 74.

46 ICC award by Jürgen Dohm (1989), ASA Bull 2/1993, pp. 216-246, at p. 231, where the decision was clear in affirming that an arbitral tribunal had authority to invoke and pronounce nullity on its own motion. Cf. also SAYED, p. 362, with reference to ICC Case No. 8891 (fn. 22 above) where the development of the proceedings led the tribunal to request that the parties address the issue of nullity of the consultancy contract because of bribery in their final brief; HAHN, p. 433.

47 PAVIC, p. 669.

contract at issue may involve corruption.[48] In proceedings where the tribunal finds indications of "soft" variations of corruption, *i.e*. private corruption or trading in influence, it will also be necessary to assess the validity of the contract under the applicable law.[49]

In extreme cases where the party raising the issue of corruption expressly asks the tribunal not to rule upon the validity of the contract, the arbitrator nevertheless retains discretionary power to declare the contract void to the extent it indeed involved corruption.[50]

The situation is slightly different in contracts procured by (underlying) corruption: The main contract is typically not null and void, but only subject to a challenge by one of the parties of the main contract (e.g. based on illegality, deception or error), *i.e.* voidable. In other words, the parties could also choose to leave the main contract intact and valid, or a challenge may not be possible anymore because the (usually rather short) time limit to do so has expired. Despite the different legal basis with respect to voidable main contracts, we submit that arbitrators, at least when international public policy is at stake, still have a right and duty to investigate corruption. International public policy dictates that a tribunal cannot turn a blind eye to apparent indicia of corruption even if the parties remain passive.

In line with this view, it is held by the doctrine that a tribunal will not be regarded as having exceeded its authority as long as the matters determined or the relevance relied upon in its

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48 SAYED, p. 362, who mentions that a mere allusion to corruption may result from the fact that a party is reluctant to admit having entered into a despicable transaction.

49 Cf. SCHERER, p. 29.

50 *LUNIK Engineering Ltd v SOLIMAN S.A*, ICC case (1993), ASA Bull 1/1998, pp. 210-236 *("Lunik v. Soliman")*, at p. 216 para. 36, where the defendant openly requested the sole arbitrator not to pronounce the contract as void, arguing that it could not in good faith have signed the contract and at the same time invoke the legal argument of voidance; cf. also SAYED, p. 361.

award are relevant to the dispute.[51] Given that corrupt activities by one or more parties can have a dispositive impact on the validity (and enforceability) of a claim submitted to the tribunal, the investigation of, and ruling upon, corruption must fall within the tribunal's mandate. Accordingly, investigations of suspected corruption will as a rule hardly qualify as exceeding an arbitrator's mandate within the meaning of the New York Convention or the UNCITRAL Model Law.[52]

On the level of their procedural rights, parties might try to argue that *ex officio* inquiries of the tribunal would *de facto* result in an unlevel playing field: The party subject to inquisitorial steps by the tribunal is obviously in a less favourable position because it is forced to deliver explanations, evidence or even to summon (its own) witnesses to counter any potential suspicion of the tribunal that it was involved in corrupt dealings.

Concerns of unequal treatment can, however, reasonably be mitigated by observing the principles of due process, i.e. by informing the parties of the tribunal's suspicion on corruption and providing them with a sufficient opportunity to present their position.[53]

Looking at the bigger picture, the arbitrator's responsibility of establishing the relevant facts is closely tied to the – legitimate – expectation of the parties that the tribunal render an award which is enforceable and based on all relevant facts necessary to decide the dispute. Against this background, arbitrators should not fear the risk of being challenged only on the basis of taking investigative steps where there is circumstantial evidence of corruption.

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[51] HWANG/LIM, p. 16; PAVIC, pp. 670-671.

[52] PAVIC, p. 670.

[53] Cf. MARCENARO, p. 145; HAHN, p. 433. For an illustrative example on how to deal with the respondent's right to be heard, cf. *Westacre* (fn. 36), at pp. 311-314.

C. Duty to Render an Enforceable Award

Although it is debated whether an arbitral tribunal has the implicit or express duty to render an enforceable award,[54] such duty is nevertheless an important reason in our view why arbitrators should take any suspicion on corruption seriously. This task militates in favour of not only a right, but an essential duty of the tribunal to investigate *sua sponte* if there are indications of corruption.[55] Any award that ignores (circumstantial) evidence of corruption or does not adequately address corresponding suspicions carries the significant risk of subsequently being set aside or not being enforced because it violates public policy provisions of the seat of arbitration or the country of enforcement.[56]

The duty to render an enforceable award is, in turn, closely tied to the question of the applicable public policy.[57] In our view, in light of the international trend towards a transnational understanding of enforceability of arbitral awards,[58] arbitrators may be well advised to assess the compliance of their award with the public policy of: (i) the arbitral seat; (ii) the country of performance; (iii) the countries of the parties' origins; and (iv) other countries of potential enforcement. In any event, as corruption is globally perceived as a wrongful and, indeed, unacceptable practice, it is only fair that the condemnation of such practice must, as an example of international/transnational public policy, apply irrespective of the law the parties have chosen to govern the contract.[59]

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[54] Article 41 ICC Rules and Article 32.2 LCIA Rules; cf. MARCENARO, P. 144-145; KURKELA, p. 282.

[55] Cf. MOURRE, p. 110.

[56] CREMADES/CAIRNS, p. 77.

[57] Cf. KURKELA, pp. 282-283.

[58] Cf. GAILLARD, pp. 464-465; *contra*, among others, KARRER, para. 2.

[59] Cf. in detail *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7 (Award of 4 October 2006), paras. 138-157, discussed in HAUGENEDER/LIEBSCHER, pp. 4-5; ICC Case No. 13914 (Award of March 2008), ICC Bulletin Special Supplement 2013, pp. 77-82, at pp. 80-81, paras. 230-232; ICC

Although, at least theoretically, the number and respective scope of public policies is relevant for the scope of the arbitrators' duty to investigate, the differences between public policies in different jurisdictions are minor when it comes to corruption; as mentioned earlier, the only practically relevant differences will be in the areas of facilitation payments[60] and trading in influence.[61]

Because an award may be challenged if it does not adequately address indications of corruption, the arbitrator's duty to render an enforceable award includes a corresponding obligation to comprehensively establish the (true) facts of the case. Corrupt dealings, if established, regularly have an essential influence on the resolution of the dispute. At the same time, it is well understood that arbitral tribunals need to balance the interest in a comprehensive establishment of the facts with the postulate of time- and cost-efficient proceedings.

D. The Arbitrator's Judicial Responsibility

One could also try to look at the arbitrator's mandate in order to determine whether his or her duty to investigate may be within or outside the scope of the task assigned by the parties. More specifically, it might be argued that the guiding principle of party autonomy would, by its very nature, prohibit any investigations by the tribunal *sua sponte*, because it is in the parties' (own) power to decide whether issues of corruption shall be part of their dispute or not.

Case No. 13384 (Award of December 2005), ICC Bulletin Special Supplement 2013, pp. 62-66, at p. 63 para. 65; MENAKER/GREENWALD, p. 77 fn. 2; SCHERER, p. 30 fn. 5, with reference to the decision of the Federal Supreme Court of 30 December 1994 regarding *Westacre* (fn. 36), published in ASA Bull 2/1995, pp. 217-226, at p. 226.

[60] Which in any event will hardly ever be relevant or decisive in arbitration proceedings.

[61] For an in-depth discussion, cf. HWANG/LIM, pp. 37-61.

In view of the requirements of (international) public policy and the duty to render an enforceable award as set forth above, an (express) agreement of the parties to exclude corruption at the outset of the proceedings would not restrict the arbitrator's power to investigate and establish all aspects and facts relevant to the outcome of the dispute.[62] The situation is even clearer where the parties (silently) wish that corruption is not raised by the tribunal. Once the procedure has been established between the tribunal and the parties (i.e. by procedural order no. 1 and a procedural timetable), the tribunal assumes the power to conduct the proceedings as it sees fit where the parties have not expressly provided for a rule.[63]

In any event, the better view is to define the role of an arbitrator as going beyond a mere (private) service provider.[64] Although arbitral tribunals derive their authority from contractual agreements of the parties, they ultimately fulfil a judicial and therefore public function which has traditionally been vested in public authorities. The goal of the arbitral process is to reach a (binding and globally enforceable) decision, and the state provides such a decision with equal effect to that of a final judgment of a state court. In line with this functional approach, an arbitral tribunal is first of all a body with the competence, and hence the duties, of a state authority. Consequently, the state – and the parties to the dispute – may expect that arbitration approaches matters of public policy and specific mandatory norms related to bribery

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62 BORN, p. 2705: *"[...] arbitrators are obliged, by the adjudicative character of their mandate, to consider and apply mandatory laws and public policies, even when this is contrary to the terms of the parties' choice-of-law or other agreement."*; cf. MOURRE, p. 110, supporting the view that an arbitral tribunal should not be bound by a fraudulent agreement to exclude an aspect of illegality from the arbitration; cf. also *Lunik v. Soliman* (fn. 51).

63 Cf. Article 182(2) of the Swiss Private International Law Act (PILA); Article 15(1) Swiss Rules; Article 22(2) ICC Rules.

64 For an in-depth discussion in light of the application of European competition law by arbitral tribunals *ex officio*, cf. KHVALEI, Standards of Proof, p. 74.

with the same level of attentiveness as a state judiciary would.[65]

Such public responsibility towards the administration of justice requires tribunals – as one of their foremost duties – not to condone corruption. In light of the seriousness of rendering binding awards over millions of dollars which might be connected to corrupt acts, arbitral tribunals are vested with a responsibility beyond the mere settlement of the parties' disputes.

IV. Considerations on Evidence in Light of the Arbitrator's Duty to Investigate

A. Grappling with Lack of Evidence

While red flags may help the tribunal to identify *prima facie* evidence of corrupt dealings under an intermediary agreement, they are not conclusive evidence that a corrupt payment was made or offered. Naturally, according to the procedural law concepts of most jurisdictions, the duty to substantiate the relevant facts and, even more critical, the burden of proof remain with the parties of the dispute.

Both the party bearing the burden of proof and the tribunal are in a delicate and, to some extent, intertwined situation: On one hand, the submission of pertaining evidence may turn into a *probatio diabolica* for the party bearing the burden of proof of corrupt acts. On the other hand, the arbitral tribunal is, under most arbitration laws, the only instance which has

[65] PAVIC, pp. 669-670, with further references; ZIADÉ, pp. 120-121; MARCENARO, P. 145, supporting a public function of the arbitrator *"in the interest of collective needs of the international trade community."*

the competence to establish – and investigate – the facts of the case.[66]

The issue that certain facts may be difficult to prove due to the fact that the necessary evidence is not available or out of the control of the party carrying the burden to proof, is not confined to the area of corruption, but one of the essential conceptual challenges of any procedural rules in litigation and arbitration.[67] Adding to the complexity is the fact that the basis for the parties' duty to substantiate their claims and the applicable rules for the burden and standard of proof may have different sources.[68]

B. Characteristics of Intermediary Agreements

To date, the vast majority of published awards in the area of corruption directly concern intermediary agreements.

Under an intermediary agreement, the intermediary (or agent) is engaged by his principal, in particular contractors participating in tender proceedings, to assist in procuring a government contract or a license to do business in a particular country. In exchange, the intermediary is entitled to a commission which is typically calculated as a percentage of the value of the (main) contract awarded to the principal,

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[66] Cf. Article 191 PILA in connection with Article 77(2) of the Swiss Act on the Federal Supreme Court; Federal Supreme Court decisions of 17 January 2013 (4A_538/2012 cons. 6.1) and of 23 September 2014 (4A_231/2014 cons. 5.1), where the Federal Supreme Court, in cases involving allegations of corruption, expressly stated that it cannot review the assessment of the evidence by the arbitral tribunal. See also HAHN, p. 436.

[67] Cf. KREINDLER, pp. 252-280, for an in-depth-analysis.

[68] As with other issues involving choice of law questions, the tribunal must assess whether the burden of proof is a procedural issue (and thus subject to the procedural law of the arbitral seat or *lex arbitri*), a substantive issue (and thus subject to the law governing the underlying substantive issues or *lex causae*), or subject to some international standard, cf. MENAKER/GREENWALD, p. 78; BORN, pp. 2313-2315.

rather than on a time-spent basis or flat rate. The value of the awarded contract can be very large, and commission payments correspondingly substantial. Hence, the intermediary's remuneration may be out of proportion to the nature of the services rendered. As some authors have correctly observed, such potentially high remunerations – coupled with the risk that the intermediary may not be reimbursed for its expenses as the intermediary is only paid when its efforts result in successful procurement of the envisaged contract, license, or permit – contribute to significant pressure on intermediaries to make a payment to a government official to "ensure" successful conclusion of the main contract.[69]

The described (contractual) mechanism of intermediary agreements may aggravate arbitrators' already existing concerns that part of the reward to be paid to the intermediary is in fact intended to be used to bribe government officials, be it with or without knowledge, consent or connivance of the principal.[70]

If a tribunal detects any red flags which may indicate corruption, the specific difficulty of proving corruption in connection with an intermediary agreement lies, accordingly, in demonstrating that there were in fact such illegal acts involved or intended in the manner the intermediary performed or was to perform the contract. In addition, the evidence necessary to prove any indication of corruption will often require an involvement of public officials whom the intermediary has allegedly bribed. Because they often risk criminal prosecution in their home countries, it will be almost impossible to summon the concerned governmental representatives as witnesses.[71]

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[69] HWANG/LIM, pp. 26-27 with further references; SCHERER, P. 29.
[70] HWANG/LIM, p. 27.
[71] HWANG/LIM, p. 28.

C. Evidentiary Rules

The difficulties of proving facts in relation to corruption – for instance, but not exclusively, in connection with intermediary agreements – may create an incentive to depart from basic propositions in terms of the standard (and burden) of proof, given the limits of arbitrators' powers of investigation and compulsion, and considering that the participants in bribery and corruption schemes often mask their activities with great criminal energy. In view of the described difficulties, arbitral tribunals and legal doctrine have developed diverging approaches for the assessment of evidence.

1. Burden of Proof

Generally, the party wishing to rely on corruption as a basis for its claim or defence bears the respective burden of proof (*actori incumbit probatio*).[72] The party accused of corruption does not have the burden of proving that its own or its agent's activity was lawful. However, the tribunal may take into account a party's failure to produce relevant evidence within its possession, custody, or control.

Notwithstanding the wide acceptance of the principle that the burden of proof rests with the party raising the related argument, some commentators have suggested that tribunals should shift the burden of proof to the accused party if there is *prima facie* evidence of corruption.[73] Certain tribunals have issued awards that appear to support this position.[74] However,

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[72] Cf. Article 27(1) UNCITRAL Arbitration Rules; MENAKER/GREENWALD, pp. 79-80; SAYED, p. 92, with reference to authors suggesting that this rule even pertains to international public policy; cf. *Westacre* (fn. 36), at p. 46 para. 54; *Metal-Tech* (fn. 22), para. 237, with reference to the practice of the International Court of Justice and arbitral tribunals constituted under the ICSID Convention and NAFTA.

[73] MILLS, pp. 295-296; for further references, cf. MENAKER/GREENWALD, p. 80 fn. 26.

[74] *Consultant v. Contractor* (fn. 27), at p. 234 para. 4; cf. ICC Case No. 12990 (Award of December 2005), ICC Bulletin Special Supplement 2013, pp. 52-62, at

in line with the prevailing doctrine,[75] we consider a shifting of the burden of proof as too far-fetched for several reasons. *First*, as tribunals have correctly held, *"[i]nternational arbitration is not an inquisitorial system where the [t]ribunal establishes the facts for a denunciating party, nor a system where it is sufficient to make a prima facie case relying on the opponent to rebut that case."*[76] *Second*, a shift of the burden of proof is not compatible with its nature as a persuasive – purely *legal* – burden which may never shift from one party to the other in the course of the proceedings.[77] Nonetheless, the burden *to produce evidence* can shift from one party to another, depending upon the state of the evidence.[78] *Third*, a reversal of the standard burden of proof deviates from established practice in international arbitration,[79] and may even be in contradiction with the parties' (legitimate) expectations when consenting to arbitration as a means of dispute resolution. In light of the arbitrators' (and parties') obligation to maintain the integrity of the fact-finding process and other procedural duties, in particular the general call for time- and cost-efficient proceedings, we do not see any basis to deviate from the standard burden of proof in international

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p. 55 para 259, where it is held that an agent's refusal to establish proof of its activity is *a priori* an indication of unlawfulness.

[75] MOURRE, p. 102, objecting that, in corruption cases, *"a reversal of the burden of proof does not seem to be acceptable or compatible with the right to a fair trial"*, and further submitting that the tribunal in ICC Case No. 6497 did not shift the burden of proof, but rather drew adverse inferences from the refusal of a party to cooperate fully with the procedure. Cf. also STACHER, p. 1565.

[76] Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL Award (redacted) of 23 April 2012, para. 148.

[77] MENAKER/GREENWALD, p. 81, with further references.

[78] Cf. Apotex Holdings Inc. and Apotex Inc. v. United States of America, NAFTA/ICSID Case No. ARB(AF)/12/1 (Award of 25 August 2014), Part VIII, para. 8.8; Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II), ICSID Case No. ARB/11/12 (2014), para. 299: *"[...] The Tribunal accepts that if Respondent adduces evidence sufficient to present a prima facie case, Claimant must produce rebuttal evidence, although Respondent retains the ultimate burden to prove its jurisdictional objection."*; MENAKER/GREENWALD, p. 81.

[79] Cf. HWANG/LIM, p. 29.

arbitration, at least not as a matter of principle. *Fourth*, a reversal of the burden of proof might unduly incentivise parties to raise false allegations or otherwise interfere with the scheduled course of the proceedings. *Fifth*, if a shift is allowed in corruption cases, the burden of proof might also be questioned in other areas for which evidence is difficult to obtain, and may thus disrupt international arbitration standards developed over decades.[80]

2. Circumstantial Evidence and (Adverse) Inferences

The preferable approach to address missing counter-evidence is to draw an adverse inference. Thereby, a better balance is achieved between the interest of the party bearing the burden of proof and a counterparty's reasonable capability of contributing to the establishment of the factual background.[81] Generally, the tribunal may order either party to produce evidence concerning any disputed factual issue (e.g. written evidence, witness testimony, or expert reports), and may draw an adverse inference against a party that fails to produce such evidence, even if that party does not have the burden of proving the related issue.[82] Where an inference is a reasonable conclusion to draw from the known or assumed facts, tribunals should, given the often deliberately concealed nature of corruption, be all the more encouraged to take appropriate action.[83] In fact, numerous tribunals have found corruption to be proven based on inferences arising from

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80 HWANG/LIM, p. 29.

81 PARTASIDES, para. 63; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Award of 6 May 2013), para. 184; cf. MENAKER/GREENWALD, p. 82.

82 MENAKER/GREENWALD, p. 82, referring to Sandifer Durward, Evidence Before International Tribunals, 1975, p. 131: *"[A] party cannot simply assert or deny a proposition and then rest his case upon a technical rule, throwing the burden of proof on the other party, without running a risk of adverse inference being drawn from his failure to produce evidence."*

83 PARTASIDES, para. 77; cf. KHVALEI, Standards of Proof, p. 75.

indicia (red flags) of corruption and the accused party's failure to produce any relevant evidence.[84]

Thus, if a party retains an intermediary to assist in procuring a government contract and the tribunal finds that the transaction involves one or more red flags, the tribunal may draw an adverse inference from the failure to provide evidence that the intermediary performed legitimate services in return for any commissions. Specifically, the tribunal may infer from the absence of such evidence that the intermediary did not provide any legitimate services, but rather transmitted the payments as bribes to obtain the award of the contract. The tribunal accordingly may conclude on that basis that the party alleging corruption has met its burden of proof.[85]

In more detail, the following general requirements for drawing adverse inferences have been identified by the doctrine:[86]

(a) the party seeking an adverse inference must produce *prima facie* evidence for its allegation, i.e. evidence which is reasonably consistent, complete and detailed;

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[84] E.g. Consultant v. Contractor (fn. 27), at p. 240 para 30: *"[...] Taking into account all circumstances, the arbitral tribunal considers [...] that there is a high degree of probability that the real object of the [agreement] was to channel bribes to officials in country x [...]"*; ICC Case No. 8891 (fn. 22), at p. 564 and p. 567: "*[...] Une telle preuve s'avère souvent difficile. En effet, l'objet illicite est généralement dissimulé derrière des dispositions contractuelles d'apparence anodine. C'est pourquoi les arbitres n'ont souvent d'autre choix que de se fonder sur des indices [...] Le cumul des indices ne laisse place à aucune hésitation à conclure que le contrat de consultance avait pour objet d'obtenir une augmentation du prix du [Ministère] par le versement de «pots-de-vin» à des personnes bien placées dans l'administration [de l'Etat]*"; ICC Case No 12990, at p. 61 para 340: "*[...] La Défenderesse a fourni au [t]ribunal [a]rbitral des indices qui ont corroboré une présomption d'illicéité [...]*"; cf. MENAKER/GREENWALD, p. 82; HWANG/LIM, p. 36, with a reference to ICC Case No. 3916 (1982).

[85] Cf. MENAKER/GREENWALD, pp. 92-93; STACHER, p. 1565.

[86] ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, Art. 9 N 58 with further references. Cf. also PARTASIDES, pp. 59-61.

(b) the requested evidence must be accessible to the other party;

(c) the inference sought must be reasonable, consistent with the facts on the record and logically related to the likely nature of the evidence withheld; and

(d) the other party must know, or have reason to know, of its obligation to produce evidence rebutting the adverse inference sought.

First and foremost, before drawing any adverse inference, arbitral tribunals will have to examine very carefully whether the party alleging corruption has presented a *prima facie* case, or - if no party raises any allegations – whether sufficient indications of bribery exist. Any allegations or indications of corruption need to be accompanied by conclusive circumstantial evidence, i.e. a sufficient concentration of red flags in order to reasonably indicate bribery.[87]

Secondly, once a *prima facie* case has been established, it must be assessed whether the requested evidence can reasonably be expected to be in the possession of the other party. In today's business environment, consultants may be expected to keep records of their activities (meeting notes etc.) and expenses, since they will want to prove – in a legitimate situation – that the contract has been concluded through their efforts. The regularity of contemporaneous records and the absence of contemporaneous objections to invoices or other correspondence may be taken into account.[88] Furthermore, consultants may be requested to disclose their corporate structure and indicate the ultimate beneficial owner(s) of their company if this is unclear.

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[87] Cf. the in-depth discussion of *Metal-Tech* (fn. 22) by NAPPERT, pp. 179-182.

[88] HWANG/LIM, pp. 34-35, with reference to BORN, International Commercial Arbitration, Wolters Kluwer Law & Business 2009, pp. 1855-1856.

If the requested party refuses to produce relevant evidence which may reasonably be assumed to be in its possession (or witnesses under the control of a party do not appear at a hearing without sufficient reasons[89]), arbitrators are empowered to draw adverse inferences.

Companies and state entities suspected of having paid or received bribes via employees should also be allowed to contest (and possibly avoid) liability by a so-called "adequate procedures defence", i.e. a showing that adequate anti-corruption measures have been introduced, implemented and monitored within the organization.[90] It goes without saying that arbitral tribunals must take into account whether any anti-corruption measures have genuinely been implemented and enforced and do not merely constitute window-dressing. If a rogue employee nevertheless engages in corrupt activities (and is criminally prosecuted), his or her criminal actions should not be attributable to the employer if adequate anti-corruption measures were in place.

Next, even if a party refuses to produce evidence sought by the tribunal, an adverse inference should only be drawn if there is a logical connection between the documents withheld and the adverse inference. Silence may be motivated by various reasons, and even if it gives rise to a suspicion of wrongdoing, it must be weighed against the weaknesses in the other party's case. In the situations described above, such logical nexus should be fairly easy to establish.[91]

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[89] Bearing in mind that persons charged with a criminal offence are under no duty to incriminate themselves and corruption is sanctioned by the death penalty in certain countries such as China.

[90] UK Ministry of Justice: The Bribery Act 2010, Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010); Transparency International UK: The 2010 UK Bribery Act Adequate Procedures; cf. MARCENARO, pp. 141-142, with an example of a respective code of ethics.

[91] HWANG/LIM, p. 36.

Finally, tribunals must be careful to provide a sufficient warning to the requested party that the arbitrators might draw an adverse inference if the requested evidence is not produced. Even though Arts. 9(5) and 9(6) of the IBA Rules of Evidence stipulate the possibility to draw an adverse inference, a separate and clear announcement should be included in any production order.[92]

Applying the above principles and caveats, numerous tribunals have made affirmative findings of corruption on the basis of circumstantial evidence and inferences, regardless of the standard of proof applied.[93]

3. Standard of Proof

While some authors suggest that a particular standard of proof may have decisive consequences for the outcome of the case,[94] there is no common benchmark in this area.[95] The standard of proof to be applied depends on the applicable substantive law and procedures adopted in the arbitration.[96] In particular, the standard of proof will vary considerably between countries from common law and civil law traditions.[97]

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[92] ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, Art. 9 N 68.

[93] MENAKER/GREENWALD, pp. 92-93; cf. fn. 84.

[94] Cf. MENAKER/GREENWALD, p. 86 for a discussion of the illustrative case of *Mohamed Bin Hammam v. Fédération Internationale de Football Association*, CAS 2011/A/2625 (Award of 19 July 2012), at paras. 153-155, 195-199, and 204-205.

[95] Cf. MENAKER/GREENWALD, p. 82; BORN, p. 2313, who emphasizes that international arbitration conventions, national arbitration laws, arbitration rules and decisions of arbitral tribunals are almost uniformly silent on the subject of the standard of proof.

[96] MENAKER/GREENWALD, p. 79, referring to BORN, p. 2315.

[97] Cf. MENAKER/GREENWALD, p. 79 and pp. 82-83 for a more detailed discussion, in particular regarding the difficulty to "translate" the "inner conviction" standard of proof often used in civil law jurisdictions into the three applicable standards of proof under US law, i.e. "beyond reasonable doubt", "clear and convincing evidence", and "preponderance of the evidence" or "balance of probabilities".

A large part of the doctrine has in the past postulated a heightened standard of proof to be applied in case of corruption. In particular, arbitral tribunals in a number of ICC cases have heightened the standard of proof for allegations of corruption beyond the balance of probabilities standard (which is by some commentators perceived as the "usual standard" in international arbitrations[98]) to "clear and convincing evidence". The background is that civil law allegations of criminal misconduct are considered more serious than factual issues in ordinary civil cases and fall within certain stigmatized classes of acts where a greater degree of certitude is required.[99] Moreover, it is argued in the doctrine that parties could be induced to raise unjustified corruption allegations and thereby more easily evade their contractual obligations.[100] Corruption as a criminal offence may thus, by way of analogy, suggest an even higher standard of proof than "clear and convincing evidence", i.e. the standard of proof which is commonly applied in criminal law ("beyond any reasonable doubt").

It is our view that the requisite standard of proof that a party must discharge in order to establish corruption should not depart from the common standard of proof in civil matters (in accordance with applicable law) – and not to the standard of "clear and convincing evidence"[101] or to the standard in criminal law. *First*, arbitral tribunals are dealing with the consequences of corruption as a matter of civil, not criminal liability. *Second*, arbitrators do not have the power to impose criminal sanctions. Accordingly, it appears unnecessary to proceed with the same degree of caution as a criminal court would in ascertaining the facts of the case before it. *Third*,

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[98] MENAKER/GREENWALD, p. 83, referring to BORN, p. 2314.

[99] MENAKER/GREENWALD, pp. 83-84, with further references.

[100] MENAKER/GREENWALD, pp. 83-84; SAYED, p. 103.

[101] Among others, cf. MENAKER/GREENWALD, pp. 87-90, submitting a number of reasons as to why the standard of preponderance of evidence should apply to allegations of corruption.

from a practical – and in our view essential – point of view, given the difficulty of proving corruption, a standard of proof as applied in criminal law would in most situations be almost impossible to satisfy. This would in turn (i) factually lead to a blind-eye approach by the tribunal and thereby (ii) play directly into the hands of unscrupulous parties who would be in the comfortable position of simply denying any wrongdoing and, even worse, exploit the high threshold of proof to avoid any liability.[102] In any event, it should be kept in mind that, in arbitral practice, the standard of proof will rarely make a true difference if an arbitral tribunal is convinced about the existence of corrupt acts.[103]

In line with this view, it has been argued that the only appropriate standard of proof upon *sua sponte* investigations by the arbitral tribunal is the "inner conviction" of the arbitrators. The logical consequence of this standard for the arbitrator's conduct is, in turn, to ensure that all the relevant facts are established by the tribunal. Naturally, the "inner conviction" standard does, by way of theory and as a practical matter, incentivize arbitrators to put more weight on their judicial responsibility rather than turning a blind eye to suspicious transactions.[104]

The wide discretion of the tribunal to establish the facts of the case by all appropriate means[105] and to determine the

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[102] Cf. HWANG/LIM, pp. 29-30.

[103] Cf. NAPPERT, p. 181, discussing *Metal-Tech* (fn. 22) and pointing out that the tribunal found it unnecessary to embark upon an analysis of the requisite burden of proof because there was a sufficient concentration of red flags; similarly HAUGENEDER/LIEBSCHER, pp. 8-11.

[104] Cf. KHVALEI, Standards of Proof, p. 75.

[105] Cf. Article 25(1) ICC Rules; Article 25(5) ICC Rules specifies that *"[a]t any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence"*; Article 9(1) of the IBA Rules on the Taking of Evidence in International Arbitration: *"The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence."* In this respect, Article 19(2) SIAC Rules 2016 specifies that *"the Tribunal is not required to apply the rules of evidence of any applicable law in making such determination."*

admissibility, relevance, materiality and the weight of the evidence under most arbitration rules[106] corresponds with this understanding of the arbitrator's role. In particular, the tools of considering circumstantial evidence and drawing adverse inferences are effective means to determine whether corruption has been proven.[107]

V. Conclusion

Provided that an arbitral tribunal has jurisdiction to decide a case, it is entitled – and may be obliged – to investigate and decide upon the existence and consequences of corruption on its own motion.

Arbitrators must be careful, however, only to pursue indications of corruption where *prima facie* evidence of wrongdoing exists. Otherwise, unjustified investigations may unnecessarily disrupt the proceedings.

If a sufficient concentration of red flags emerges during the proceedings and corruption appears to be plausible, arbitrators should not hesitate to start investigating the matter by inviting the parties to submit explanations and evidence in connection with the red flags. More often than not, the requested evidence will be sufficient for the arbitrators to take a decision on whether corruption has in fact tainted a contractual relationship or not. If the requested evidence appears to be insufficient, tribunals are empowered to draw adverse inferences under certain circumstances.

Addressing suspicions of corruption will remain a balancing act and a great challenge for arbitrators. We are not compliance officers or prosecutors, but also should not close

[106] Cf. Article 182(3) PILA; Article 15(1) Swiss Rules; SCHERER, p. 31.
[107] HWANG/LIM, pp. 31-32.

our eyes to corrupt dealings of government officials and their accomplices.

There is no doubt that a proactive approach by international arbitrators best assists the efforts of states, supranational organizations and international business to eliminate corruption. Last but not least, it is obviously in the tribunals' own interest to assume their public and moral responsibility, due to the simple fact that weak or indifferent judicial authorities are one of the roots of persisting corruption. It is in the very interest of the arbitration community to be seen as helping to eliminate this scourge of humanity.

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Contractual issues arising from the arbitration agreement and the *receptum arbitri*

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I. Introduction

At the heart of arbitration lies the arbitration agreement: an agreement whereby two or more parties agree that a dispute, which has arisen or may arise between them in connection

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with a particular legal relationship, will be settled by a binding award rendered by one or more arbitrators[1].

This arbitration agreement may be found in an *arbitration clause* in a contract (or a group of contracts) or may result from an agreement concluded after a dispute has arisen (the so-called "submission agreement"). It has a contractual nature, but given that it contains the consent of the parties to withdraw their dispute from a national court system and to submit it to a specific (arbitral) procedure, it is mainly of a procedural nature. It could therefore be considered as a **contract of procedural law**.[2] As a result, issues arising from the arbitration agreement may be resolved by reference to contractual solutions but only by taking into account procedural considerations and requirements.

Similarly, the agreement between the arbitrators and the parties in dispute, the so-called *receptum arbitri*, is also mainly of a contractual nature,[3] but its validity and its duration are dependent upon procedural concerns. It is therefore rather a contract of a mixed nature.

As a matter of fact, questions linked to the arbitration agreement are numerous and the subject is broad. This is why I have chosen to concentrate on three questions that I consider to be of particular interest. First, I will focus on contractual issues linked to the validity and initial pathologies of arbitration agreements (II.). Second, I will deal with the breach of such agreements (III.). Finally, I will discuss the nature of, the obligations arising from, and breach of the *receptum arbitri* (IV.).

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1 DFT 142 III 239/247 reason 3.3.1, DFT 4A_676/2014, 3.6.2015 reason 3.2.2; DFT 138 III 29/35 reason 2.2.3; see also BORN, N 241; FOUCHARD/GAILLARD/GOLDMAN/SAVAGE, N 385; GIRSBERGER/VOSER, International arbitration, N 264; GÖKSU, N 401; POUDRET/BESSON, N 4; MÜLLER, Commentary, Art. 178 PILA N 3.

2 BERGER/KELLERHALS, N 309; LEW/MISTELIS/KRÖLL, NN 5-1 to 5-33.

3 BERGER/KELLERHALS, N 963; GIRSBERGER/VOSER N 852.

II. Validity and Initial Pathologies of the arbitration agreement

Chapter 12 PILA does not precisely define an agreement to arbitrate. Art. 178(2) PILA is only a conflict of law provision and Art. 357(1) CCP has been termed as "highly incomplete"[4]. Therefore, the Federal Tribunal has had to develop case law on Art. 178 PILA in order to supplement this provision.

The **principle of severability**, partially codified by Art. 178(3) PILA and recognised by the Federal Tribunal for many decades,[5] requires the validity requirements of the arbitration agreement to be analysed independently from the validity of the contract(s) in question.[6]

A. The conclusion of a valid arbitration agreement

An arbitral agreement does not have any effect unless the requirements for its validity are met (1.). However, it is not always easy to determine the moment when these requirements are fulfilled (2.).

1. Validity requirements

Like any agreement, the arbitration agreement has to fulfil some substantive and formal requirements in order to be binding on the parties.

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4 BERGER/KELLERHALS, N 278.

5 For the first time in DFT 59 I 177; recently DFT 142 III 239 reason 3.2.1, DFT 140 III 134, reason 3.3.2 *in fine* and references; DFT 121 III 495, reason 5a; DFT 116 Ia 56, reason 5a; see for all others GIRSBERGER/VOSER N 540 et seq., 545 et seq.; MÜLLER, Commentary, Art. 178 PILA N 85; BORN, pp. 814 et seq.; SCHWEIZER, Art. 357 N 8.

6 MÜLLER, Commentary, Art. 178 PILA NN 83 seq.; BUCHER, N 83; LALIVE/POUDRET/RAYMOND, Art. 178 PILA N 4.

For arbitration agreements, the **substantive requirements** that have to be met are the following: there has to be an exchange of *concurring and mutual declarations of will* and these declarations must cover, with sufficient precision, a minimum content of *essentialia*, namely the intent of the parties to exclusively submit (according to the Federal Tribunal[7]) their dispute to an arbitral tribunal,[8] the description of the dispute and the legal relationship which shall be covered by the arbitration agreement.[9] The filing of a request for arbitration is not possible unless the parties have agreed on these *essentialia*.[10]

If there is no reference to institutional rules, parties also have to fix the place of arbitration, the number of arbitrators, the procedure for the appointment of the arbitral tribunal and the language of the arbitration,[11] since there is no administrating body which will decide in the absence of any precision.[12] However, the Federal Tribunal does not consider these elements as *essentialia*, unless one party makes them a *condicio sine qua non* for the conclusion of the contract and that fact is recognizable by the other party.[13]

National statutes and international conventions on arbitration generally require a **written agreement** for the formal validity of the arbitration agreement.[14] The notion of writing however

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[7] DFT 142 III 239/247 reason 3.3.1; DFT 25.10.2010, 4A_279/2010, reason 3, ASA 2011, p. 129; DFT 138 III 29/35 reason 2.2.3; see also POUDRET/BESSON, N 155; *for a different opinion,* see CR LDIP- BUCHER, Art. 176 PILA N 10.

[8] DFT 130 III 66/70, reason 3.1; DFT 129 III 675, reason 2.3; DFT 19.4.2011, 4A_404/2010, reason 4.2.2; BERGER/KELLERHALS, N 285 et seq.; GIRSBERGER/VOSER N 284 et seq.; LALIVE/POUDRET/RAYMOND, Art. 178 PILA N 1; BÄRTSCH/PETTI, p. 29.

[9] BERGER/KELLERHALS, N 286; POUDRET/BESSON, N 156; LALIVE/POUDRET/RAYMOND, Art. 178 PILA N 1; BÄRTSCH/PETTI, p. 35 et seq.

[10] DFT 126 III 529, see CR LDIP- BUCHER, Art. 176 PILA N 10.

[11] See for different practices, BEALE/LAUTENSCHLAGER/SCOTTI/VAN DEN HOLE.

[12] For details see, among many others BERGER/KELLERHALS, N 304; BSK IPRG-GRÄNICHER, Art. 178 PILA N 36; GÖKSU, NN 457 et seq.

[13] DFT 138 III 29/32 reason 2.1.

[14] For all others, see BORN, 657; GIRSBERGER/VOSER N 277; GÖKSU, NN 544 et seq.

differs from one regime to another. Art. 7(3) UNCITRAL Model Law (Option I) reads as follows: "*An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means".* Art. II(2) NYC also provides that the arbitration agreement is considered to be in writing as long as it results from the exchange of written declarations, which need not be signed.[15]

The UNCITRAL declaration of 2006 underlines that the definition of writing is not exhaustive, given, among other aspects, the growing importance of electronic means of communication.[16] National statutes also vary with respect to whether the writing requirement is a validity requirement or serves an evidentiary purpose.[17]

Art. 178(1) PILA requires an arbitration agreement to be made in writing, by telegram, telex, fax or any other means of communication which permits it to be evidenced by a text. The Federal Tribunal adds that a written agreement is important (and a validity requirement) because one should avoid that a party too readily renounces the jurisdiction of the "natural judge" and the means of appeal which are available before the national courts.[18]

2. Determination of when the arbitration agreement becomes effective

Since there is a formal requirement that the consent of the parties, with respect to an arbitration agreement, should be in "written form" and therefore explicit, it should be easy to determine **when** the arbitration agreement becomes

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15 GIRSBERGER/VOSER N 279.

16 UNCITRAL Recommendation regarding the interpretation of Arts II(2) and VII(1) New York Convention, New York 2006, Recommendation 2, available at www.uncitral.org; see also BORN, Cases and Materials, pp. 331 et seq.

17 GIRSBERGER/VOSER N 281.

18 DFT 142 III 239/249 reason 3.3.1.

effective. As shown by the next case, this is not always true. This may be problematic since a party cannot have recourse to arbitration before the arbitration agreement has come into force.

In the aforementioned case released in February 2016 (**DFT 142 III 239**), the Federal Tribunal came, quite generously, to the conclusion that both the requirement of consent to resort to arbitration and the requirement of a written form were fulfilled and thus, that the arbitration agreement was valid despite the fact that the parties had not agreed on the main contract.[19] It is therefore useful to briefly comment on this decision.

After a first "Sales Contract for Payment by Draft" for a certain quantity of steel, the Parties began to negotiate a "Frame Contract" for the supply of steel. The drafts provided that the contract needed to be duly signed by the parties in order to be binding and they also contained an extensive arbitration clause declaring the Swiss Rules applicable.[20] After many exchanges, including some suggestions with respect to the arbitration clause by one of the parties (among other points, reference to ICC France and a seat in Paris), which were rejected by the other party, the parties came back to a

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19 DFT 142 III 239 (4A_84/2015; 18 February 2016).

20 Art. 13 of the draft Frame Agreement provided as follows: "Any dispute, controversy or claim arising out of or in relation to this Contract, including the validity, invalidity, breach or termination thereof shall be settled by amicable negotiations and friendly discussions between both parties. In case no settlement can be reached, such dispute shall be resolved by arbitration in accordance with the *Swiss Rules of International Arbitration of the Swiss Chambers of Commerce* in force when the Notice of Arbitration is submitted in accordance with these Rules.
The numbers of arbitrators shall be one or three. The seat of the arbitration shall be *Lugano*. The arbitral proceedings shall be conducted in English.
This Contract is governed, constructed, interpreted in accordance with the laws of Switzerland in every respect without regard to the conflict of law rules. *The United Nations Convention on Contracts for International Sale of Goods of April 11, 1980 does not apply*." (see DFT 142 III 239/240 seq.).

wording that was identical to the first proposal, including the seat in Lugano, apart from the applicable law (CISG) which was deleted. The draft contract, including the arbitration clause, was sent to the other party with the following indication "*Awaiting your acceptance and a copy of the signed contract*".

In the end, the Frame Contract was never signed. The designated arbitrator nevertheless declared that he had jurisdiction in an "Award on Jurisdiction". This award was challenged before the Federal Tribunal by one of the parties.

The issue might have been to determine whether the arbitration clause could be effective as long as there was no agreement ("**explicit dissent**") on the "defined relationship", since the "Frame Contract" had never been agreed upon by the parties. According to the principle of severability (Art. 178[3] PILA)[21], one could however argue that the parties had come to an agreement following the exchange of proposals on the arbitration clause and that this agreement was in a written form, and thus, valid.

The Federal Tribunal took a slightly different approach. It first began by stating that Art. 178(3) PILA, which sets out the **principle of severability**, is not precise enough, since it does not indicate what to do if the contract, in which the arbitral clause is contained, never comes into existence, and since it gives the impression that the invalidity of the main contract may never affect the validity of the arbitral clause.

For the Federal Tribunal,[22] there are however cases of **identity of defect** where the defect affecting the main

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[21] On the principle of severability, see for the first time in DFT 59 I 177; recently DFT 142 III 239 reason 3.2.1; DFT 140 III 134, reason 3.3.2 *in fine* and references; DFT 121 III 495, reason 5a; DFT 116 Ia 56, reason 5a; see also among others BERGER/KELLERHALS, NN 679 seq.; DUTOIT, art. 178 PILA N 13; GIRSBERGER/VOSER, NN 540 seq., NN 545 seq.; GÖKSU, NN 693 et seq.; MÜLLER, Commentary, Art. 178 PILA N 85; BORN, pp. 814 et seq.

[22] DFT 121 III 495 reason 6a; DFT 128 III 50 reason 2b/bb.

contract may also have an impact on the validity of the arbitral clause.[23] Thus, if the arbitral tribunal considers that there is a fundamental defect with respect to the main agreement, *which similarly affects the arbitration agreement*, then it has to declare that it has no jurisdiction.[24] For some authors, such a situation occurs when there is a lack of (initial) consent, i.e. when there is absence of any consent to the main contract (open or hidden dissent) or in case of a contract concluded under duress (CO 29 seq.). In these cases, they consider that there cannot be consent to the arbitral agreement.[25]

Following the opinion of other authors,[26] the Federal Tribunal considers however that it is possible – in some instances – to have an agreement on an arbitration clause despite the absence of an agreement on the main contract itself. This is for example the case when the parties have previously signed different contracts which all contained the same clause, when the parties have an objective, understandable and recognizable interest to submit their dispute to arbitration (e.g. neutrality of the forum, choice of an international language, confidentiality) or if the text of the exchanged drafts reveals their joint consent to conclude an arbitration agreement irrespective of the conclusion of the main contract. This could for example be the case when the parties modify the arbitration clause, but then – as was the case here – do not make any further modifications despite changes being made to other clauses in the contract.[27] Of course, this implies that the interpretation of the will of the parties, or its

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[23] BERGER/KELLERHALS, N 683; DUTOIT, Art. 178 PILA N 13; GIRSBERGER/VOSER, N 547; KAUFMANN-KOHLER/RIGOZZI, N 3.08; GÖKSU, N 695; BORN, p. 367.

[24] DFT 142 III 239/245 cites on this point FOUCHARD/GAILLARD/GOLDMAN, Traité de l'arbitrage commercial international 1996, N 411.

[25] MAYER, N 8; BERGER/KELLERHALS, N 683 fn 39.

[26] GABRIEL/WICKI, p. 252 seq.; BSK IPRG-GRÄNICHER, Art. 178 PILA N 90; BKomm ZPO III-PFISTERER, Art. 357 CCP N 63; KuKo ZPO-DASSER, Art. 357 CCP N 33 ; with some reservations GÖKSU, N 438.

[27] DFT 142 III 239/246 reason 3.3.1.

normative interpretation according to the principle of confidence, evidences that the parties agreed on the substantive and formal essential requirements of the arbitration agreement.

One can certainly **agree with the reasoning** of the Federal Tribunal and accept that the parties might have, in that case, agreed on the arbitral clause since they had done so in a previous contract and had initially discussed the content of such clause and subsequently apparently not disagreed anymore about it.

The most disputed aspect was however linked with the formal requirement. Indeed, the drafts of the main contract – even if evidencing the agreement on the arbitration clause – did not meet the requirement of a written form in the sense of Art. 13 CO. Nevertheless, as mentioned before, Art. 178(1) PILA does not require such a high level of formality. However, the Federal Tribunal wondered whether this was a requirement that also applied to the arbitration agreement, given that they had agreed that the *Frame Contract* had to be concluded in a written form. In other words, does the contractual requirement of a specific form (Art. 16 CO) also impose a more stringent formal requirement on the arbitration agreement?[28]

The answer depends on **two factors**:

a) *Mandatory nature of Art. 178(1) PILA.* One has first to determine whether Art. 178(1) PILA is a mandatory provision. Indeed, if the written requirement is mandatory, parties could not impose a different formality requirement for the arbitration agreement. The Federal Tribunal clearly states that it is certainly not possible to go below what is required by Art. 178(1) PILA. However, it

[28] *Ibidem.*

has left undecided the question of whether Art. 178(1) PILA is mandatory and therefore whether the parties may be more demanding in terms of formal requirements.[29] In agreement with some authors, I consider that it should be possible to require a more stringent formality for the arbitration clause, if this is the wish of the parties.[30]

However, this does not imply that the parties want to have a more stringent form for the arbitration clause each time they agree on a more stringent form for their contract.[31] Since most commercial contracts have no required formality by law, it is usually the parties' decision (Art. 16 CO) to require compliance with a written form, even more specific than the formal requirements which flow from Art. 13 CO. For most commercial contracts, if there was an implicit extension of the formalities for the main contract to the arbitration clause then issues of precontractual liability arising out of negotiations or issues of a lack of consent ("*Konsensstreit*") would be excluded from arbitration. This cannot be considered as the default solution for the parties. It should therefore remain a matter of interpretation to determine whether the formal requirements for the arbitration agreement have been made more stringent or not.

b) *Interpretation of the parties' conduct.* To decide whether the arbitration agreement should be valid despite the non-conclusion of the main contract

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29 *Ibidem*.

30 CR LDIP-TSCHANZ, Art. 178 PILA N 113; BSK IPRG-GRÄNICHER, Art. 178 PILA N 15; BERGER/KELLERHALS, N 423.

31 See however for such an idea, BERGER/KELLERHALS, N 437.

depends on the parties' intent. Interpretation of the situation may depend on the applicable law. If Swiss law is applicable, one will apply principles of contract law by trying first to determine the "real" and common understanding of the parties.[32] Hints for such understanding may be found not only in the declaration of the parties, but also in the general context, i.e. the circumstances of the conclusion of the contract, the wording used in the exchange of drafts, the conduct of the parties during negotiations, but also possibly the conduct or declarations of the parties after the conclusion, if they may shed light on the understanding of the parties at the time of the conclusion of the contract (subjective interpretation).[33] In the absence of a conclusive result, the interpretation should be done according to what the parties could and should have understood in accordance with the principle of confidence and good faith, and all the circumstances of the case (so-called normative interpretation).[34] Applying this latter approach, the arbitral tribunal will probably have to come to the same solution as the Federal Tribunal: if the arbitral clause has been discussed by the parties and has not changed subsequently or if it is a standard practice between them to include an arbitration clause, one will accept the validity of the clause despite the non-conclusion of the main contract.

[32] DFT 142 III 239/253 reason 5.2.1; DFT 132 III 626 reason 2.1; DFT 131 III 606/611 reason 4.1.

[33] Recently, DFT 142 III 239/253 reason 5.2.1; DFT 4A_65/2012 of 21.5.2012 reason 10.2 with references.

[34] Recently, DFT 142 III 239/253 reason 5.2.1; DFT 140 III 134, reason 3.2; DFT 135 III 295/302 reason 5.2.

Such position may present some risks for a party who would not necessarily think that it is bound by the arbitral clause before the main contract is concluded. However, as mentioned by the Federal Tribunal, legal certainty is not threatened that much, since a party may always make clear from the outset, that it does not want to be bound by the clause before the main contract is signed.[35]

B. Pathological arbitration clauses

Even if they comply with the required formalities, arbitration agreements may be pathological because they do not appear to contain all *essentialia*, they appear to be contradictory in themselves or they reveal a mistake by one or both parties as to a required element.[36] One can think of mistakes as to the correct designation of an arbitral institution, the designation of an institution which does not consider itself as having jurisdiction (as was the case in a dispute over the transfer of a football player which indicated that the FIFA Commission or the UEFA Commission should decide the dispute[37]), the designation of parties that do not exist or arbitrators specifically designated in the arbitration agreement who are dead at the time of the dispute.[38]

Such a pathological clause will be dormant until a request for arbitration is filed. It is only at this stage that the absence of an *essentialia* will lead to the nullity of the arbitration agreement, if there is no constructive interpretation which

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[35] DFT 142 III 239/256 reason 6: "*Au demeurant, pour écarter pareille menace, il eût suffi à la recourante de préciser, noir sur blanc, dans son premier courriel adressé à l'intimée, qu'elle ne s'estimerait en aucun cas liée par la clause compromissoire en discussion avant la signature, par les deux parties, du contrat-cadre contenant cette clause.*".

[36] DFT 138 III 29/35 reason 2.2.3; DFT 130 III 66/70 reason 3.1.

[37] DFT 138 III 29.

[38] See GIRSBERGER/VOSER N 288; as well as for many examples GIRSBERGER/MRÀZ, Pathologische Schiedsvereibarung, pp. 129-165.

may salvage the clause.[39] To deal with such issues, the courts will apply the **traditional interpretation principles** for contracts,[40] according to the applicable law as well as some general principles. For instance, there is a tendency to apply the **principle of *in favorem validitatis*** when interpreting arbitral agreements.[41] The Federal Tribunal has invoked this principle, at least for form requirements in a sports arbitration, in a case in which the Tribunal mentioned being inclined to look "favorably" ("*wohlwollend*") at the parties' arbitration agreement.[42]

The Federal Tribunal has also underlined that even if the arbitration clause is partially invalid, for instance because the designated institution does not have jurisdiction to designate or supervise the arbitrators or the arbitration procedure, the filling in of the gap is possible.[43] The Court should then follow the hypothetical will of the parties.

If the "pathology" affects the arbitration agreement itself, only the validity of the arbitration agreement may be affected.[44] This might be the case for example where there is a **lack of consent**, i.e. unconscionability (Art. 21 CO), mistake (Art. 23 seq. CO)[45], wilful deception (Art. 28 CO), duress or threat (Art. 29 seq. CO)[46], which only affects the arbitration agreement. In such a situation, Art. 31 CO allows one to

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[39] SCHWEIZER, Art. 359 CCP, NN 8 et seq.

[40] DFT 138 III 29/35 reason 2.2.3; DFT 130 III 66/71 reason 3.1.

[41] DFT 138 III 29/35 reason 2.2.3; DFT 130 III 66/71 reason 3.1; BORN, p. 647 and 940; FOUCHARD/GAILLARD/GOLDMAN/SAVAGE, N 484; for Swiss law, see for instance BÄRTSCH/PETTI, p. 31; GÖKSU, NN 422 et seq., 510; MÜLLER, Commentary, Art. 178 PILA N 33; BSK IPRG-GRÄNICHER, Art. 178 PILA N 24; GEISINGER/VOSER, p. 30; SAYED, p. 633; VON SEGESSER, p. 1195.

[42] DFT 138 III 29/34 reason 2.2.2.

[43] DFT 138 III 29/39 reason 2.3.3.

[44] DUTOIT, Art. 178 PILS N 13 *in fine* ; DFT, 17.2.1999, RSDIE 1999, p. 601, comment F. KNOEPFLER, ASA Bull. 2000, 311.

[45] FOUCHARD/GAILLARD/GOLDMAN/SAVAGE, N 531.

[46] DFT 4A_514/2010 (11.3.2011), reason 4.2.1, citing KAUFMANN-KOHLER/RIGOZZI, N 235; see also FOUCHARD/GAILLARD/GOLDMAN/SAVAGE, N 529.

consider the arbitration agreement as invalid. In a decision of 2011, the Federal Tribunal examined the situation of *duress* (crainte fondée – *Furcht*, art. 29 seq. CO) where a criminal complaint had been unjustly filed against one party to the contract which led him to sign the arbitration agreement to avoid such criminal procedure from going forward. The Court did not follow this argumentation based on facts which were not convincingly proven and for which the causal link between the filing of the complaint and the signing of the agreement was also not satisfactorily proven.[47]

If the arbitration agreement is null for reason of absence of *essentialia* (CO 20) or invalidated for mistake or duress (CO 31), it is also possible to **invalidate the main contract** itself for reason of mistake, by arguing that the validity of the arbitration agreement was a fundamental element for the conclusion of the main contract. It could indeed be that the content of the main contract may readily impose that an arbitration procedure rather than a national court procedure should be followed, among other reasons, for confidentiality reasons. In such a case, it would be difficult to invoke the severability principle. One would then be driven to consider that if confidentiality is really a core element of the whole endeavour, partial nullity (even based on Art. 20 para. 2 CO) of the main contract (i.e. only the arbitration clause is null) is not possible because the parties would not have concluded the contract if they had known of the defective arbitration clause.

Arbitration clauses may be integrated into a contract by means of **standard terms and conditions** (STC). According to the Federal Tribunal, since arbitration necessarily implies

[47] DFT 4A_514/2010 (11.3.2011), reason 4.2.2; see however US domestic arbitration, for a refusal to enforce an award on the ground that the arbitration clause, part of the renegotiation of a loan, was signed under economic duress, ITT Commercial Finance Corp. v. Tyler, N° 917660, 1994 WL 879497 (Mass. Super. Aug. 10, 1994), 5 World Arb & Med Rep 285 (1994); mentioned by FOUCHARD/GAILLARD/GOLDMAN/SAVAGE, N 529 fn 289.

that one renounces the jurisdiction of one's "natural judge", the case law on express renunciation of jurisdiction applies.[48] By global integration of STC, the validity of an arbitration clause is dependent upon effective knowledge of the clause and understanding of its scope.[49] This is why there is no fundamental opposition to an incorporation of a standard clause by way of STC in commercial contracts. In such contracts, it is indeed difficult to prove that a party was not aware of the arbitration clause, did not understand its content and scope, and was surprised by it.[50] However, the situation may be more complicated with respect to consumers, although the Federal Tribunal seems to be rather favourable towards the validity of such a clause[51] in the case of sports persons and sports associations.

III. Breach of the arbitration agreement and subsequent pathologies

"*La convention d'arbitrage n'est qu'un contrat, même si sa nature est singulière*": an arbitration agreement is only a contract, even if its nature is unique, states the Federal Tribunal.[52] The contractual nature of the arbitration agreement is important in terms of **contractual freedom**. Parties may choose to widely adapt the procedure they want to apply in case of a dispute. They may not only choose between an institutional or an *ad hoc* arbitration, or to fix the number of arbitrators or the arbitration procedure to a certain extent, but they may also provide for specific mechanisms to be fulfilled prior to arbitration, as is for instance the case with

48 DFT 4C.282/2003 reason 3.1.

49 GÖKSU, N 516 ; BERGER/KELLERHALS, N 455 et seq.; BSK IPRG-GRÄNICHER, Art. 178 PILA N 59.

50 GÖKSU, N 516 et seq.; BERGER/KELLERHALS, N 461; LALIVE/POUDRET/REYMOND, Art. 178 PILA N 13.

51 DFT 4A_358/2009 (6.11.2009) reason 3.2.2 and ref.

52 DFT 142 III 239/250 reason 3.3.1.

a clause providing for a compulsory mediation before arbitration,[53] so-called "multi-tiered clauses".[54]

A. Breach of a multi-tiered clause

In case of a breach of the contractual mechanism provided for by the arbitration agreement, should the deciding body apply contractual or procedural remedies?

The Federal Tribunal had to decide on such an issue on 16 March 2016 (**DFT 142 III 296**).[55] The arbitration clause foresaw a mechanism of compulsory mediation before arbitration. However, after having initiated mediation proceedings under the auspices of a sole mediator with seat in Paris and after some preliminary discussions to set up a phone conference had taken place, the requesting party filed a request for arbitration and sent a letter to the mediator stating that the mediation had failed (although no actual discussion on the matter had taken place). The other party argued that the request for arbitration should be considered as being without object, since the mediation proceedings were still ongoing. At the same time, it also designated its arbitrator, whilst reserving its right to invoke the tribunal's lack of jurisdiction. The procedure to nominate the chairperson of the arbitral tribunal continued. In its decision on jurisdiction, the arbitral tribunal declared that it had jurisdiction to hear the case. Thereafter, the Respondent filed an appeal before of the Federal Tribunal arguing that the arbitral tribunal lacked jurisdiction *ratione temporis*.[56]

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[53] See for instance the standard mediation-arbitration clauses C and C by the ICC, at page: http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/suggested-clauses/.

[54] See for a good analysis of these types of clauses, BAIZEAU/LOONG, NN 1 et seq.

[55] DFT 142 III 296 (4A_628/2015).

[56] DFT 142 III 296/300 Part Facts B.

There is no need to discuss the whole case here. It is sufficient to mention that the Federal Tribunal, interpreting the arbitral clause, considered that the **mediation prior to arbitration mechanism** was a compulsory one. By filing a request for arbitration before a real mediation process had taken place, the claimant had breached the requirement of the mediation-arbitration clause, and the Federal Tribunal held that sanctions should therefore be imposed.[57]

The interesting question here is whether these sanctions should be of a contractual nature (damages) or of a procedural nature (inadmissibility of the request for arbitration or potentially suspension of the arbitral proceedings until the conclusion of the mediation procedure).[58] Both the United Kingdom and France have adopted a procedural perspective.[59]

In Switzerland, the majority of authors are of the view that **sanctions** should be *procedural* and not contractual.[60] Among such authors, a few consider that if the mediation procedure has not been carried out, a condition precedent to arbitration has not been met, which means that the claim should be treated as *procedurally inadmissible.*[61] Most authors however seem to be of the view that the arbitral proceedings should be *suspended* and a period of time should be given to the claimant to redress the omission.[62]

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57 DFT 142 III 296/306 reason 2.4.1.2.

58 DFT 142 III 296/306 reason 2.4.1.1; already in a similar case DFT 4A_18/2007 of 6 June 2007 reason 4.3.1; see among others BAIZEAU/LOONG, NN 46-50.

59 See BAIZEAU/LOONG, N 47; see for the UK, *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd and others* [1993] 2 WLR 262 [HL], at pp. 276-294; also Section 9(2) of the UK Arbitration Act 1996 ("an application [for a stay of court proceedings] may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures"); for France, see Cour de Cassation, *Poiré v. Tripier*, 14 February 2003, in: Rev.Arb. 2003, p. 403.

60 See also BROWN-BERSET, pp. 368 et seq.; MONBARON, p. 433.

61 RÜEDE/HADENFELDT, p. 27.

62 See also DFT 4A_46/2011 of 16 May 2011 reason 3.4 (in which however the Federal Tribunal left the issue undecided); BAIZEAU/LOONG, N 49; BOOG, Bulletin

Other authors have however contested this procedural perspective. For them, the remedies should be *contractual* and damages should be awarded.[63] Finally, for some authors, there should be *neither contractual sanctions*, since the mediation agreement can be withdrawn at any time (referring to Art. 404 CO), *nor procedural ones*, since there is no procedural impediment in the sense of Art. 59(2) CCP; the arbitral tribunal should not take into account the fact that the mediation procedure has not been completed.[64]

In the case described above, the Federal Tribunal adopted a **procedural perspective**. It began by stating the following: "It is not a satisfactory solution to sanction by damages a party who refuses to submit to the mandatory preliminary step required before arbitration or who refuses to pursue until the end the specific ongoing proceedings which aim to settle the dispute amicably".[65] According to the Federal Tribunal, damages are not a satisfactory remedy in such a situation, since they would always come too late, and allow mediation to be avoided in the end. Moreover, it would be very difficult to prove the actual loss suffered, since there is no obligation for the parties to reach an agreement in mediation.[66]

ASA 2008, pp. 103 ss, 109; KAUFMANN-KOHLER/RIGOZZI, N 32a; POUDRET/BESSON, N 13 *in fine*; BOOG, p. 109.

[63] As cited by the Supreme Court in DFT 4A_18/2007 para. 4.3.1, ASA Bull. 2008, pp. 95-96; see EIHOLZER, NN 643-696; BROWN-BERSET, pp. 372 et seq.; see also for France JARROSSON, NN 2, 6 and 27.

[64] GÖKSU, NN 78-79; also KassGer ZH, ASA Bulletin 2002, pp. 375 s.; RUGGLE, BSK-ZPO, Art. 213 CCP N 8; WYSS, N 46.

[65] DFT 142 III 296/316 reason 2.4.4.1: "Sanctionner par des dommages-intérêts la partie qui refuse de se soumettre à l'obligation de recourir à un préalable obligatoire à l'arbitrage ou de poursuivre jusqu'au bout la procédure spécifique en cours visant à favoriser un règlement du différend à l'amiable *n'est pas une solution satisfaisante*".

[66] On the difficulty to assess damages in such situations, see KUONEN, NN 1742 et seq.

I agree on two points with the Federal Tribunal. First, ***contractual damages*** *could possibly be envisaged.*[67] One cannot consider, as some authors do,[68] that if a contract can be terminated at any time (based on Art. 404 CO), a party which refuses to comply with a requirement of acting in good faith with respect to the mediation proceedings (e.g. simply ignoring the mediation phase or, as in the case here, not taking all the steps required by the UNCITRAL mediation procedure), would not be in *breach of its duty to employ its best efforts*. Secondly, damages may not be the "proper" solution in terms of efficiency. However, contrary to the Federal Tribunal, I do not think that the reason is that the decision could not be quick enough, since damages would not be a pressure tactic for renewed mediation, but only a remedy to compensate for the loss incurred by the absence of a mediation procedure. In my opinion, the main difficulty is rather that of **assessing damages**. This is also the case for precontractual liability, given that there is no obligation to reach a positive result at the end of the mediation, one cannot assess damages by reference to the result which should have been achieved in case of a correctly carried out mediation procedure. It is even difficult to envisage an indemnity for costs incurred as a result of a failed mediation, since these costs may not have been avoided in any case, given that mediation is compulsory.

Therefore, the only possibility would be to assess the probability of success of the mediation and the amount that would have been obtained by the party that has incurred a loss.[69] The Federal Tribunal however still seems to reject this

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[67] DFT 142 III 296/316 reason 2.4.4.1; for an analysis, see GABRIEL, Damages, pp. 1473 et seq.

[68] See fn 64.

[69] For such a valid proposal in precontractual liability, see KUONEN, NN 1926 et seq.; KUONEN, SJ 2008 II pp. 249 et seq., esp. 272.

type of "**loss of chance**".[70] In any case, for the breach of such multi-tier clauses, the loss might be even more difficult to assess; indeed, such loss should take into account the outcome of the arbitration procedure and the cost of it, which should also be discounted by the probability of arbitral proceedings taking place after the mediation. Needless to say that this would become not only difficult in theory, but also in practice, since adducing all the evidence needed for the probability assessment might be very tricky.

It is therefore correct, and not surprising, that in line with international trends, the Federal Tribunal has considered that **only procedural sanctions** may be considered.

B. Termination of the arbitration agreement

A further question may be of interest. Given the mixed nature of the arbitration agreement,[71] would it be possible for a party to terminate the arbitration agreement by reference to contractual provisions either because the arbitration agreement subsequently becomes impossible (Art. 119 CO) or because one party breaches its duties? More concretely, if there is a multi-tier arbitration clause (MED-ARB), could the respondent insist that the other party continue with the mediation for a certain period of time and, if that party does not comply, would it be possible to terminate the whole arbitration agreement by reference to the regime of Art. 107(2) CO?

Subsequent impossibility may arise if it proves impossible to implement a defective arbitration agreement or when its purpose of ending the proceedings with an award can objectively no longer be attained.[72] One can think of an

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[70] DFT 133 III 462/468, reason 4.2 and reason 4.4.3; reaffirmed recently in DFT 4A_17/2015 (22.9.2105), reason 4.

[71] Cf. *supra* and GÖKSU, NN 13 and 405 et seq.

[72] BORN pp. 890 et seq.; GIRSBERGER/VOSER N 531; POUDRET/BESSON, N 384.

arbitral tribunal composed by an even number of arbitrators (which is of course a bad idea), which cannot reach a decision when there is no rule on what should happen in such cases.[73] Impossibility may also occur when the arbitrator has already been designated in the arbitration agreement and dies after the conclusion of the arbitration agreement.[74] In this situation, unless one can interpret the wording of the clause as allowing a Court to designate a different arbitrator, the agreement will be automatically terminated (Art. 119[2] CO) if Swiss law is applicable.

Delay and breach of duties may also lead to termination. For instance, if a party acts in such a way that the process of arbitration is no longer possible, there might be (in rather exceptional circumstances) a justified ground to terminate the arbitration agreement.[75]

Similarly, if the parties have provided for such a possibility to terminate in their *arbitration agreement*, then of course, a unilateral termination is possible.[76]

In the presence of a multi-tier arbitration clause, one could envisage that the violation by one party of the compulsory prerequisite of a mediation proceeding may be a breach of a duty that allows a unilateral termination of the arbitration agreement on justified grounds. It could also be considered, in some instances, that a party is delaying the progress of the mediation proceedings, which will allow a party to invoke the possibility of a qualified delay and then terminate (Art. 107[2] CO). However, such a situation will not be easy to prove, unless there are some deadlines fixed in the arbitration clause

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73 Girsberger/Voser N 531.
74 GÖKSU, N 713; BSK IPRG-GRÄNICHER, Art. 178 PILA N 87; RUEDE/HADENFELDT, p. 102.
75 GÖKSU, N 716; RUEDE/HADENFELDT, p. 103.
76 See BORN p. 889; GIRSBERGER/VOSER N 527; GÖKSU, N 714.

or a party clearly does not participate actively in the mediation.

Lack of financial resources may lead to a one-sided termination on justified grounds, based on Art. 2(2) SCC or on the case law applicable to term contracts.[77] Indeed, if it is no longer acceptable for one party to comply with the arbitration agreement, a unilateral termination is possible. This is the case when a party lacks financial resources, since there is no legal aid for a party which has no means to pay for the ongoing arbitration (Art. 380 CCP).[78] The justified grounds must however be current. This means that they cannot be invoked before an arbitration has started and should be invoked rapidly once the justified ground has occurred.[79]

The **procedural consequences** of such cases are quite clear. As soon as the arbitration agreement has been terminated, each party loses the right to invoke the arbitration agreement in order to justify the jurisdiction of the arbitrators. The arbitrators lose therefore jurisdiction in favour of the State courts.[80] However, despite (contractual) termination of the arbitration agreement, there may still remain some procedural aspects to be fulfilled by the arbitral tribunal, such as the delivery of a certificate of enforceability according to Art. 193 (3) PILA.[81]

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77 DFT 128 III 428 reason 3; see also BERGER/KELLERHALS, N 631; GIRSBERGER/VOSER N 528 GÖKSU, N 716; RÜEDE/HADENFELDT, p. 103.

78 BERGER/KELLERHALS, N 572; GÖKSU, N 716; BSK ZPO- HABEGGER, Art. 378 CCP N 30; BSK IPRG-GRÄNICHER, Art. 178 PILA N 85.

79 GÖKSU, N 718.

80 GIRSBERGER/VOSER N 532.

81 GÖKSU, N 710.

IV. *Receptum arbitri* as an arbitral contract

Despite their jurisdictional function, arbitrators are part of a relationship between the parties and themselves, which is widely considered as being of a **contractual nature**.[82] This contract is sometimes called *receptum arbitri*[83] by reference to the Roman law institution "receptum" which was concluded to entrust an arbitrator to render an award ("*sententia*").[84] It has to be distinguished from the arbitration agreement, which is only concluded between the parties ("*compromissum*").

A. Nature of the contract

The exact nature of the arbitral contract is controversial, since it is a mixture between a contract of a substantive nature and a contract with procedural aspects.[85] Should it be considered as a simple agency or mandate contract ("*Auftrag*", "*mandat*") or a more specific contract for provision of services, possibly *sui generis*?[86] The qualification however depends on the law applicable to this contract, which is often the law of the seat,[87] and is not a central issue in all jurisdictions. English law, for instance, is not built around the qualification of contracts,

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82 BORN, pp. 1967, 1974 ; FOUCHARD/GAILLARD/GOLDMAN/SAVAGE, NN 1102-1125; for Switzerland: BERGER/KELLERHALS, N 962; GIRSBERGER/VOSER N 16, 851; GÖKSU, N 1060; CR LDIP-TSCHANZ, Art. 179 PILA N 46; LALIVE/POUDRET/REYMOND, Art. 179 PILA N 6.

83 GÖKSU, N 1060; BERGER/KELLERHALS, NN 963 et seq.; GIRSBERGER/VOSER NN 828 et seq.

84 Titel in the Justinian Digest (533 AD) is D. 4.8.1 seq. ("*De receptis: qui arbitrium receperint ut sententiam dicant*"); ROEBUCK/LYNES DE FUMICHON, Roman Arbitration, pp. 136 seq.; BERGER/KELLERHALS, N 963; GIRSBERGER/VOSER N 852.

85 GIRSBERGER/VOSER NN 16 et seq. and NN 851 et seq.; BERGER/KELLERHALS, N 964.

86 See for a discussion POUDRET/BESSON, N 437; BORN, p. 1977; FOUCHARD/GAILLARD/GOLDMAN/SAVAGE, NN 1115-1125; GIRSBERGER/VOSER N 830; LALIVE/POUDRET/REYMOND, Art. 179 PILA N 8.

87 GIRSBERGER/VOSER N 831; POUDRET/BESSON, N 439.

whereas under Swiss law, the correct qualification may help to give some remedies and fix some duties of the arbitrators.

Although provisions of the *lex arbitri* dealing with the rights and obligations of the arbitrator and the parties will be applicable as mandatory provisions, the rules applicable to an **agency contract** (Art. 394 seq.) seem to be the most suitable ones for such a contract.[88] It is indeed not sufficient to consider that the contract is of a procedural nature as any contract might be subject to mandatory provisions.[89] This has no impact on its qualification.

One could consider that, for some issues, it would be more proper to refer to other rules, especially given that the relationship between the parties and the arbitral tribunal implies a **cooperation duty** similar to partnership contracts. It is difficult to admit, due to procedural reasons, that the arbitrator or the parties could terminate unilaterally the contract at any time by application of Art. 404 CO; it can only resign for justified grounds.[90] This is the reason why, to exclude the application of Art. 404 CO, the Federal Tribunal has recently qualified the arbitral contract as an "agency contract *sui generis*".[91]

B. Contractual obligations of the arbitrators and sanctions for breach

The arbitral contract creates obligations for arbitrators. Some obligations are also created by the applicable arbitration rules

[88] POUDRET/BESSON, N 437; BERGER/KELLERHALS, N 964; GÖKSU, N 1061 ("*rein privatrechtliches Auftragsverhältnis*").

[89] See however BERGER/KELLERHALS, NN 965-967, who consider that the *receptum arbitri* derives directly from statutory law; also BUCHER, pp. 413 et seq.; GULDENER, p. 607.

[90] GIRSBERGER/VOSER NN 815 et seq. (resignation for "good cause"); BERGER/KELLERHALS, N 934; GÖKSU, NN 1142-1147; also for justified grounds DFT 117 Ia 166, reason 6c.

[91] DFT 140 III 75 reason 3.2.1.

(to the extent allowed by the *lex arbitri*) or by the *lex arbitri* itself.[92]

The main obligation arising out of the arbitral contract is the obligation, in cooperation with the other members of the tribunal, **to render an award** if the proceedings are not terminated by settlement or by withdrawal of the claim,[93] in return for remuneration. The arbitrator has therefore no right to withdraw from the contract (Art. 404 CO is not applicable), unless there is a justified ground (good cause).[94] Furthermore, even after the rendering of the award, there might be some obligations to act, as in case of the revision of the award.[95]

If the arbitrators are delaying the proceedings or do not decide in an efficient manner, this may lead to the **right to terminate** the *receptum arbitri*.[96] Thus, if an arbitrator or an arbitral tribunal do not make a decision, despite an interpellation, parties may validly terminate the agreement by application of Art. 107(2) CO.[97] One could also consider that the right to remove the arbitrator may be grounded on the right to terminate the contract for justified grounds.[98] However, contrary to what some authors have considered, Art. 404 CO should not be applicable and should not give the right to terminate the *receptum arbitri* at any time and for any reason.[99]

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92 GIRSBERGER/VOSER NN 833 et seq.; BORN, pp. 1985 et seq.; FOUCHARD/GAILLARD/GOLDMAN/SAVAGE, NN 1126-1156.

93 GIRSBERGER/VOSER N 835; BORN, pp. 1986-1988; LEW/MISTELIS/KRÖLL, N 12-12.

94 See above fn 90.

95 GIRSBERGER/VOSER N 837; BORN, p. 3154.

96 DFT 140 III 75 (4A_490/2013 of 28 January 2014), commented by BERGER, pp. 562 seq.; see also BERGER/KELLERHALS, N 851; GÖKSU, N 1105.

97 BERGER/KELLERHALS, N 568; GIRSBERGER/VOSER N 387; GÖKSU, N 714.

98 BERGER/KELLERHALS, N 860; GIRSBERGER/VOSER N 812; GÖKSU, N 1125 and 1137 seq.; Born, pp. 1982-1983.

99 DFT 140 III 75; see however, GÖKSU, N 1100, however see also N 1142 seq., where only the justified grounds are mentioned.

The **procedural consequences** of a termination of the *receptum arbitri* are comparable to those of a challenge or a dismissal, since a new arbitrator has to be appointed.[100] Removal of an arbitrator does not constitute termination of the arbitration agreement.

The obligations to remain independent and impartial are also of central importance. Arbitrators have the obligation to disclose possible conflict of interests.[101] Breach of these duties not only triggers the procedural right to remove the arbitrators, but may justify **liability for breach** of these contractual duties.[102] Due to the similarity of their position with that of a judge, some authors rightly consider that arbitrators are immune from liability stemming from acts directly linked to their judicial mandate as arbitrators.[103] However, for acts of a non-judicial nature, such as the breach of a duty of confidentiality or the lack of care, an arbitrator should be held liable.[104] One has to acknowledge, however, that it might be difficult to assess (and prove) the amount of damages to be requested by parties.

V. Conclusion

The aim of the present contribution was to expose some of the many contractual issues arising from the arbitration agreement and *receptum arbitri*. From the cases we have presented above, two main observations can be made:

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[100] DFT 4A_386/2010, reason 4.3; GIRSBERGER/VOSER, N 814, also N 790 et seq.; GÖKSU, N 1141.

[101] GIRSBERGER/VOSER, NN 838-840; GÖKSU, NN 934-949; BORN, pp. 1988-1992; LEW/MISTELIS/KRÖLL, N 12-17; RUBINO-SAMMARTANO, pp. 508-512; SCHWEIZER, Art. 363 N 13.

[102] GIRSBERGER/VOSER, N 843; GÖKSU, N 948; BORN, p. 2012; LEW/MISTELIS/KRÖLL, N 12-37; POUDRET/BESSON, N 445; RUBINO-SAMMARTANO, pp. 519-523.

[103] BORN, p. 2026; FOUCHARD/GAILLARD/GOLDMAN/SAVAGE, N 1084. LEW/MISTELIS/KRÖLL, N 12-38; GIRSBERGER/VOSER, N 843; POUDRET/BESSON, N 446.

[104] GIRSBERGER/VOSER, N 843; POUDRET/BESSON, N 449.

Firstly, the Federal Tribunal appears to have given **a very broad meaning to the principle of severability** in order to ensure the maximum validity of arbitration agreements. In the first case mentioned above, the Federal Tribunal invokes the principle of severability to ensure the validity of an arbitration agreement despite the lack of consent to the main contract and the non-fulfilment of the formal requirement chosen by the parties for such contract. This is a direct consequence of the international trend of applying the principle of *in favorem validatis* when interpreting arbitration agreements.

Secondly, when dealing with issues connected to arbitration, the Federal Tribunal increasingly takes into account **the mixed nature of arbitration agreements** to find appropriate solutions. Although the Federal Tribunal still applies contractual remedies to some of these issues, it takes systematically into consideration procedural concerns and requirements, even considering procedural sanctions to be the only valid sanctions in some instances. For instance, the Federal Tribunal considers that contractual remedies are not the most suitable ones for breach of a multi-tiered clause and has privileged procedural sanctions.

By dealing with contractual issues arising from the arbitration agreement and *receptum arbitri*, one has to take into account the importance of a high quality arbitration procedure which calls for a large recognition of the validity of arbitration agreements, but also for procedure-oriented solutions to resolve issues which arise from such contracts. The Federal Tribunal appears to heading into the right direction in order to keep Switzerland as one of the hot spots in the arbitration world.

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Expert Witness: Role and Independence

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I. Introduction

John Langbein wrote in 1985: "those of us who serve as expert witnesses are known as 'saxophones'. This is a revealing term, as slang often is. The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes […]. Opposing counsel undertakes a similar exercise, hiring and schooling another expert to parrot the contrary position. The result is our familiar battle of opposing experts. The more measured and impartial an expert is, the less likely he is to be used by either side".[1]

Whether simply valuable or truly necessary, experts play a crucial role in every dispute resolution system, including in the arbitral process. Typically, experts are appointed in disputes in which complex issues relating to the quantum of damages or industry conduct arise. Although party-appointed experts[2] clearly dominate in international arbitration, arbitral tribunals may also appoint their own experts. That is actually the norm in the court system of civil law jurisdictions.

Despite the fact that the rules and procedures governing expert evidence in international arbitration tend to vary in any given case, it is fair to say that these rules do not provide much information when it comes to defining the role and duties of party-appointed experts vis-à-vis the parties and the arbitral tribunal. More specifically, while a number of international arbitration rules require that tribunal-appointed

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[1] LANGBEIN, The German Advantage in Civil Procedure, 52 U. CHI. L. REV. 823, 835–36 (1985). The author would like to thank Ms Sinem Mermer, registered with the Istanbul bar and trainee lawyer at Schellenberg Wittmer, for kindly assisting in the preparation of this contribution.

[2] Throughout this article, the terms "*party-appointed expert*" and "*expert witness*" will be used interchangeably. Where explanations are provided with respect to court- or arbitral tribunal-appointed experts specifically, this will be specified.

experts must be independent and impartial, the role of party-appointed experts is less clearly delineated.

This article proposes to explore the role and duties of experts in international arbitration, with a focus on party-appointed experts. With that in mind, this article starts by recalling briefly the role and duties of experts in domestic litigation (Chapter II), before considering in greater detail the rules that have developed in international arbitration with regard to the experts' duty of independence and impartiality (Chapter III). It then considers some of the methods that are commonly used in practice to test the independence and impartiality of party-appointed experts (Chapter IV), before turning to some of the sanctions that can be imposed on such party-appointed experts for failing to act independently (Chapter V). Finally, we set out some concluding remarks in Chapter VI.

II. The Role and Duties of Experts in Domestic Litigation

This section presents briefly the development of the use of experts and expert witness testimony in both common law and civil law jurisdictions.[3] For the purpose of this section, Swiss law and German law are compared to the relevant legal principles applicable to expert testimony in the United States and the United Kingdom.

[3] For a discussion of the main differences between common law and civil law jurisdictions, *see* generally ELSING/TOWNSEND.

A. Civil Law Jurisdictions - The Prevalence of Court-appointed Experts

When confronted with technical problems, civil law courts follow the so-called *inquisitorial* system, where the court is actively involved in investigating the facts of the case.

In this system, the expert is usually not a witness chosen by the parties but someone appointed by the court, and it falls primarily on the judge to examine the expert, most of the time without cross-examination by the parties.[4] By owing his or her duty exclusively to the court, the court-appointed expert is expected, and trusted, to remain independent, impartial and neutral vis-à-vis the parties.

Under Swiss law, for instance, a court may seek the opinion of a court-appointed expert upon request or *ex officio*, and after hearing the parties. It is the court that will instruct the expert. The parties will however be granted the possibility to comment on the questions to be asked to the expert. Finally, it is the court that will examine the expert at the hearing, sometimes with follow-up questions from the parties.

Court-appointed experts in civil law legal systems are usually considered to be auxiliary organs of the court. As such, these experts are under a duty to the court to provide an objective and independent opinion. As a result, both the Swiss and German Codes of Civil Procedures give the parties the right to object to the appointment of an expert on the ground of lack of independence.[5]

In essence, under both Swiss and German law, the same rules as those applying to court members regarding duties of

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[4] DE BERTI, p. 55.

[5] Article 406 (1) of the German Code of Civil Procedure (ZPO) reads, in relevant part, as follows: "*the appointment of an expert can be challenged for the same reasons a party is entitled to challenge a judge*". *See* also TIMMERBEIL, p. 174; SCHNEIDER P. 457; Article 183 (2) of Swiss Civil Procedure Code (CPC).

independence and impartiality will apply to tribunal-appointed experts.[6] Successful challenges have been mounted, for example, in the case of (i) a close relationship (either personal or professional) between an expert and a party;[7] (ii) negative opinions articulated by an expert towards one of the parties before conducting his or her investigation;[8] and (iii) experts having an interest, financial or otherwise, in the outcome of the case.[9]

This does not mean that parties are not free to submit reports prepared by their own experts. However, such reports will not be given more evidentiary weight than party allegations.[10]

B. Common Law Jurisdictions– The Prevalence of Party-appointed Experts

One of the most obvious features of the common law system is its adversarial nature. Unlike in the civil law system, party appointment of experts is rooted in the common law tradition, wherein each party presents an expert to testify on its behalf.

Unlike claim consultants, whose task is to prosecute their clients' case, expert witnesses are to act as advisors to the court on those matters within the experts' particular expertise. Put differently, the expert witness is not supposed to act as an advocate of the party, but has an overriding duty

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6 Article 183 (2) of the Swiss Code of Civil Procedure (CPC); Article 406 (1) ZPO.

7 BECKOK/SCHEUCH ZPO para. 406 Rn. 22-22.6; Decision of the Higher Regional Court of Frankfurt am Main [OLG Frankfurt am Main], 1 U 104/96 of 28 April 2005, para. 3.

8 Decision of the Higher Regional Court of Saarland [OLG Saarland], 5W 42/08-16 of 11 March 2008, para. 26.

9 BECKOK/SCHEUCH ZPO para. 406 Rn. 20.

10 Decision of the Swiss Federal Supreme Court, 4A_178/2015 of 11 November 2015 consid. 2.6; Decision of the Federal Court of Germany [BGH], V ZB 124/10 of 2 December 2010, para. 12. *See* also TIMMERBEIL, p. 178; BECKOK ZPO/SCHEUCH ZPO para. 402 Rn. 6.

vis-à-vis the court, and more specifically, a duty to assist the court in making an informed determination of facts.

The role and duties of expert witnesses vis-à-vis the court is crucial, because the degree to which an expert is independent and impartial will impact on the evaluation of the probative value of the expert evidence. More importantly, these duties are also aimed at putting to rest the criticisms that expert witnesses are simply "*hired guns*".[11]

In the United Kingdom, Lord Woolf published a comprehensive interim report on Access to Justice in June 1995, in which he identified, amongst others, the use of expert evidence as a major source of expense, delay and complexity in civil litigation. This report precipitated the Civil Procedure Rules ("**CPR**"), which came into force in England and Wales on 26 April 1999.

These rules clearly seek to avoid the effects of partisan expert evidence. More specifically, Rule 35 of the CPR sets out the duties of expert witnesses vis-à-vis the court.[12] Rule 35.3 emphasises that the expert's primary duty is to "*help*" the court. This duty is stated to override any obligation the expert may (or may perceive to have) to those instructing him or her.[13] Finally, a violation by an expert of his or her duties is likely to lead to sanctions, such as, amongst others, costs allocation sanctions, and, in extreme cases, the disqualification of the entire expert's report.[14]

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[11] TIMMERBEIL, p. 168; KANTOR, A Code of Conduct, p. 325. See also KANTOR, Valuation for Arbitration, p. 294 ("*If court or arbitral rules require impartiality and independence from the party-appointed experts, parties may be encouraged to seek experts who are partisan but appear impartial and independent*".)

[12] JONES, pp. 138-139; KANTOR, Valuation for Arbitration, pp. 287-288.

[13] Rule 35.3 reads as follows: "*(1) It is the duty of experts to help the court on matters within their expertise. (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid*".

[14] In the case of *Cala Homes (South) Ltd v. Alfred McAlpine Homes East Ltd* [1995] EWHC 7 (Ch), the judge dedicated the final part of his judgment to criticising the defendant's expert – an "*eminent architect*" – who had written, some years prior

Equally, the UK Civil Justice Council's Guidance for the instruction of experts in civil claims ("**CJC Guidance**"), which replaced in 2014 the "*Protocol for the Instruction of Experts to give evidence in civil claims*"[15] ("**CJC Protocol**"), emphasises that experts have an overriding duty to help and assist the court, and that this duty prevails over any obligation to their clients.

Item 11 of the CJC Guidance provides, in pertinent part, that "*experts must provide opinions that are independent, regardless of the pressures of litigation. A useful test of 'independence' is that the expert would express the same opinion if given the same instructions by another party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators*".

In *London Underground Ltd v. Kenchington Ford Plc & Others*[16], a case decided under the CJC Protocol, which contained a provision similar to that of Item 11 of the CJC Guidance, HHJ Wilcox strongly criticised the lack of independence of one expert, and stated, in no unclear terms, that this expert had *"ignored his duty to both the court and*

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to this case, an article on his perception of the duties of an expert witness, which advocated a completely adversarial approach. This article was summed up by the judge when he described the expert's use of the term "*pragmatic flexibility*" as a euphemism for "*misleading selectivity*".

[15] Although the CJC Protocol applies to court proceedings, it is likely to be followed, in principle, by some arbitral tribunals applying English procedural law.

[16] *London Underground Ltd v. Kenchington Ford Plc & Others* [1998] 63 ConLR 1. In *Gareth Pearce v. Ove Arup* [1997] 2 WLR 779, a case concerning copyright issues, the court stated: *"[...] in my Judgment Mr. W.'s 'expert' evidence fell far short of the standards of objectivity required of an expert witness. He claimed to have appreciated the seriousness of what he was saying but made blunder after blunder. [...] He showed his biased attitude by looking for triangles in the early stages of the Kunsthal design ('keen to find the triangle' as it was 'an element alleged to have been copied'). His keenness resulted in his misreading a drawing and finding a vertical trapezium*". The judge concluded scathingly: "*so biased and irrational do I find his 'expert' evidence that I conclude he failed in his duty to the court*".

his fellow experts" and *"continued to assume the role of advocate of his client's cause"*.

In the United States, Rule 26 of the Federal Rules of Civil Procedure provides that any appointed expert should disclose his or her expert report three months before a hearing, stating not only the expert's terms of reference, but also listing any expert report he or she has previously produced in the past four years and any article authored in the past ten years.

In addition, since 1993, the US Supreme Court has developed a test, the *Daubert*[17] test, for assessing the reliability and admissibility of expert testimony in federal trials.[18] The *Daubert* test provides that an expert may testify on (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.[19] Although the US Supreme Court did not directly deal in the *Daubert* case with the issue of objectivity of party-appointed experts, it set out the criteria for admissibility of expert reports in court proceedings and shifted "*the examination of the validity of scientific expert evidence from juries towards the control of the court*".[20]

In *Feduniak v. Old Republic Nat'l Title Co*, the District Court of San Jose went as far as to exclude the expert's opinion and testimony, citing, among several reasons, the "'*very significant fact' that [the expert's] methodology was developed for this litigation*", that the expert's methodology had not been "*reliably or independently verified*", and that the

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17 *Daubert v. Merrell Dow*, 509 U.S. 579 (1993).

18 Before 1993, the standard in federal courts for the admissibility of expert testimony was the *Frye* Standard, so called after the case that set the standard, *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923). In short, the *Frye* Standard required that a theory have "*general acceptance*" in the field of science before expert testimony would be admissible in court.

19 KANTOR, A Code of Conduct, p. 325.

20 KANTOR, Valuation for Arbitration, p. 294; TIMMERBEIL, p. 181.

index was "*developed by a person with absolutely no experience in valuing real property*".

C. The ALI/UNIDROIT PRINCIPLES

The ALI/UNIDROIT Principles of transnational civil procedure (the "**ALI/UNIDROIT Principles**"), adopted in 2004 by the Governing Council of UNIDROIT, are standards for the adjudication of transnational commercial disputes.[21] These principles aim at reconciling the differences between various national rules of civil procedure, taking into account the peculiarities of transnational disputes as compared to purely domestic ones.[22] The ALI/UNIDROIT Principles are accompanied by a set of Rules of Transnational Civil Procedure (the "**Rules**"), which were not formally adopted by either UNIDROIT or ALI, but constitute the Reporters' model implementation of these principles.

Article 22 (4) of the ALI/UNIDROIT Principles provides that the court may appoint its own expert to give evidence on any relevant issue for which expert testimony is appropriate. This provision then goes on to state that the parties have the right to present their own expert evidence.[23] Importantly, these experts, irrespective of whether they have been appointed by the court or a party, owe their duty to the court only. Article 26 of the Rules further provides that court-appointed experts have to be neutral and independent from the parties and from any other influence. Similarly, party-appointed experts are

[21] The ALI/UNIDROIT Principles of Transnational Civil Procedure was first published as a draft in 1996 and amended in 2005, available at: http://www.unidroit.org/english/governments/councildocuments/2005session/relrela/s-76-13-e.pdf.
Since 2013, the European Law Institute and UNIDROIT are working on a joint project regarding transnational civil procedure rules; *see* Website of UNIDROIT on Transnational Civil Procedure, available at: http://www.unidroit.org/about-unidroit/work-programme?id=1625#a1.

[22] BARCELO III, pp. 493-494.

[23] ALI/UNIDROIT Principles of Transnational Civil Procedure, Article 22.4.3.

subject to the same standards of neutrality and independence as court-appointed experts.[24]

As such, the ALI/UNIDROIT Principles (supplemented by the Rules) adopt an intermediate position between the common law and civil law systems discussed earlier. The court may then appoint experts, but the parties may also present experts irrespective of whether the court has appointed its own expert. However, and this is the most salient feature of this set of rules, party- and court-appointed experts ultimately owe their duty exclusively to the court and are subject to the same standards and obligations in terms of independence.

III. Experts in International Arbitration

A. Arbitration Rules[25]

Most arbitration rules expressly permit parties to present expert evidence.[26] This right is usually in addition to the arbitral tribunal's inherent power to appoint an expert.

As will emerge from the discussion below, while arbitration rules set out very specific (and strict) requirements for tribunal-appointed experts, in particular stringent requirements of independence and impartiality, the same

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24 ALI/UNIDROIT Principles of Transnational Civil Procedure, p. 59.

25 For the purpose of this article, the following arbitration rules have been considered: ICC Rules, London Court of International Arbitration Rules 2014 (LCIA Rules), Singapore International Arbitration Center Arbitration Rules 2016 (SIAC Rules), UNCITRAL Arbitration Rules 2013 (UNCITRAL Arbitration Rules), International Centre of Dispute Resolution Arbitration Rules 2014 (ICDR Rules), Swiss Rules of International Arbitration 2012 (Swiss Rules), Stockholm Chamber of Commerce Arbitration Rules 2010 (SCC Rules).

26 For example, *see* ICC Rules Article 25 (3); Swiss Rules, Article 25 (2); SIAC Rules, Article 25. See also BORN, p. 2278.

arbitration rules are either silent or say very little on the requirements for party-appointed experts.[27]

1. Tribunal-appointed Experts

Tribunal-appointed experts are usually subject to a strict screening process.

In general, arbitration rules dealing with tribunal-appointed experts will specifically cover the following points: (i) the appointment of the expert; (ii) the duty of independence and impartiality of the expert; (iii) the duty of the parties to give the expert information or to produce any documentation or material that the expert may require; (iv) the right of the parties to comment on the expert report; and (v) the presence of the expert at the hearing.[28]

Concerning the requirement of independence and impartiality, the LCIA Rules, for example, provide that the expert shall be and remain impartial and independent of the parties and shall sign a written declaration to that effect, delivered to the arbitral tribunal and copied to all parties.[29] Similarly, the UNCITRAL Arbitration Rules provide that the tribunal may appoint one or more "*independent*" experts "*after consultation with the parties*", and that the expert so appointed must submit a description of his or her qualifications and a statement of his or her impartiality.[30]

2. Party-appointed Experts

Most arbitration rules allow party-appointed experts. In particular, most of these rules codify the well-established

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[27] KANTOR, A Code of Conduct, pp. 327-328.

[28] *See*, for example, ICC Rules, Article 25 (4); LCIA Rules, Article 21; SIAC Rules, Article 26; UNCITRAL Arbitration Rules, Article 29; ICDR Rules, Article 25; Swiss Rules, Article 27; SCC Rules, Article 29.

[29] LCIA Rules, Article 21 (2).

[30] UNCITRAL Arbitration Rules, Article 29 (2).

principle that a party can present its own expert witnesses to testify on the points at issue.

However, unlike rules applicable to tribunal-appointed experts, the most prominent arbitration rules, including the ICC, LCIA, SCC, UNCITRAL or SIAC Rules do not address specifically the responsibilities of party-appointed experts, nor do they set out the ethical duties of those experts.

B. Best Practices

1. The IBA Rules on the Taking of Evidence

The International Bar Association Rules on the Taking of Evidence in International Arbitration of 2012 ("**IBA Rules**") – a composite of civil and common law practices – allow parties to follow the common law practice of calling their own experts,[31] while also providing for the civil law tradition of the tribunal appointing its own expert.[32]

Regarding party-appointed experts, Article 5.2(a) of the IBA Rules requires disclosure with respect to any and all relationships the expert may have with the parties, their legal advisors, and the arbitral tribunal.[33] Article 5.2(c) in turn requires a statement of the expert's "*independence*".[34] As such, the expert is required to evaluate any such relationships and attest that he or she is "*independent*".

Regarding tribunal-appointed experts, Article 6.1 of the IBA Rules makes clear that the arbitral tribunal is to consult with the parties before appointing one or more "*independent*" experts. The parties also have an opportunity, pursuant to Article 6.2, to identify any potential conflict of interests and state any objections they may have (e.g., based on a lack of

[31] IBA Rules, Article 5.
[32] IBA Rules, Article 6.
[33] IBA Rules, Article 5 (2) (a).
[34] IBA Rules, Article 5 (2) (c).

independence, insufficient qualifications, or lack of availability).[35] Finally, the expert is also requested to file a statement of his or her independence from the parties, their legal advisors, and the arbitral tribunal.[36]

2. The CIArb Protocol

In 2007, the Chartered Institute of Arbitrators issued its Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration ("**CIArb Protocol**"). As its name suggests, the CIArb protocol applies only to party-appointed experts.

It provides a comprehensive regime for the giving of expert witness evidence as well as a procedure for identifying the issues to be dealt with by way of expert evidence, with a clear view towards enhancing the independence of party-appointed experts in arbitration.

The CIArb Protocol has been structured along the same lines as the IBA Rules and has been aligned with those parts of the IBA Rules that deal with party-appointed experts. The CIArb Protocol also has the same characteristics as the CPR.[37]

The key provision regarding the duties of party-appointed experts reads as follows:

> "*Article 4 – Independence, Duty and Opinion*
>
> *An expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party.*
>
> *Payment by the appointing Party of the expert's reasonable professional fees for the work done in giving*

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[35] IBA Rules, Article 6 (1) and (2).
[36] IBA Rules, Article 6 (2).
[37] See supra Chapter II (B).

such evidence shall not, of itself, vitiate the expert's impartiality.

An expert's duty, in giving evidence in the Arbitration, is to assist the Arbitral Tribunal to decide the issues in respect of which expert evidence is adduced. […]"

The CIArb Protocol also provides that the party-appointed expert shall sign a declaration confirming, amongst others, his or her independence from the appointing party and his or her obligation towards the arbitral tribunal.[38]

Notably, this protocol specifies that a party's instructions to its appointed expert are not privileged and that the tribunal may order that they be disclosed, upon good cause (*see* Section IV.F below).[39] However, drafts, working papers, and any other documentation produced by an expert for the purpose of his or her expert evidence are privileged from disclosure.[40]

Finally, the CIArb Protocol makes clear not only that party-appointed experts have to be independent, but also that that their overriding duty is to the tribunal and not to the parties.[41] As to the consequences attached to breaches of those duties, Article 7.4 of the CIArb Protocol provides that the arbitral tribunal shall disregard the expert's written opinion and testimony either in whole or in part, as it considers appropriate depending on the circumstances of each case.

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38 CIArb Protocol, Article 8.
39 JONES, p. 153.
40 JONES, p. 153.
41 The overriding duty towards the tribunal is also expressed in Article 7 (1) of the CIArb Protocol, which reads, in relevant part, as follows: "[…] *the expert's testimony shall be given with the purpose of assisting the Arbitral Tribunal to narrow the issues between the experts and to understand and efficiently to use the expert evidence*".

3. The UNCITRAL Notes

Initially adopted by UNCITRAL in 1996 and updated in 2016, the UNCITRAL Notes on Organizing Arbitral Proceedings of 2016 (the "**UNCITRAL Notes**") are designed to assist arbitration practitioners by providing an annotated list of matters on which arbitral tribunals may wish or need to decide during the course of arbitral proceedings.

Those Notes spell out the duty of independence of tribunal-appointed experts in arbitration proceedings.[42] Article 15(c) provides in this respect that before appointing an expert, the arbitral tribunal will ensure that the expert has the required qualification and obtain a statement of his or her impartiality and independence. This article then goes on to state that "*the arbitral tribunal usually gives the parties an opportunity to comment on the expert's proposed mandate, qualification, impartiality and independence*".

The Notes are however silent on the duty of independence of party-appointed experts, but provide the tools available to the arbitral tribunal to test their independence, albeit indirectly. For example, Article 15(b) of the Notes provides the arbitral tribunal with the right to:

- invite party-appointed experts who are addressing the same topic to submit a joint report identifying the points on which they agree and disagree, with a view to narrow down the issues to be dealt with later in the proceedings;
- request the party-appointed experts to exchange their reports, and then hold an informal meeting where the points on which the experts agree or disagree are discussed. With this approach, the experts may respond to each other's questions

[42] UNCITRAL Notes on Organizing Arbitral Proceedings of 2016, paras. 92-106.

more effectively, find common ground or take the time to discuss any specific issues. The reports can then be modified accordingly or the outcome of such procedure can be communicated by the experts at the hearing; and

- clarify the nature and extent of communication between the parties or their representatives and their experts, and decide whether a party might be requested to disclose such communications.

C. Professional Codes of Conduct

Both party- and tribunal-appointed experts may be bound in their presentation of evidence by a specific code of conduct imposed by their own professional bodies. Those codes of conduct usually request that professionals giving expert evidence be and remain independent.[43]

For example, the American Institute of Certified Public Accountants (AICPA) issued a Code of Professional Conduct, requiring "*objectivity*" in the performance, by its members, of all professional services, including when providing litigation support for a client. This code also specifies that "*objectivity*" imposes the obligation to be impartial, intellectually honest, disinterested and free from conflict of interests.[44]

In addition, the UK-based Academy of Experts and Expert Witness Institute, and the Luxembourg-based EuroExpert,

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[43] Other professional rules set specific standards in terms of independence of their members such as the Institute of Chartered Accountants in England and Wales, the American Society of Appraisers, the Institute of Certified Bankers, the Institution of Civil Engineers, the National Society of Professional Engineers, the Society of Petroleum Evaluation Engineers, the American Society of Civil Engineers, the Institution of Engineers Australia and the Law Society of England and Wales; see Kantor, pp. 341-374.

[44] AICPA Code of Professional Conduct, p. 6 available at: http://www.aicpa.org/Research/ Standards/CodeofConduct/.

have jointly adopted a Code of Practice for Experts.[45] This Code clearly states that "[e]*xperts shall not do anything in the course of practising as an Expert, in any manner which compromises or impairs or is likely to compromise or impair any of the following: the Expert's independence, impartiality, objectivity and integrity* […]".[46]

In 2015, the ICC issued a new edition of its Expert Rules.[47] These new rules replaced the 2003 ICC Rules for Expertise. The Expert Rules have reinforced the duty of impartiality and independence of experts. Under all three new sets of rules, the expert (or neutral) must now not only be "*independent*," in keeping with the previous rules, but also "*impartial*".[48]

The duty of independence and impartiality has also been strengthened in ways specific to each set of rules. In particular, under the ICC Rules for the Appointment of Experts and Neutrals, if a party is not satisfied that the expert or neutral is independent or impartial, it can file a written objection with the ICC that may lead to the replacement of the expert.[49]

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45 Code of Practice for Experts , available at: https://www.academyofexperts.org/guidance/expert-witnesses/code-practice-experts/tae-code-practice-experts.

46 Code of Practice for Experts, Rule 1 (a).

47 There are three distinct services and sets of rules relating to experts and neutrals offered under the 2015 Expert Rules: (1) ICC Rules for the Proposals of Experts and Neutrals (where the ICC puts forward the names of one or more experts or neutrals at the request of one or more parties or an arbitral tribunal); (2) ICC Rules for the Appointment of Experts and Neutrals (where the ICC makes an appointment that is binding upon the requesting parties); and (3) ICC Rules for the Administration of Expert Proceedings (where the ICC is chosen to administer and supervise the expert proceedings).

48 ICC Rules for the Proposal of Experts and Neutrals, Article 2; ICC Rules for the Appointment of Experts and Neutrals, Article 3 (3); ICC Rules for the Administration of the Proceedings, Article 4.

49 The 2003 version of the rules did not contemplate the possibility of a party objecting to an expert's appointment; nor did they provide for the replacement of an expert in the context of appointment proceedings.

IV. Testing the Independence and Impartiality of Expert Witnesses

A. Cross-examination/Questions by the Arbitral Tribunal

The most obvious tool to probe the independence (or lack thereof) of an expert witness is cross-examination by counsel. Depending on the legal and cultural background of the parties, counsel, and the arbitrators, examination by the arbitral tribunal will serve the same purpose.

This article will not cover this technique, in any detail, mainly for two reasons. First, they are extensively described and commented in general advocacy literature. Secondly, a truly biased expert witness is unlikely to confess his or her lack of independence on the stand. Beyond that, cross-examination or examination by the arbitral tribunal generally reveals a lack of independence only in rather egregious circumstances.

There are other, more subtle, ways of detecting, and in the best of cases, overcoming the lack of independence of an expert witness. These will now be discussed.

B. Disclosure of Conflicts

The proximity of an expert to a party or pre-existing links with a case are likely to affect the credibility of an expert witness, although it is not always clear evidence of a lack of independence. In order to be placed in a position to carry out this assessment, the arbitral tribunal should ideally be made aware of any relevant circumstances that might influence the independence of the expert witness.

Although several arbitration rules require tribunal-appointed experts to submit a statement of independence and

impartiality, those rules do not provide for the same obligation for party-appointed witnesses.[50]

However, under Article 5.2 of the IBA Rules, party-appointed expert reports are required to include a declaration of current and past relationships with the parties and the parties' counsel. According to the Commentary of the IBA Rules, the declaration of relationships is a requirement for disclosure, while the declaration of independence is a requirement for the expert witness to evaluate any such relationship and attest that he or she is independent. The emphasis seems to be more on ensuring that the expert is capable of an impartial opinion, rather than prohibiting the existence of a relationship with the parties.

C. The *Sachs* Protocol ("Expert Teaming")

At the 2010 ICCA Congress in Rio de Janeiro, Dr Klaus Sachs proposed a method of appointing experts which was received rather enthusiastically.[51] This method (also known as Expert Teaming) sought to combine the advantages of party-appointed and tribunal-appointed experts.

In short, instead of relying exclusively on party-appointed experts or appointing its own expert of choice, the tribunal would usually consult with the parties at an early stage in the proceedings and invite them each to provide the tribunal and the opposing party with a list of candidates who they consider could serve as an expert to give evidence.

The tribunal would then invite the parties to comment briefly on the experts proposed by the other party, in particular as to whether there are any conflicts of interest. Thereafter, the tribunal would choose two experts, one from each list, and

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[50] LCIA Rules, Article 21.2; UNCITRAL Arbitration Rules, Article 29(2); IBA Rules, Article 6; UNCITRAL Notes, Article 15.

[51] See generally SACHS/SCHMIDT-AHRENDTS.

appoint these experts jointly as an "expert team". These experts would be compensated out of the common fund of deposits for the arbitration paid by the parties. Following such appointment, the tribunal would meet with the expert team and the parties, in order to establish a protocol on the expert team's mission.

Additionally, this method envisages that at least one session be held for both parties' counsel to question the expert team in the presence of the tribunal.

The Sachs Protocol also sets out the duties of the members of the expert team, including duties of impartiality and independence commonly expected from tribunal-appointed witnesses. Further, it provides that the two members of the expert team would not have *ex parte* communications following appointment, in much the same manner as party-appointed arbitrators and tribunal-appointed experts act in international arbitration.

One of the most interesting features of this method is that, although they have been proposed by the parties, experts are ultimately appointed by the tribunal.[52] As a result, it bridges the divide between party-appointed and tribunal-appointed experts and, more importantly, puts to rest any debate on possible diverging standards of impartiality and independence between these two categories of experts. In addition, because the experts are ultimately appointed by the tribunal, the parties will usually employ their best efforts to propose someone whose competence, independence and impartiality is beyond doubt. As such, the Sachs Protocol may allow for certain benefits from both civil and common law approaches and may ensure that an expert neither operates nor is seen to operate as the extension of the parties. Naturally, from the perspective of arbitration practitioners acquainted with

[52] SACHS/SCHMIDT-AHRENDTS, p. 146; SCHMIDT-AHRENDTS, Expert Teaming, p. 658. See also BORN, p. 2280; KANTOR, A Code of Conduct, p. 338.

traditional arbitral procedure, the method proposed by Klaus Sachs might prove a bit disorienting. Not to mention that the parties may feel that they arelosing control over "their" experts.

D. Joint Report by Party-appointed Experts

Another way to test the level of independence and impartiality of expert witnesses is to request the party-appointed experts to submit a joint report detailing, for instance, issues agreed and not agreed upon (with reasons for disagreement).[53] Arbitral tribunals are likely to seek the submission of joint reports when the expert reports filed in the first place are much more diverging than one would expect them to be.

It is indeed expected that in preparing the joint report, the experts will confer and genuinely endeavour to reach agreement on any matters at issue within their field of expertise to narrow any points of difference between them.

While experts are free to disagree, such disagreement must come from the free exercise of their own independent and professional judgment. The preparation of the joint report is therefore intended to allow experts to reconsider and revise their opinions where appropriate in a professional and non-confrontational environment if new evidence and relevant material become available.

This method, which is expressly promoted by the IBA Rules in Article 5(4),[54] is said to have proven highly useful. Most of the time, the experts are in a position to narrow the number and scope of disputed issues. Even where they do not, the meeting may prompt the experts to join issue, resulting in more focused final reports.

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[53] WAINCYMER, pp. 961-962; BORN, pp. 2281-2282.

[54] This method is also promoted in the UNCITRAL Notes, *see* 2016 UNCITRAL Notes, paras. 1-3, 95-98.

While joint reports aim primarily at narrowing down the number and scope of disputed issues, they can also cast light on the independence (or lack thereof) of the expert witnesses. When the expert witnesses reach broad agreement in a joint report, this is generally almost evidence that they have understood their duty of independence towards the parties as well as their duty to assist the tribunal.[55]

Conversely, where there is little or no agreement, or no agreement on important issues, in the joint report, this is frequently an indication that one of the experts (or all of them) is lacking independence. In that case, it can become even more important for counsel and the arbitral tribunal to test the expert's (or the experts') independence using other tools at their disposal (such as experts hot-tubbing sessions, as explored below).

E. Expert Conferencing

Expert conferencing, also referred to as "hot-tubbing"[56] is undoubtedly gaining popularity in international arbitration and many arbitrators are supporters and proponents of this method.

Traditionally, witnesses and experts are examined at the (evidentiary) hearing one after another. Expert conferencing involves experts from opposing sides sitting together for

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[55] This was recently noted in a DIAC Award, in which the arbitral tribunal commended the experts in the following terms: "*during the proceedings, the experts were extremely helpful and their efficient collaboration greatly assisted the Arbitral Tribunal. The Arbitral Tribunal considers that this is an example of how expert evidence should work. [...] The Arbitral Tribunal is particularly appreciative of the way the Parties and their counsel managed the evidence of the quantum experts, and of the work performed by the experts themselves. In all aspects, the manner in which expert evidence was led in this case was exemplary and assisted the Arbitral Tribunal immensely in rendering its award*" (Excerpts from a DIAC award rendered in 2016).

[56] JONES, pp. 147-149.

examination by the arbitral tribunal and, in some instances, the parties.[57]

This technique has been successful in narrowing, clarifying and, in some cases, resolving the issues in dispute between expert witnesses.[58] More importantly, expert conferencing is said to compel experts to present their opinions more independently and objectively, although one cannot avoid the tendency of some experts to focus solely on avoiding hurting "their" party's case, rather than genuinely seeking agreement or guiding the arbitrators. Despite the popularity of expert conferencing, there is however little formal guidance issued by arbitral institutions on this subject.[59]

In terms of its mechanics, expert conferencing may involve the preparation of a defined list of issues (on which the experts may or may not agree) on the basis of which the expert conferencing will proceed.[60] Both the arbitral tribunal and the parties will then have the possibility of examining the experts together.[61] As such, expert conferencing can be used not only to maximise procedural efficiency, but also to test the independence and impartiality of party-appointed experts.[62]

When expert witnesses are hot-tubbed, this should result in an exchange of professional opinions given by persons of the same discipline (for example engineering, chemistry, life sciences, etc.). Even if the arbitrators may not have any expertise in engineering, chemistry, or life sciences, the dynamic of that exchange can often be revealing and assist

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57 WAINCYMER, p. 967; HUNTER, pp. 821-822.

58 HUNTER, p. 822.

59 Article 8.3(f) of the IBA Rules expressly refers to expert conferencing. Similarly, the ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration contemplates expert conferencing as a procedural option for parties.

60 EHLE, p. 84.

61 HUNTER, pp. 821-822. For more information on how to organise expert conferencing, *see* WAINCYMER, pp. 970-972.

62 WAINCYMER, p. 969; JONES, pp. 147-148. See also HUNTER, p. 822.

the tribunal in assessing the credibility (and the independence of mind) of those expert witnesses.

F. Disclosure of Communications between Counsel and Party-appointed Experts

Whether or not written communications between party-appointed experts and counsel may be subject to disclosure is a very controversial topic. In international arbitration, and although this issue is not dealt with in any of the rules of major arbitral institutions, there is a presumption of non-disclosure of counsel-expert communications.[63]

FRIEDLAND/BROWN DE VEJAR explains in this respect: "[p]*roduction of documents reflecting such communications is rarely sought – almost all of the arbitrators questioned on the subject replied that they had never faced the question – and the overwhelming view among experienced international arbitrators is that, in the ordinary situation, production would not be warranted*".[64]

There are some potential exceptions to this principle: for instance, the documents relied upon by the expert in forming his or her opinion (which the expert will usually attach to the expert report), as well as the documents expressly referenced by the expert in the report are usually subject to disclosure.[65] A second potential exception comprises those communications that deal with the scope of the expert's engagement, and more specifically the instructions from counsel, although requests to produce such documents are rare in practice.[66]

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[63] FRIEDLAND/BROWN DE VEJAR, p. 2.
[64] FRIEDLAND/BROWN DE VEJAR, p. 3.
[65] FRIEDLAND/BROWN DE VEJAR, pp. 5-8.
[66] FRIEDLAND/BROWN DE VEJAR, pp. 5-8.

The CIArb Protocol supports this view, and goes even further, as its Article 4 provides that the expert report should contain a statement setting out all of the instructions the expert witness has received from the appointing party, while its Article 5 provides that all instructions to an expert shall not be privileged against disclosure in the arbitration. Having said that, Article 5(1)(b) of the same precludes questioning of an expert regarding his or her instructions unless the tribunal is satisfied that there is good cause. In the same vein, the UNCITRAL Notes, referred to earlier, provide the arbitral tribunal with the possibility to clarify the nature and extent of the communications between an expert and the party that has appointed him or her by seeking the production of those communications.[67]

While counsel-expert communications may be relevant to assist in evaluating the credibility and independence of an expert, a word of caution is however needed. Just like anyone who is involved in a project or a dispute (e.g. engineers, lawyers, or arbitrators), a party-appointed expert will be, at least in the first months, on a learning curve. As such, he or she may form tentative opinions that are very likely to change as the expert witness's understanding of the facts is supplemented by information, documents, and explanations provided by the party or its counsel. As a result, it is perfectly normal for an expert to change his or her opinion as he or she progresses on the learning curve. In other words, it is not a change of mind that may be suspect, it is the manner and the circumstances in which it occurs that may give rise to doubts to the expert witness's independence.

Be that as it may, we consider that it would be highly unlikely that an arbitral tribunal grant the production of communications between counsel and party-appointed experts on the mere chance that some of the communications

[67] UNCITRAL Notes, para. 100.

might eventually shed light on the independence of the expert.

V. Sanctions for the Breach of Expert Witness's Duties of Independence and Impartiality

A. Disqualification of the Expert Witness

Disqualification of a party-appointed expert for lack of independence and impartiality is a rather rare occurrence in court litigation.

As party-appointed experts are not usually labelled as "experts" in countries with a civil law tradition, no such kind of sanctions is likely to arise. In common law countries, disqualification of an expert for lack of independence and impartiality does not receive much more attention from courts and commentators. Yet, recently, the Supreme Court of Canada considered whether the independence and impartiality of an expert witness would bear on the admissibility of that expert’s evidence, or only on the weight to be given to the evidence, once it is admitted.[68] The Supreme Court concluded that judges should have the discretion to disqualify biased reports and expunge the testimony of partisan experts.

In the context of arbitration proceedings, can an arbitral tribunal, upon request or on its own motion, decide to

[68] Similary, in *White Burgess Langille Inman v. Abbott and Haliburton Co*. (2015 SCC 23), relating to the assessment of the impartiality and independence of expert witnesses, the Supreme Court of Canada concluded on 30 April 2015 that the dominant approach in Canadian common law is to treat independence and impartiality as bearing not just on the weight, but also on the admissibility of the evidence.

disqualify and remove a party-appointed expert for lack of independence and impartiality?

We are not aware of many decisions dealing with this kind of sanction. BORN observes that, even in situations where the expert witness is an employee of the party that has appointed him or her, arbitral tribunals would not go as far as to disqualify that expert.[69]

In *Flughafen Zürich AG and Gestión e Ingenería IDC SA v. Bolivarian Republic of Venezuela*, an ICSID tribunal considered the claimants' application to disqualify an expert appointed by the respondent and to exclude his expert report.[70] In that case, the claimants had considered appointing an expert witness and had sent him documents and information. The claimants eventually decided not to retain him and the expert was later appointed by the respondent in the same arbitration.[71]

The arbitral tribunal rejected the application to disqualify the expert witness. The tribunal noted that the claimants had not marked the information sent to the expert as confidential, nor had they made any other reservations as to its confidentiality. More importantly, the tribunal accepted that the expert had not accessed the information sent to him and therefore had no knowledge of its content.

Finally, we have been made aware of an ongoing arbitration case where information was presented to the arbitral tribunal that gave rise to justifiable doubts as to the independence and impartiality of an expert witness.[72] Interestingly, the arbitral tribunal did not disqualify the expert, but strongly urged the

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[69] BORN, p. 2281.

[70] Decision on Claimants' proposal for disqualification of one of Respondent's expert witnesses, and request for inadmissibility of evidence of 29 August 2012, ICSID Case No. ARB/10/19.

[71] GARCÍA, p. 25.

[72] Due to confidentiality reasons, the author is not at liberty to provide more information on that case.

party that had appointed that expert to consider replacing its expert by another one who would offer all the guarantees of independence and impartiality.

B. Costs Allocation

Arbitration rules increasingly include specific reference to an obligation of "*good faith*" of the parties in the conduct of the arbitration proceedings,[73] or expressly link the parties' behaviour to costs allocation.[74]

For example, Article 37 (5) of the ICC Rules provides that "*in making decisions as to the costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner*".

Similarly, Article 15(7) of the Swiss Rules provides that "[a]*ll participants in the arbitral proceedings shall act in good faith, and make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delay* [...]".

In light of these provisions, there is no reason that an arbitral tribunal could not sanction a party, when allocating costs, for using the evidence of a partisan expert.

Interestingly, a recent ICC Commission Report on the Decisions on Costs in International Arbitration revealed that a number of arbitral tribunals had decided not to give any weight (or very little weight) to expert witness evidence and, for this reason, dismissed entirely the claims for reimbursement of costs related thereto.[75]

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[73] Swiss Rules, Article 15(7); JAMS, Rule 29. See also BÉDARD/NELSON/KALANTIRSKY, p. 755.

[74] ICC Rules, Article 37(5); ICDR Rules, Articles 28 and 31.

[75] ICC COMMISSION REPORT, p. 26.

C. Weighing the Evidence

The vast majority of arbitration rules provide arbitral tribunals with broad discretion to assess and weigh the evidence adduced by the parties.[76]

There is therefore a wide recognition of the discretion of arbitral tribunals to admit any relevant evidence deemed to have probative value, as well as of their power to reject evidence that is irrelevant or unsuitable to prove the facts allegedly supported by that evidence.

In this context, arbitral tribunals have undoubtedly full discretion to give evidentiary weight or not to expert reports prepared by partisan witness experts.[77]

We were made aware of a case governed by the Swiss Rules where an arbitral tribunal decided not to give any particular evidentiary weight to the evidence presented by the expert witness of a party due to the long-standing business relationship between the expert and the party that had retained him as an expert witness.[78] In that case, the entity that employed the expert witness had provided professional advisory services to the appointing party on the very project that was the subject matter of the arbitration. The arbitral tribunal further noted that the relationship was not disclosed during the proceedings; this omission was also taken into account by the tribunal in the final award.[79]

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[76] LCIA Rules, Article 22 (1)(vi); UNCITRAL Arbitration Rules, Article 27.4; SIAC Rules, Article 19.2; SCC Rules, Article 26.

[77] BORN takes the view that the admissibility of an expert report should not be used as a sanction, but that the lack of independence and impartiality of an expert witness should affect the weight given to the credibility of that expert witness; *see* BORN, p. 2279.

[78] Due to confidentiality reasons, the author is not at liberty to publish the details of this award.

[79] Idem.

We were also made aware of a case, an arbitration under the ICC Rules, where one of the parties was represented in the arbitration proceeding by a claim consultancy company, which appointed as expert witnesses its own employees.[80] The arbitral tribunal informed the parties that although they were entirely free to retain the experts of their choice, proceeding with such a choice would likely have an impact on the degree of evidentiary weight the tribunal would ultimately give to these reports. Interestingly, the tribunal eventually found that the experts' findings and opinions were clear and helpful towards educating the arbitral tribunal, even though the independence of those experts could have been legitimately questioned in the first place.

D. Reputational Damage

Expert evidence must be and be seen to be an independent view of the expert witness, and not partial, prejudiced or biased.

Expert witnesses must be careful in what they write in their reports. They must be presumptively truthful. The expert's reputation for professional integrity must be above suspicions, and his or her report has to be the product of his or her honest and unbiased belief.

One of the greatest fears for most professionals who make their living as testifying experts is to see their reputations as experts tainted, after being referred to in arbitral awards as being "*partisan*" and a "*hired gun*".

Although one cannot deny that expert witnesses have an incentive to please their clients, so that they will be hired again, partisanship is likely to have completely the opposite effect. As a matter of fact, the prospect that the (past)

[80] Due to confidentiality reasons, the author is not at liberty to give further details of this case.

partisanship of an expert be exposed to an arbitral tribunal would almost certainly lower demand for that expert.

VI. Conclusions

There is a broad consensus among arbitration practitioners that the assistance of expert witnesses is often useful, and sometimes essential, in disputes involving professional expertise that counsel or arbitral tribunals are not in a position to fully grasp. Having said that, there is also a consensus in the arbitration community that, in order to be helpful, expert witnesses need to be truly independent. Here, we are just stating the obvious.

The true question is how to reach that goal.

First, there should be no ambiguity that expert witnesses have to be independent and impartial in very much the same way as tribunal-appointed experts. There seems to be a soft consensus on this principle, but the picture is fuzzier. In most jurisdictions, we have not found any clear statutory basis for this duty. The duty of independence (and impartiality) of expert witnesses exists mainly in certain texts of a private nature. One suggested way forward would be to make the existence and the content of that duty clearer, for example in arbitration rules.

Secondly, we should determine how to test best those duties of independence and impartiality. Arbitration practice is scattered in this respect. The arbitration community is unlikely to be able to establish fail-safe rules, principles or methods to guarantee the independence of expert witnesses. In these circumstances, it is via the development (and the increasing use) of techniques such as expert conferencing or expert teaming that the independence and impartially of experts shall continue to be tested, and, it is hoped, ensured to the broadest extent possible.

Thirdly, and most importantly, what can arbitral tribunals do about bad conduct? Since arbitral tribunals derive theirs powers from the agreement of the parties, institutional rules referred to by the parties (where applicable), and the statutory framework governing the proceedings, any sanctions they can impose will normally be determined by reference to those sources. Major arbitration rules and the IBA rules all contain provisions that give arbitrators the discretion to decide the admissibility, relevance or weight given to evidence, including expert evidence. This does not constitute however a sanction "per se". A tribunal may also decide to sanction a party that appointed a "hired gun" in its decision on costs. Would that constitute a sanction sufficiently severe to give a clear signal to the arbitration community? One need only state the proposition to undermine it. In light of this, we believe that the time may have come for the arbitration community to open a real debate on this issue and consider whether arbitral tribunals should not be provided with more tools to sanction the appointment of partisan expert witnesses.

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Review of the Recent Case Law of the Swiss Federal Supreme Court

JONATAN BAIER[1]

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I. Introduction

This paper reviews the decisions of the Swiss Federal Supreme Court (hereinafter "Supreme Court") relating to international arbitration which were published on the Supreme Court's website[2] between 25 August 2015 and 25 August 2016 (hereinafter "period under review" or "year under review").[3] Decisions relating to domestic arbitration or purely procedural decisions – e.g. acknowledging the withdrawal of the application to set aside the arbitral award or declaring the challenge inadmissible for non-payment of the advance of costs – will not be examined.

During the period under review, the Supreme Court rendered 30 decisions relating to international arbitration (excluding the above-mentioned "purely procedural" decisions), 29 of which pertain to setting aside proceedings and 1 to enforcement proceedings.[4] These figures are slightly lower than those of the previous period under review[5] and lower than the average number of decisions rendered during the past five years.[6] 4 of

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2 http://www.bger.ch (last visited: 26 August 2016).

3 Given that the publication on the Court's website generally takes place a few weeks after a decision has been issued, there may have been additional decisions issued in the period under review, which had not yet been published on the Court's website on 25 August 2016.

4 It is interesting to note that there was no decision on applications for revision of arbitral awards during the period under review.

5 See BEFFA, Review of the Recent Case Law of the Swiss Federal Supreme Court, in MÜLLER/RIGOZZI/BESSON (eds.), New Developments in International Commercial Arbitration 2015, p. 163 *et seq.*, reporting that, in the period between 25 August 2014 and 25 August 2015, the Supreme Court rendered 33 decisions, 29 of which pertained to setting aside proceedings, 2 to revision proceedings and 2 to enforcement proceedings.

6 See ROBERT-TISSOT, Review of the Recent Case Law of the Swiss Federal Supreme Court, in MÜLLER/RIGOZZI/BESSON (eds.), New Developments in International Commercial Arbitration 2014, p. 121 *et seq.*, recalling that, as reported by the previous authors of this review, the Supreme Court rendered 35 decisions in the period from 25 August 2010 to 25 August 2011; 34 decisions in the period from 25 August 2011 to 25 August 2012; 41 decisions in the period from 25 August

the decisions reviewed have been (or will be) published in the Supreme Court's reporter (hereinafter "ATF").[7]

The most frequently invoked ground in the setting aside decisions was the violation of the principle of equal treatment and the right to be heard (Article 190(2)(d) Swiss Private International Law Act (hereinafter "PILA")), followed quite closely by incorrect decisions on jurisdiction (Article 190(2)(b) PILA) and incompatibility with public policy (Article 190(2)(e) PILA). The grounds of irregular constitution of the arbitral tribunal (Article 190(2)(a) PILA) and decisions ruling beyond the claims submitted or failing to adjudicate claims (Article 190(2)(c) PILA) were less frequently invoked.

Only 1 of the 29 decisions rendered in setting aside proceedings during the period under review resulted in the award being set aside due to the lack of jurisdiction of the arbitral tribunal (Article 190(2)(b) PILA).[8] This results in a success rate of approximately 3.4%, which is clearly lower than in the past few years.[9] It is interesting to note that the only successful challenge was in a commercial arbitration case whereas all the challenges in the sports arbitration cases –

2012 to 25 August 2013; and 32 decisions in the period from 25 August 2013 to 25 August 2014.

[7] Decision 4A_34/2015 of 6 October 2015, published in ATF 141 III 495; decision 4A_84/2015 of 18 February 2016, published in ATF 142 III 239; decision 4A_628/2015 of 16 March 2016, published in ATF 142 III 296; and decision 4A_342/2015 of 26 April 2016 which had not yet been published at the time of writing.

[8] Decision 4A_628/2015 of 16 March 2016, published in ATF 142 III 296.

[9] See BEFFA, *op. cit.*, p. 167, reporting the following success rates between 2011 and 2015: 6.45% for the period from 25 August 2011 to 25 August 2012; 5.26% for the period from 25 August 2012 to 25 August 2013; 13.8% for the period from 25 August 2013 to 25 August 2014; and 6.9% for the period from 25 August 2014 to 25 August 2015.

which tend to have slightly higher success rates than commercial arbitration cases – were unsuccessful.[10]

Following the tradition of this review, the decisions issued in setting aside proceedings pursuant to Article 190(2) PILA will be analyzed first in Section II. This section will address procedural issues arising in relation to applications to set aside an award as well as the substantive grounds for setting aside an award, following the order in which the grounds are set out in Article 190(2)(a)-(e) PILA. It concludes with an analysis of the consequences of a successful challenge. Section III will cover the recent case law on the enforcement of arbitral awards in Switzerland, while Section IV will briefly examine issues relating to the costs of federal proceedings. In each section, the decisions are addressed in chronological order. In Section V, we will conclude by highlighting the most interesting developments during the period under review. As in the past year's review, the main developments in the Supreme Court's decisions will be summarized in a table at the end of this paper (Section VI).

II. Decisions on applications to set aside arbitral awards (Article 190(2) PILA)

A. Admissibility of applications to set aside

1. Time limit to challenge the award

a) Decision No. 4A_214/2016 of 4 May 2016

Facts: A sole arbitrator rendered an arbitral award on 8 February 2016.

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[10] Regarding statistical data since 1989 see also DASSER/WOJTOWICZ, Challenges of Swiss Arbitral Awards – Updated and Extended Statistical Data as of 2015, in ASA Bull. 2/2016, p. 280 *et seq.*

By fax dated 9 March 2016, X filed a motion to set aside the award before the Supreme Court. In a letter dated 15 March 2016, the Supreme Court informed X that the challenge was inadmissible as it was sent by fax. The Supreme Court did not set a deadline for the submission of the motion by the correct means, given that the time limit to challenge the award had expired on 9 March 2016.

X claimed that it had sent the motion to the Supreme Court with a valid signature on 9 March 2016. However, the copy of the motion to set aside the award never reached the Supreme Court.

On 11 April 2016, X filed another submission in which it (i) challenged the decision by the Supreme Court as communicated in its letter dated 15 March 2016 and (ii) refiled the original motion including a photocopied signature.

Decision: The Supreme Court held that the motion to set aside the award was inadmissible.

First, the Supreme Court confirmed that the time limit to challenge the award had already expired. The Supreme Court also held that an application to set aside an award which is only sent by fax is inadmissible and that the Supreme Court does not give an appellant the opportunity to correct this mistake.[11] The Supreme Court held that it never received the hard copy of the original submission and that the resubmission of X did not change anything.

Second, the Supreme Court confirmed that its decision as communicated in the letter of 15 March 2016 could not be challenged.

Third, the Supreme Court held that the motion was inadmissible in any event given that an award may only be set

[11] See ATF 121 II 252.

aside based on the grounds set out in Article 190(2) PILA and that the application did not invoke any of these grounds.

Comment: This decision confirms that it is important to file an application for the setting aside of an award within the time limit and that the submission of the application by fax only is insufficient.

2. Limited grounds to set aside an award[12]

a) Decision No. 4A_342/2015 of 26 April 2016

As international arbitral awards can only be challenged on the basis of the limited grounds listed in Article 190(2) PILA, the Supreme Court held that a party cannot directly rely on a violation of the European Convention on Human Rights (hereinafter "ECHR") in order to have the award set aside.[13] However, the principles in the ECHR may serve as a benchmark for the interpretation of the grounds listed in Article 190(2) PILA.

b) Decision No. 4A_206/2016 of 20 May 2016

In this decision, the Supreme Court reiterated that international arbitral awards can only be challenged based on the limited grounds listed in Article 190(2) PILA.[14] In addition, the Supreme Court held that it only reviews the grounds which are duly raised and substantiated by the appellant according to Article 77(3) Swiss Supreme Court Act (hereinafter "SSCA"). Accordingly, A's application to have the award set aside based on grounds found in the Swiss Civil Procedure

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[12] In this section, only a selection of the cases issued in the period under review is presented in which the Supreme Court confirmed its established case law regarding the limited grounds in the PILA for setting aside international arbitral awards.

[13] As to the facts of the case see below, p. 175.

[14] See also below, p. 115.

Code (hereinafter "CPC") rendered the application inadmissible.

3. No review of the facts in setting aside proceedings[15]

a) Decision No. 4A_136/2015 of 15 September 2015

The Supreme Court confirmed that it is bound by the facts as established by the arbitral tribunal. In this case, which will be discussed in more detail below,[16] the sole arbitrator established in its award – through subjective interpretation – a common intent of the parties to resolve their dispute by arbitration. The Supreme Court confirmed that the common intent of the parties is a factual issue and that therefore, this factual conclusion is binding upon the Supreme Court, irrespective of its correctness.

b) Decision No. 4A_176/2015 of 9 November 2015

The Supreme Court once again confirmed that it is bound by the facts as established by the arbitral tribunal. In this case, which will be discussed in more detail below,[17] the arbitrator of the Court of Arbitration for Sport (hereinafter "CAS") established in its award that the agent – who entered into an agreement with a FIFA-affiliated Ecuadorian football club – had demonstrated that the services he provided under the agreement were in his capacity as a players' agent within the scope of the FIFA Players' Agents Regulations of 2008 (hereinafter «PAR»). Accordingly, the Supreme Court held that the relevant findings by the arbitrator were of a factual nature, and as such, outside of the Supreme Court's scrutiny.

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[15] In the remainder of this section, only a selection of the cases issued in the period under review is presented in which the Supreme Court confirmed its established case law regarding the absence of the review of facts in setting aside proceedings.

[16] See below, p. 128.

[17] See below, p. 142 et seq.

c) ATF 142 III 239 (Decision No. 4A_84/2015 of 18 February 2016)

The sole arbitrator established through subjective interpretation that the parties had a common intent to submit the disputes relating to the Framework Contract to arbitration. This constituted a finding of fact which the Supreme Court again confirmed that it cannot review.[18]

d) Decision No. 4A_342/2015 of 26 April 2016

The Supreme Court reminded the parties that it issues its decision on the basis of the facts established by the arbitral tribunal. It cannot rectify or supplement such facts on its own even if they were manifestly inaccurate or in violation of the law. As an exception, the Supreme Court has the power to review the factual findings on which a challenged award is based, if one of the grounds in Article 190(2) PILA is raised with respect to such a factual finding, or if new facts or evidence are exceptionally taken into consideration in the proceedings.

Accordingly, the Supreme Court confirmed that a finding of fact by the tribunal, even a finding regarding a procedural fact, was not subject to review.[19] The arbitral tribunal had established the subjective common intent of the parties to limit the first phase of the proceedings to one round of submissions, and the Supreme Court held that it was bound by that fact.

4. Application/Opting-out of Chapter 12 PILA

a) Decision No. 4A_568/2015 of 10 December 2015

In a rather helpless attempt, the appellant tried to argue that as the parties chose to "apply the FIFA regulations and the

[18] As to the facts of the case see below, p. 149 et seq.
[19] As to the facts of the case see below, p. 175 et seq.

Swiss Civil Code" in their agency contract, they had opted out of Chapter 12 PILA in favor of the provisions of the CPC.[20] The Supreme Court found that there was no explicit waiver of the applicability of the PILA in favor of Article 353 *et seqq.* CPC as required under Article 176(2) PILA. Accordingly, the appellant's arguments based on Article 393 CPC were dismissed by the Supreme Court.

b) Decision No. 4A_206/2016 of 20 May 2016

Facts: In 2010, A and B signed an asset management contract. According to the contract, B was to manage the assets that A held in a Swiss bank. The agreement also contained a dispute resolution clause according to which all disputes were to be resolved by an arbitral tribunal seated in Lugano.

In 2015, A initiated arbitration proceedings against B claiming EUR 130'000.-- for breach of contract. The arbitral tribunal rejected A's claim.

A then filed a motion to set aside the award, arguing a violation of Article 393(e) of the CPC. A stated that the award was arbitrary in its result because it was based on findings that were obviously contrary to the facts as stated in the case files and because it constituted an obvious violation of law and equity.

Decision: The Supreme Court held that the application was inadmissible.

Referring to Article 176(1) PILA, the Supreme Court stated that if at least one of the parties is domiciled or has its habitual residence in a foreign country when entering into the arbitration agreement, the arbitration is deemed international and is therefore in principle governed by Chapter 12 PILA. On the other hand, if both parties had their seats in Switzerland

[20] As to the facts of the case see below, p. 192 et seq.

at that time, then the rules governing domestic arbitration apply (Articles 353 *et seq.* CPC).

The Supreme Court pointed out that the appellant did not state where he was domiciled at the time the contract was signed. However, there were several indications that A was domiciled in Italy at that time. As he did not even assert that the parties had opted out of Chapter 12 PILA in accordance with Article 176(1) PILA, the Supreme Court held that the PILA provisions were applicable to the case at hand.

The Supreme Court confirmed that in international arbitration cases, awards can only be set aside based on the grounds set out in Article 190(2) PILA. Accordingly, A's application to have the award set aside based on the grounds of the CPC rendered the application inadmissible.

Comment: This decision serves as a reminder that in the context of international arbitration, arbitral awards can only be set aside based on the grounds listed in Article 190(2) PILA.

5. Challengeable awards

Decision No. 4A_222/2015 of 28 January 2016

Facts: The former manager (X) of a cycling team, a Belgian national domiciled in Spain, was a manager of several cycling teams, including in the United States. X was a member of the Belgian Cycling Federation and a holder of a license issued by the Union Cycliste Internationale (UCI). On the license application form he signed, there was a reference to UCI regulations *inter alia* regarding anti-doping and to the exclusive jurisdiction of the CAS.

On 28 June 2012, the United States Anti-Doping Agency (USADA) informed X that it had discovered sufficient evidence of repeated violations of anti-doping rules and that it was considering imposing sanctions in this respect. In addition, the

USADA told him that he had the choice of either accepting the finding, or challenging it in the framework of arbitral proceedings as provided for under the USADA Protocol. The USADA Protocol included a provision that stated that in the event the suggested sanctions were contested, the matter would be heard by a three-member panel of the American Arbitration Association (AAA).

In a letter of 12 July 2012, X replied to the USADA and challenged not only the proposed sanctions but moreover the very jurisdiction of this body to impose sanctions upon him. X stated in particular that his forced appearance in an AAA arbitration should not be interpreted as a waiver of his jurisdictional objection.

On 30 July 2012, the arbitral panel was constituted. Subsequently, it issued a procedural order which provisionally assumed jurisdiction as to X. On 21 April 2014, the AAA arbitral panel issued its final award. As to jurisdiction, it simply confirmed its provisional decision contained in the provisional order. As to the merits of the case, the arbitral panel found X guilty of involvement in a doping conspiracy and handed X a 10-year ban. X then appealed the final award of the AAA tribunal before the CAS.

Upon request by X, CAS agreed to first address the issue of jurisdiction as a preliminary issue. Subsequently, a CAS panel was constituted. On 11 March 2015, the CAS Secretariat sent a letter to the parties stating that the CAS panel had *"decided that USADA had results management jurisdiction and the AAA the disciplinary authority over Messrs. [X]."* The letter also stated that "*[t]he present decision is a partial decision on a substantive issue and not a preliminary decision on the jurisdiction of CAS within the meaning of Article 190 of the Swiss Private International [Law] Act"*. The letter then stated that the reasons for the panel's decision would be included in its final award.

On 24 April 2015, X invoked Article 190(2)(b) PILA and filed a civil law appeal before the Supreme Court arguing that the CAS did not have jurisdiction over the dispute.

Decision: The Supreme Court held that the application was not admissible.

First, the Supreme Court emphasized that only certain types of decisions may be challenged in accordance with Article 190 PILA, i.e. (i) final awards putting an end to the arbitration on substantive or procedural grounds, (ii) partial awards putting an end to the arbitration with respect to a part of the dispute and (iii) preliminary or interim awards adjudicating one or several preliminary issues as to the merits or the procedure (e.g. an explicit or implicit decision on jurisdiction).

By contrast, procedural orders cannot be challenged before the Supreme Court. As a rule, arbitral tribunals decide on their jurisdiction in a preliminary award in accordance with Article 186(3) PILA. Nevertheless, arbitral tribunals often choose to decide on their jurisdiction in the final award given that Article 186(3) PILA is not a mandatory provision.

In order to determine whether the CAS panel's decision constituted an award, the Supreme Court analyzed it carefully. Firstly, it noted that a decision described as a "*partial decision on a substantive issue and not a preliminary decision on the jurisdiction of CAS*" was communicated to the parties in a simple letter from the CAS Secretariat. This letter was not signed by any member of the panel. Nevertheless, the Supreme Court maintained that neither the form of a decision, nor the title assigned to it is in itself decisive. The Supreme Court pointed out that all specific circumstances need to be taken into account in order to determine the nature of the decision.

The Supreme Court noted that it was fairly unusual for the CAS panel to be seized with an appeal against an arbitral award issued by an arbitral tribunal. As a rule, the CAS

constitutes an appeal authority for decisions taken by disciplinary boards of sports bodies. Further, X was not a cyclist subject to the authority of a national federation by delegation from the UCI, but rather a team director who was neither a U.S. citizen nor a U.S. resident. X was also a member of the Belgian Cycling Federation and consequently had a license from the UCI. Given that UCI indicated that it was opposed to the USADA action, the Supreme Court considered that it was not surprising that X challenged the authority of the USADA and the AAA panel.

However, X was the one who seized the CAS and thereby accepted its jurisdiction to decide on the matter of the USADA and AAA panels' authority. X did not argue that the CAS lacked jurisdiction prior to his application to the Supreme Court.

Following an examination of the wording, the Supreme Court held that the CAS panel had rendered a preliminary award on the authority of the USADA's and AAA's panel. Had the CAS panel considered that the authority was lacking, the case would have been dismissed. In the case at hand, the CAS panel, however, implicitly accepted jurisdiction over the dispute by stating that it had reached a decision on the issue of the authority of the USADA's and AAA's panel. At the same time, it maintained that the decision did not qualify as «a preliminary decision on the jurisdiction of CAS».

The Supreme Court held that the CAS panel accepted jurisdiction on a «provisional basis» only, and in doing so, reserved its reasoned decision for the final award. The Supreme Court noted that this conduct did not comply with the rule in Article 186(3) PILA, but that it was not prohibited either. The Supreme Court then ruled that there were no sanctions for breaches of Article 186(3) PILA except in case of clear abuse.

The Supreme Court stated that it was reasonable to wait for the notification of the final award, and any possible challenge

raised against it, in order to examine the grounds alleged by X. Accordingly, the application by X was declared inadmissible.

Comment: This is an unusual case based on a rather unusual set of circumstances.[21] After a thorough analysis, the Supreme Court concluded that the decision did not definitively settle the issue of jurisdiction of the CAS and thus found that it was not an implicit award on jurisdiction.

Irrespective of whether one finds the Supreme Court's reasoning convincing or not, the problem for counsel with regard to «implicit» decisions on jurisdiction remains. It is difficult to tell whether a decision rendered by an arbitral tribunal will be considered to be an implicit decision on jurisdiction and therefore capable of being challenged. Thus, the case law of the Supreme Court urges practitioners not to take a risk and to submit an application to set aside before the Supreme Court if the decision may be an implicit one on jurisdiction.

6. No challenges in a foreign language

Decision No. 4A_596/2015 of 9 December 2015

Facts: A's challenge of an award of a CAS panel was submitted to the Supreme Court in a foreign language, i.e. English.

The Supreme Court gave the appellant the opportunity to correct this mistake and set a deadline to submit a translation in an official language of Switzerland (i.e. German, French or

[21] For further analysis of this decision of the Supreme Court see PONCET, Provisional determination of jurisdiction not capable of appeal, available at: http://www.swissarbitrationdecisions.com/provisional-determination-jurisdiction-not-capable-appeal (last visited: 26 August 2016); VOSER/GEORGE, Doping charges against Lance Armstrong's former team director: Swiss Supreme Court examines ambiguous CAS decision, available at: http://www.swlegal.ch/getdoc/744c856d-1602-4fde-bb3f-9f34aee56df3/2016_Nathalie-Voser_Anya-George_Doping-charges-aga.aspx (last visited: 26 August 2016).

Italian). It informed the appellant that the challenge would be refused otherwise. Subsequently, the appellant sent a German translation of the application by e-mail on the last day of the deadline. However, there was no electronic signature on the e-mail sent by the appellant.

Decision: The Supreme Court refused to allow the application to set aside the award.

The Supreme Court held that submissions to the Supreme Court must be made in an official language of Switzerland pursuant to Article 42(1) of the SSCA. Since the application was submitted in English, the Supreme Court declined to examine the application to set aside the award.

With respect to the e-mail with no electronic signature, the Supreme Court stated that the appellant had again failed to comply with the requirements of the SSCA according to which submissions to the Supreme Court must be made either in hard copy, with a handwritten signature, or electronically, with a certified electronic signature. As the appellant filed a hardcopy of the submission including a signature of its representative only after the deadline, the Supreme Court dismissed the submission as being out of time.

Comment: This case shows that, while the Supreme Court generally allows appellants – particularly in sport arbitration cases – to correct mistakes as to the formal requirement of the language of the appeal, it will not accept repeated failures to comply with formal requirements.[22] There might be changes in the future, but as of today appellants are required to submit the challenge in an official language of Switzerland.

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[22] For further analysis of this decision of the Supreme Court see VOSER/GEORGE, Swiss Supreme Court refuses to allow challenge to award filed in a foreign language, available at: http://www.swlegal.ch/getdoc/e5762dd6-c361-4934-87fe-c7a90d64a0bd/2016_Nathalie-Voser_Anya-George_Swiss-Supreme-Cour.aspx (last visited: 26 August 2016).

7. Current legitimate interest to challenge the award

Decision No. 4A_620/2015 of 1 April 2016

Facts: A professional football player (X) signed a contract with Club B (B) in 2010. After having played only one match for B in the U21 league, X was transferred to Club C (C) for whom he played several games. X and B then jointly terminated their contract in January 2015. On the following day, X signed with Club D (D) for the season 2014/2015. Subsequently, the French Professional Football League (FPFL) seized the FIFA Players' Status Committee (PSC) before approving the contract in order to find out whether U21 matches were "official games" under the applicable FIFA Regulations on the Status and Transfer of Players. According to these regulations, a player may be registered with a maximum of three clubs during a season but may only play official games for two clubs. The PSC confirmed that the U21 matches were official games (PSC Decision). Subsequently, the FPFL approved the new contract with X, but decided that X could only participate in the official matches as of 1 July 2015, i.e. after the end of the season 2014/2015 (FPFL Decision).

Thereafter, X challenged the PSC Decision before the CAS but not the FPFL Decision. The CAS rejected X's appeal on the basis that X had no legitimate interest considering that the PSC Decision provided for a general interpretation of a statutory provision. Thus, it did not adjudicate his particular case.

Subsequently, X filed an application before the Supreme Court to set aside the CAS award.

Decision: The Supreme Court rejected the motion to set aside the award.

The Supreme Court confirmed its case law on the requirement of a "legitimate interest" worthy of protection when seeking the setting aside of an award according to Article 76(1)(b) SSCA. The Supreme Court held that a legitimate interest requires a party to show that the challenged decision would be economically, morally or materially detrimental to him or her. Furthermore, the party's interest must be a current one; i.e. it must exist when the award is challenged before the Supreme Court as well as when the Supreme Court renders its decision.

In the present case, the Supreme Court confirmed the reasoning of the CAS. The Supreme Court restated that it was the FPFL Decision that temporarily prevented X from playing for D, and not the PSC Decision which was a general interpretation of the FIFA Regulations on the Status and Transfer of Players.

In addition, the Supreme Court held that when the CAS rendered its award in September 2015, X was already permitted to play for D. Therefore, it decided that X lacked a legitimate interest when it challenged the CAS award in November 2015 before the Supreme Court.

Comment: The case at hand underlines the importance of having a current legitimate interest when filing a motion to set aside the award.[23] It must be noted, that, in particular in sports-related cases, the Supreme Court often finds that the appellant lacks a current interest.

[23] For further analysis of this decision of the Supreme Court see VOSER/GEORGE, Swiss Supreme Court refuses to allow challenge to award filed in a foreign language, available at: http://www.swlegal.ch/getdoc/e5762dd6-c361-4934-87fe-c7a90d64a0bd/2016_Nathalie-Voser_Anya-George_Swiss-Supreme-Cour.aspx (last visited: 26 August 2016).

B. Substantive grounds for setting aside

1. Irregular constitution of the arbitral tribunal (Article 190(2)(a) PILA)

a) Decision No. 4A_510/2015 of 8 March 2016

Facts: The case involved a football player (A) who was transferred from one football club (Y) to another football club (X). According to the agreement that Y, X and A signed, X *inter alia* had to pay to Y a certain amount and promised not to lend or transfer A to a third club without Y's written consent. In case of a violation by X, the contract contained a penalty clause of USD 2 million. It further provided that X would owe Y USD 1.5 million if an anticipated breach of the player's employment contract was caused by X. Later on, X asked for Y's consent to prematurely terminate the player's employment contract or temporally transfer him to another club (Z) for personal reasons. Y did not consent. Subsequently, X lent the player to Z, and Y filed a complaint before the FIFA Players' Status Committee. In December 2013, the Committee rejected Y's complaint. Thereupon, Y appealed this decision to the CAS.

On 13 August 2015, an online newspaper article was published reporting that the CAS tribunal had ordered X to pay USD 2 million to Y. X immediately contacted the CAS asking it to ensure that any decision was first communicated to the parties and not the press.

On 24 August 2015, the CAS tribunal rendered its award and faxed it to the parties. In its decision, the tribunal overturned the FIFA Committee decision. It held that the penalty clause in the contract was applicable, but reduced the amount due by 25 % from USD 2 million to USD 1.5 million.

X then filed an application before the Supreme Court to set aside the award *inter alia* due to a violation of Article

190(2)(a) PILA. X alleged that the rules regarding impartiality and independence of the arbitrators were violated due to a breach of confidentiality which resulted in an arbitral tribunal that was not properly constituted. According to X, an arbitrator must have been the source of the leak and this was a violation of S 19(1) of the CAS Statutes which provides that "*CAS arbitrators and mediators are bound by the duty of confidentiality, which is provided for in the Code and in particular shall not disclose to any third party any facts or other information relating to proceedings conducted before CAS.*" X further alleged that the outcome reported in the press might have influenced the tribunal or that the tribunal even tried to protect one of the arbitrators by ensuring that the sum in the final award was not identical to that in the report.

Decision: The Supreme Court rejected the motion to set aside the award.

The Supreme Court first maintained that there was no evidence to support X's allegation that the tribunal had leaked information. It noted that the news report was wrong on several points. The Supreme Court further noted that the article did not mention any sources and that the CAS was not contacted by a journalist to verify it. In addition, the Supreme Court even pointed out that X might have leaked the information itself. In this regard, the Supreme Court noted that X's initial reaction after the leak was to ask that the award first be communicated to the parties, but not to question the arbitrator's impartiality.

The Supreme Court further held that even if there had been a breach of confidentiality attributable to the arbitral tribunal, this would in general not constitute a basis for challenging an award. However, it also pointed out that, according to some commentators, a breach of confidentiality might violate the principle of equal treatment pursuant to Article 190(2)(d) PILA in the event that one party is provided with more information than the other. The Supreme Court then held that this was not

the situation in the case at hand as the main allegation of X was that the arbitral tribunal changed its award based on the published newspaper report.

Comment: In this case, the Supreme Court confirmed the majority view of the doctrine stating that a breach of confidentiality will, in general, not result in the setting aside of an award.[24] However, if the breach of confidentiality results in an uneven distribution of information between the parties, there might be a possibility for a successful challenge based on a violation of Article 190(2)(d) PILA (violation of the principle of equal treatment). In any case, proving a breach of confidentiality and attributing it to one of the several actors in an arbitration will always be difficult.

b) Decision No. 4A_173/2016 of 20 June 2016

Facts: B and C each concluded an agreement with A. According to these agreements, A was engaged as a trustee in order to acquire shares of a fund D for B and C. The parties included a dispute resolution clause in their agreement that provided for arbitration in Basel.

Subsequently, a dispute arose regarding the repayment of the amounts that B and C paid to A. B and C filed a request for arbitration against A. A sole arbitrator was appointed who gave a preliminary assessment of the case before the evidentiary hearing. As the parties were not able to settle the case, the sole arbitrator issued its final award and obliged A to repay most of the amounts to B and C as A breached his duty of care according to Article 398(2) Swiss Code of

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[24] For further analysis of this decision of the Supreme Court see BÄRTSCH/KOZMENKO, Suspected leak to the press does not lead to overturned award (Swiss Supreme Court), available at: http://www.swlegal.ch/getdoc/0a0b25c3-027f-4968-8153-367737c1e64b/2016_Philippe-Bartsch_Anna-Kozmenko_Suspected-leak.aspx (last visited: 26 August 2016).

Obligations (hereinafter "CO"). A then filed a motion to set aside the award *inter alia* based on Article 190(2)(a) PILA.

Decision: The Supreme Court rejected the motion to set aside the award.

The Supreme Court recalled that if an arbitrator is to be challenged pursuant to Article 190(2)(a) PILA, this challenge must be raised immediately during the arbitration proceedings. If there is a procedural error, this too must be raised immediately so that the tribunal has an opportunity to correct it. A party holding in reserve a procedural error or a challenge that it could have raised in the arbitration, acts in bad faith and forfeits the right to advance such issue before the Supreme Court.

A alleged that the sole arbitrator violated his duty of independence and impartiality by giving a clear cut and full assessment of the case in favor of B and C prior to having heard the witnesses. According to A, the sole arbitrator could not depart from that assessment later on in the proceedings. The appellant claimed that it was only agreed between the parties that the sole arbitrator would point out the risks and chances of each party and not that he would give a full assessment. The Supreme Court dismissed A's arguments. It pointed out that A should have raised the issue of impartiality right after the preliminary assessment by the sole arbitrator, which he did not. Rather, A waited until the final award was issued. Thus, A's respective objection was too late. In addition, the Supreme Court pointed out that A confirmed, prior to the assessment, that he would not challenge the arbitrator based on the preliminary assessment. The Supreme Court further held that the fact that the sole arbitrator confirmed his preliminary assessment in the final award did not prove a violation of his duty of independence and impartiality.

Comment: This case confirms that challenges of arbitrators must be raised immediately in the arbitral proceedings. To do otherwise is against good faith and results in a forfeiture of the right to challenge. This decision also serves as a reminder for arbitrators not to give a preliminary assessment of the case prior to having a confirmation by all parties on the record that they will not challenge him or her based on the preliminary assessment.

c) Decision No. 4A_132/2016 of 30 June 2016

In this case, the appellant asserted for the first time before the Supreme Court that the CAS tribunal violated its duty of independence and impartiality according to Article 190(2)(a) PILA.[25] The Supreme Court held that the appellant A acted in bad faith by not raising this issue in the arbitration proceedings. A party that holds in reserve a procedural error or a challenge that it could have raised in the arbitration forfeits the right to raise it before the Supreme Court. Accordingly, the respective objection was rejected.

2. Incorrect decision on jurisdiction (Article 190(2)(b) PILA)

a) Decision No. 4A_136/2015 of 15 September 2015

Facts: By a tripartite distribution agreement of 21 July 2009 (Distribution Agreement), a French laboratory (A) committed itself to sell pharmaceutical products to a UK buyer (B), which would then deliver the products to a Russian company (C). The Distribution Agreement – to which Swiss law was applicable and which was drafted in English and Russian – contained the following clause at Article 22:

"*22 – ARBITRATION*

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[25] As to the facts of the case see below, p. 198 et seq.

> *Any disputes and disagreements that may arise out of or in connection with this Contract have to be settled between the Parties by negotiations. If no Contract can be reached, the Parties shall submit their dispute to the empowered jurisdiction of Geneva, Switzerland.*"

In this context, it must be noted that the preamble of the Distribution Agreement stated that "the headings to clauses are inserted for convenience only and shall not affect the construction of this Contract".

Moreover, Article 21 of the Distribution Agreement specified that the English language shall prevail.

The parties later agreed to amend the Distribution Agreement and signed a respective amendment on 1 April 2010 (Amendment). However, the Amendment did not affect Article 22 of the Distribution Agreement. Based on the Amendment A and C – but not B – then signed an agreement entitled "Quality and Safety Data Exchange Agreement", which was considered to be an annex to the Distribution Agreement. Article 7(1) of the Quality and Safety Data Exchange Agreement stated as follows:

> "*7-1) Governing law – Jurisdiction*
>
> > *This Agreement shall be governed by and construed in accordance with the laws of France.*
> >
> > *The Parties shall do their utmost to reach an amicable settlement to any dispute arising hereunder. If no agreement can be reached, the Parties shall submit their dispute to the empowered jurisdiction of Lyon, France.*
> >
> > *This Agreement constitutes the entire agreement of the Parties hereto with respect to its object and supersedes and cancels any prior representation, commitment, undertaking or agreement between*

> *the parties, whether oral or written, with respect to or in connection with any of the matters of things to which such Agreement applies or refers.*
>
> *The English version of this Agreement shall prevail."*

By letter dated 26 May 2011, A notified C that it was terminating the Distribution Agreement with immediate effect.

On 22 May 2013, B filed a request for conciliatory proceedings at the court of first instance in the canton of Geneva according to Article 22 of the Distribution Agreement. As to jurisdiction, B selected the Geneva Court as the competent forum arguing that the heading of Article 22 "Arbitration" did not turn the provision into an agreement to arbitrate. B further argued that pursuant to the preamble of the Distribution Agreement, the heading was not decisive, but was rather meant as a reference only. Moreover, B noted that the term "arbitration" simply meant "jurisdiction" in the Russian language and that therefore, the provision could not be understood as an obligation to arbitrate. B also pointed out that C would initiate proceedings against A before the French courts in Lyon pursuant to Article 7 of the Quality and Safety Data Exchange Agreement.

Subsequently, A raised an objection to the jurisdiction of the court based on the existence of an arbitration agreement. A argued that Article 22 of the Distribution Agreement in fact provided first for settlement and then for arbitration before the Geneva Chamber of Commerce. In addition, A argued that English was the prevailing language of the contract and thus the heading "Arbitration" must be understood as a binding agreement to arbitrate. Nevertheless, the Geneva court granted B leave to commence court proceedings.

B and C accepted A's interpretation of Article 22 Distribution Agreement and decided to jointly file a notice of arbitration with the Geneva Chamber of Commerce on 23 May 2013.

Subsequently, A filed its answer in which it denied the existence of an arbitration agreement despite having previously raised an objection to court jurisdiction based on the existence of an arbitration clause. In its answer to the notice of arbitration, A *inter alia* argued that the necessary elements for a binding arbitration agreement, such as the designation of the institution, number of arbitrators, duration of the arbitration etc. were actually missing in Article 22 of the Distribution Agreement. In turn, A argued that this provision should be interpreted as a multi-tier amicable dispute settlement clause starting with negotiations between the parties followed by negotiations under the supervision of the Geneva authorities. A also argued that B had waived arbitration by accepting the jurisdiction of the Geneva court in the conciliatory proceedings.

The sole arbitrator bifurcated the proceedings and – after a second round of briefs – rendered an interim award affirming his jurisdiction. This interim award was challenged by A before the Supreme Court on 3 March 2015.

Decision: The Swiss Supreme Court rejected A's jurisdictional challenge.

The Supreme Court first concluded that the provision of Article 22 of the Distribution Agreement satisfied the validity requirements set out in Article 178(1) PILA as to the form of an agreement to arbitrate.

The Supreme Court then affirmed that according to Article 178(2) PILA an arbitration agreement is valid if it conforms to the particular law chosen by the parties to govern the arbitration agreement, the law governing the subject matter of the dispute or Swiss law (*in favorem validitatis*). In the case at hand, only Swiss law was applicable.

Further, the Supreme Court affirmed that arbitral tribunals must establish that the parties have a clear and common intent to exclude the jurisdiction of the state courts in favor of an arbitral tribunal. This must be done according to the general rules of contract interpretation. Even if an arbitration agreement is incomplete, unclear or contradictory (e.g. pathological) it may nevertheless be valid if the minimal requirement for a valid arbitration agreement – namely the intent to resolve a specific dispute by an arbitral tribunal and to exclude state courts – is fulfilled.

The sole arbitrator established in its award a common intent of the parties to resolve their disputes by arbitration (subjective interpretation). The Supreme Court confirmed that the common intent of the parties is a factual issue and that therefore, these factual conclusions were binding upon the Supreme Court, irrespective of their correctness.

However, the Supreme Court did not stop here. It proceeded to review the decision of the sole arbitrator and found that even based on an objective interpretation – *quod non* – the sole arbitrator's conclusions were correct in the present case for different reasons. Firstly, the heading of the jurisdiction clause "arbitration" written in caps carried particular weight, whereas the contractual preamble was of considerably less importance. Further, the double mechanism for amicable settlement argued by A did not convince the Supreme Court. The Supreme Court also found that the term "empowered" as stated in Article 22 of the Distribution Agreement did not establish state court jurisdiction. Moreover, the Supreme Court considered the international nature of the transaction and found that there was a general trend in international commerce that arbitration is the preferred dispute resolution mechanism. This favored a finding that the parties agreed to arbitration, in particular considering that Geneva is a well-known place for arbitration.

Lastly, the Swiss Supreme Court affirmed that despite Article 22 of the Distribution Agreement's short and summary nature, the sole arbitrator was in a position to establish the common intent of the parties to submit their disputes to arbitration and not to state courts. Therefore, the fact that the clause was so short on details was not decisive. Conversely, the Supreme Court pointed out A may have been acting in bad faith by first raising the defense that the dispute should go to arbitration and then taking the opposite view.

Comment: The case confirms the very arbitration-friendly position of the Supreme Court.[26] It demonstrates that while a poorly drafted dispute resolution clause can still constitute a valid arbitration agreement, this may entail a significant loss of time and costs. Practitioners must be aware of the risks of dual-language contracts, in particular the dual meaning of the term "arbitration" in the Russian language.

Furthermore, the decision confirms that factual findings are beyond the reach of an appeal. In particular, it demonstrates that the common intent of the parties as established by the arbitral tribunal is a factual issue and that it is therefore binding upon the Supreme Court. Consequently, it would not have been necessary for the Supreme Court to comment on the objective interpretation of Article 22 of the Distribution Agreement. These comments by the Supreme Court are not entirely convincing. Nevertheless, it is interesting to note that the Supreme Court may have departed from its long standing

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[26] For further analysis of this decision of the Supreme Court see STUTZER/BÖSCH, Just write "ARBITRATION" - and you get it in Switzerland!, available at: http://thouvenin.com/wp-content/uploads/2015/10/Arbitration-Newsletter-Switzerland_Just-write-Arbitration-you-get-it-in-Switzerland.pdf (last visited: 26 August 2016); VOSER/KOZMENKO, Swiss Supreme Court considers meaning of "arbitration" in dual language contracts, available at: http://www.swlegal.ch/getdoc/a2189ada-92d7-44fb-a606-c9d4e2430966/2015_Nathalie-Voser_Anna-Kozmenko_Swiss-Supreme-Co.aspx (last visited: 26 August 2016); MENZ, Die bundesgerichtliche Rechtsprechung zur Schiedsgerichtsbarkeit 2014/2015, in: Jusletter 4 April 2016, N 27 *et seq.*

approach according to which the consent to conclude an agreement to arbitrate must be clear and unambiguous and that a restrictive approach applies when determining whether the parties concluded an obligation to arbitrate or not.[27] In this context, the Supreme Court seems to accept that arbitration has become the preferred means of dispute resolution in international contracts and that even a poorly drafted dispute resolution clause can result in an obligation to arbitrate in the context of international commerce.

Finally, the holding of the Supreme Court was also influenced by the appellant's contradictory statements claiming first that the dispute should go to arbitration and then taking the opposite view in the arbitration proceedings.

b) Decision No. 4A_172/2015 of 29 September 2015

Facts: By a cooperation agreement dated 27 March 2007 (Cooperation Agreement), a private investor (C) committed itself to transfer EUR 2 million to an attorney (A) and a securities trading company (B) for investment purposes. The Cooperation Agreement contained an arbitration clause stating that the seat of arbitration was Zurich and that the applicable law was Swiss law.

On 28 March 2007, A sent a letter to C, who countersigned it, stating *inter alia* that "I [A] undertake to reimburse the funds of EURO 2 Mio to any nominated account if the investment contract does not materialize as anticipated." This letter did not include an arbitration clause. The funds that C transferred were finally lost due to bad business decisions on investments made by a fraudulent third party that had been mandated by A. Given that A did not reimburse C the EUR 2 million as requested, C initiated arbitral proceedings against A and B

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27 See e.g. ATF 140 III 134, para. 3.2; ATF 129 III 675, para. 2.3.

before the International Chamber of Commerce (hereinafter "ICC").

The ICC-appointed sole arbitrator held that the Cooperation Agreement did not provide a basis for a claim among the three partners. However, he found that the letter from A dated 28 March 2007 constituted a promissory letter pursuant to Article 17 of the CO. As a result, the sole arbitrator ordered A alone to pay EUR 2 million to C. Subsequently, A filed an application with the Supreme Court to set aside the award. Among other grounds,[28] A argued that the sole-arbitrator had wrongfully accepted jurisdiction. A based his argument on the fact that the sole-arbitrator accepted jurisdiction based on the parties' agreement in the letter dated 28 March 2007 which, contrary to the Cooperation Agreement, did not contain an arbitration clause.

Decision: The Supreme Court rejected the application to set aside the award.

The Supreme Court relied on Article 186(2) PILA and recalled that a plea of lack of jurisdiction must be raised prior to any defense on the merits and that this provision reflects the principle of good faith found in Article 2(1) of the Swiss Civil Code (hereinafter "CC"). The Supreme Court held that if a party fails to raise a plea of lack of jurisdiction, the arbitral tribunal's jurisdiction is established based on acceptance by appearance, irrespective of the validity of an arbitration clause. Therefore, a party which comments on the merits of the case without raising a plea of lack of jurisdiction accepts the arbitral tribunal's jurisdiction and loses its right to raise a jurisdictional objection at a later stage.

The Supreme Court stated that A had admitted that he did not object to the sole arbitrator's jurisdiction in the arbitral

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[28] As to the alleged violation of the right to be heard, see below p. 166 et seq.; as to the alleged violation of public policy see below, p. 191 et seq.

proceedings. A explained that in his view it was not foreseeable that the sole-arbitrator would base his decision on the letter dated 28 March 2007 as a document independent from the Cooperation Agreement. The Supreme Court disagreed in this respect, affirming that it was evident that the question of whether the letter of 28 March 2007 constituted a promissory note would arise and would therefore be a basis for C's claim.

During the arbitral proceedings, A had advanced the argument that the letter dated 28 March 2007 did not constitute an independent agreement, but rather formed an integral part of the Cooperation Agreement which included an arbitration clause. The Supreme Court maintained that if the letter dated 28 March 2007 was considered as an independent promissory declaration, any claims based on such declaration would be excluded from the material scope of the arbitration clause. However, the Supreme Court further explained that as A did not contest the jurisdiction of the tribunal during the arbitral proceedings, but instead was deemed to have accepted the jurisdiction of the sole-arbitrator by unreservedly commenting on the merits, A could not belatedly rely on such an argument as a ground for setting aside the award. As a result, the Supreme Court rejected the application to set aside the award.

Comment: The Supreme Court's decision is correct and the principle it is based on is well established. This decision therefore serves more as a reminder for counsel.[29] First, when an arbitration procedure has its seat in Switzerland and is subject to the ICC Rules, a plea of lack of jurisdiction must be

[29] This is correctly pointed out by VOSER/BELL, Swiss Supreme Court confirms requirement under Swiss law to timely file objection to jurisdiction, available at: http://www.swlegal.ch/getdoc/86f868d0-875d-4856-bbad-30ddb8dab5b3/2015_Nathalie-Voser_Katherine-Bell_Swiss-Supre-(1).aspx (last visited: 26 August 2016). See also SCHERER, Introduction to the case law section, in: ASA Bull. 2/2016, p. 387 *et seq*.

raised prior to any defense on the merits pursuant to Article 186(2) PILA. Second, counsel must bear in mind that the potential need to object to the jurisdiction of the arbitral tribunal may constitute an alternative line of argumentation in the event that the main argument on the merits is not successful.

c) ATF 141 III 495 (Decision No. 4A_34/2015 of 6 October 2015)

Facts: In 2000, the French company B became the majority shareholder of C, a Hungarian company active in the field of heat and electricity production. This majority stake qualified as a foreign investment under the Energy Charter Treaty (ECT). One major incentive for this investment was the fact that C could benefit from long-term power purchase agreements (PPAs) entered into with a state-owned company, which allowed it to sell power at a more attractive price than on the open market.

In 2008, four years after Hungary had joined the EU, the European Commission decided that the PPAs constituted state aids that were not compliant with EU competition law. As a result, the European Commission requested Hungary to terminate the PPAs and to seek reimbursement of the amounts unduly received by the electricity producers. However, the European Commission authorized the producers to be compensated by Hungary for the loss of investments caused by the early termination of the PPAs (so-called "stranded costs") within certain limits.

Hungary terminated the PPAs at the end of 2008. In 2010, it adopted a decree granting compensation for stranded costs to the producers but limiting the amount of such compensation to the amount of state aid they had to reimburse. Thus, Hungary sought to put in place a system whereby stranded costs were to be offset against the state aid that had to be reimbursed. As a consequence, producers who had stranded

costs above that ceiling would not be compensated for those additional costs. This was the case for B whose stranded costs were almost twice the amount of the reimbursable state aids. Moreover, in another decree of 2011, Hungary capped the maximum profit that producers such as C were allowed to make.

B then brought a claim against Hungary based on Article 26 ECT for breach of the protection awarded to investors according to the ECT.

An arbitral tribunal seated in Zurich was constituted pursuant to the UNCITRAL arbitral rules and under the aegis of the Permanent Court of Arbitration. In a final award rendered on 3 December 2014, the arbitral tribunal dismissed Hungary's jurisdictional objections and held that, although the termination of the PPAs did not constitute a breach of the ECT, Hungary's failure to adequately reimburse C's stranded costs within the limits allowed by EU law violated the ECT's fair and equitable treatment standard. Considering that the cap imposed by Hungary on the recovery of stranded costs was not mandated by EU law, B's legitimate expectation that no such cap would apply had been breached. In addition, the arbitral tribunal decided that the implementation of the 2011 decree constituted another breach of B's legitimate expectations under Article 10(1) of the ECT providing that each contracting party shall ensure fair and equitable treatment of investments of investors of other contracting parties (FET). The last sentence of Article 10(1) further provided that "*[e]ach Contracting Party shall observe any obligations it has entered into with an investor or an investment of an investor of any Contracting Party*". Accordingly, the arbitral tribunal ordered Hungary to pay damages to B.

Hungary filed an application to set aside the award before the Supreme Court.

Hungary's challenge *inter alia* relied on Article 190(2)(b) PILA. Hungary argued that the arbitral tribunal had wrongly accepted jurisdiction. According to Hungary, the arbitral tribunal incorrectly assessed the claim to be a "treaty claim" based on FET when it was actually a contract claim falling under the so-called "umbrella clause" to which Hungary made a reservation regarding arbitration. It stated that consent to arbitrate should not be admitted lightly, especially where a sovereign state has expressly withheld its consent for a specific category of disputes. In accordance with the principle of *"in dubio mitius"*, one should prefer the interpretation of the treaty which is the less burdensome for the party undertaking the obligation, namely a meaning which limits as much as possible the scope of the state's consent to have investment disputes submitted to arbitration. According to Hungary, a failure to meet an investor's expectations that a contract with the host state will be concluded cannot alone be equated to a violation of the FET standard under the ECT.

Decision: The Supreme Court dismissed the application.

The main issue in the award was whether the claim brought by B was a so-called treaty claim benefiting from the protection of the FET pursuant to Article 10 ECT or whether it was a so-called contract claim governed by the "umbrella clause" to which Hungary had withheld its consent regarding arbitration.

The Supreme Court first clarified the difference between treaty and contract claims. Contract claims are claims which investors raise based on the contract they have concluded with the host state. They do not fall within the scope of investment treaty protection and its related jurisdictional clauses. Given that this represents a greater risk for investors, investment protection treaties regularly contain a so-called "umbrella clause" whereby the contract is placed under the "umbrella" of the treaty in order to benefit from its protection, including the possibility to submit a claim to the adjudicatory

bodies foreseen in that treaty. In the case at hand, the Supreme Court agreed with Hungary that the last sentence of Article 10(1) ECT represents an umbrella clause.

In contrast, treaty claims concern treaties between the national state of the investors and the host state and aim to provide for reciprocal protection of their investors. Treaty claims incorporate substantive undertakings such as the necessity to provide a FET to the investors and include a jurisdiction clause submitting investment disputes *inter alia* to an independent arbitral tribunal, such as Article 26(2)(c) ECT which allows the investor to choose between several types of arbitration.

Referring to the Vienna Convention on the Law of Treaties, the Supreme Court stated that the ECT must be interpreted in good faith according to the ordinary meaning of the words of the treaty, in their context, and in the light of the treaty's object and purpose.

The Supreme Court held that Hungary's excessively broad reading of the last sentence of Article 10(1) ECT did not hold to the extent that it would assimilate any treaty claim to a contract claim falling under the umbrella clause, thus depriving the parties of the possibility of arbitration due to Hungary's reservation. As a consequence, this would defeat the ECT's FET standard of its effect. Such an interpretation would prevent an investor from alleging a violation of the FET standard for the sole reason that it had concluded a contract with the host state or a state-owned entity or invested in a company which had entered into such a contract.

The Supreme Court decided that the arbitral tribunal had assessed and rightly accepted B's qualification of its claims and held that what was the main issue was not the premature termination of the PPAs, but rather Hungary's failure to implement an adequate system of compensation for C's stranded costs within the limits allowed by EU law. This

constituted a violation of the duty to provide a FET and gave rise to a treaty claim. Moreover, the Supreme Court agreed with the tribunal's conclusion that this type of claim acknowledged the general duties of the host state, under the first sentences of Article 10(1) of the ECT, to give investors of other contracting parties a fair and equitable treatment with respect to their investments.

Comment: This interesting case raised various issues regarding jurisdiction and was the Supreme Court's first fully-fledged decision on investment treaty arbitration.[30] Thus, this decision was rightfully published in the Supreme Court's reporter.

The Supreme Court adopted a narrow approach towards the interpretation of the umbrella clause for which Hungary had withheld its consent to arbitration, and conversely, a rather broad interpretation of the host state's general obligation to accord fair and equitable treatment to all investments made under the ECT for which Hungary had consented to arbitration. In the present case, the Supreme Court clearly decided that states could not "shut the umbrella" by withholding consent to arbitration.

The Supreme Court's decision is fully consistent with Switzerland's established tradition as a place where the judicial review of international arbitral awards is limited and arbitration-friendly. Thus, the Supreme Court made clear that it also intends to apply this arbitration-friendly approach with

[30] For further analysis of this decision of the Supreme Court see also CREMADES, Swiss Supreme Court rejects Hungary's application to set aside award under Energy Charter Treat, available at: http://www.swlegal.ch/getdoc/fe447a43-cabd-4e97-8ff3-b38c0e9f6652/2015_Nathalie-Voser_Anne-Carole-Cremades_ Swiss-Sup.aspx (last visited: 26 August 2016); PONCET, The Swiss Supreme Court addresses the difference between treaty claims and contract claims, available at: http://www.swissarbitrationdecisions.com/swiss-supreme-court-addresses-difference-between-treaty-claims-and-contract-claims (last visited: 26 August 2016); MENZ, Die bundesgerichtliche Rechtsprechung zur Schiedsgerichtsbarkeit 2014/2015, in: Jusletter 4 April 2016, N 52 *et seqq.*

respect to investment treaty arbitrations. In addition, the Supreme Court's reasons demonstrate that the court was very reluctant to second-guess the arbitrators' findings and approach taken during the arbitration proceedings.

d) Decision No. 4A_176/2015 of 9 November 2015

Facts: By agreement of July 2011, a FIFA-affiliated Ecuadorian football club (A) issued a document on its own letterhead, in which A undertook to pay to the players' agent (B) an amount in twelve identical instalments (Agreement). These payments were for B's intermediary services and sports advice. Subsequently, only the first two instalments were paid to the agent.

In May 2012, B filed a claim for payment with FIFA's Player's Status Committee (PSC) pursuant to the agreement and requested from A the payment of the outstanding balance plus interest. In a decision dated 25 February 2014, the PSC decided that the claim was inadmissible on the ground that B had not sufficiently established that his activities fell under the scope of FIFA's Players Agents Regulations of 2008 (PAR) which "*govern the occupation of players' agents who introduce players to clubs with a view to negotiating or renegotiating an employment contract or introduce two clubs to one another with a view to concluding a transfer agreement within one association or from association to another*".

In May 2014, B appealed the decision to a CAS-appointed sole arbitrator. A did not formally respond to the appeal and added a hand-written objection to a procedural order, signed by both parties, that it contested the CAS' subject matter jurisdiction. In January 2015, the arbitrator decided on the appeal and rendered his award deciding that B's appeal was admissible. The arbitrator maintained that he was competent to decide on his jurisdiction pursuant to Article 186 PILA, Article 67 FIFA Statutes, R27 CAS Code and that A's PAR-based objection, as a matter of substantive law, did not affect his jurisdiction in

any way. Moreover, the arbitrator decided that B had demonstrated that the services due under the Agreement were provided in his capacity as a players' agent within the scope of the PAR and that in this context, A had failed to discharge its burden to prove otherwise. According to the arbitrator, the PSC decision of February 2014 was to be set aside and as a result, B was to be awarded the amount plus interest from A.

In March 2015, A filed a motion with the Supreme Court to set aside the CAS award. In its motion, A argued that the arbitrator had wrongly accepted jurisdiction to hear the case. A alleged that B had not succeeded in showing that his services were being provided in his capacity as a players' agent and in fact, fell within the scope of the PAR. According to A, the arbitrator had unduly shifted the burden of proof. On the other side, B requested that A's claim be dismissed.

Decision: The Supreme Court rejected the application to set aside the award.

The Supreme Court confirmed that the CAS arbitrator had correctly established jurisdiction. In this respect, the Supreme Court approved the arbitrator's legal reasoning with respect to his jurisdiction and ability to substitute the earlier PSC decision. The Supreme Court further decided that the arbitrator's conclusions based on the relevant factual evidence presented to him were binding on the Supreme Court.

Ultimately, the Supreme Court pointed out that the CAS award was not decided based on a shifting of the burden of proof as alleged by A. According to the Supreme Court, the arbitrator had simply stated that in his view, B's services fell within the scope of the PAR. As a consequence, the party challenging this finding (here A) bore the burden of establishing the correct legal basis, or in absence thereof, the obligation that A had assumed.

Comment: This decision confirms the well-known difficulty of successfully challenging an arbitrator's jurisdiction under the Swiss *lex arbitri*, particularly in the event that the arbitrator has declared that he has jurisdiction based on questions of fact.[31]

e) Decision No. 4A_562/2015 of 9 December 2015

Facts: According to a loan agreement, the sons of FA (CA, EA, DA and AA) had the right to freely use determined buildings located in Rome, owned by company B (Loan Agreement). Pursuant to the agreement, ownership of the determined buildings could be transferred to FA's sons in the event that B was put into liquidation, on the condition that three of the sons signed a request for transfer. In addition, the Loan Agreement included a provision stating that the parties were to submit disputes with respect to its effect or interpretation to a sole arbitrator.

Subsequently, CA and DA started arbitration proceedings with the objective of giving effect to the provision concerning the transfer of ownership. AA and company B objected to the arbitrator's jurisdiction. On 28 April 2015, the arbitrator confirmed his jurisdiction in an interim award. On 9 October 2015, AA and B challenged the arbitrator's interim award *inter alia* based on the ground that the arbitrator lacked jurisdiction pursuant to Article 190(b) PILA.

According to AA and B, the arbitrator wrongly accepted jurisdiction considering that the arbitral proceedings did not include all of FA's heirs, in particular his widow. Further, AA and B argued that the issue was not covered by the

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[31] For further analysis of this decision of the Supreme Court see VOSER/ESCHMENT, Swiss Supreme Court confirms CAS jurisdiction in dispute over activities of players' agent, available at: http://www.swlegal.ch/getdoc/37c76276-8b4a-4da1-95bf-db1559fefaef/2015_Nathalie-Voser_Jorn-Eschment_Swiss-Supreme-Co.aspx (last visited: 26 August 2016).

agreement. Lastly, AA and B argued that the three necessary signatures were missing.

Decision: The Supreme Court rejected the motion to set aside the interim award.

The Supreme Court confirmed that a party's standing to sue or to be sued is a matter of substantive law which does not concern the jurisdiction of the arbitral tribunal. It held that disputes arising from the interpretation and execution of an agreement concern the merits of the case and not the arbitrator’s jurisdiction.

As a result, the Supreme Court found no grounds to set aside the award on jurisdiction.

Comment: The present case shows that Supreme Court clearly separates issues of substantive law from those pertaining to jurisdiction.[32] Accordingly, the matter of standing is a question of substantive law and must be distinguished from the question of whether there is a valid arbitration agreement which establishes jurisdiction.

f) Decision No. 4A_392/2015 of 10 December 2015

Facts: An Israeli national (A) and a Swiss national (B) agreed to submit a dispute regarding a common business to arbitration. A and B each signed a power of attorney mandating a Geneva lawyer to act as the sole arbitrator. The appointed sole arbitrator drafted a summary of the facts presented to him by the parties. Subsequently, the Parties signed an arbitration agreement explicitly referring to that summary of facts.

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[32] For further analysis of this decision of the Supreme Court see VOSER/PETTI, Swiss Supreme Court distinguishes between being a party to an arbitration agreement and having standing to sue, available at: http://www.swlegal.ch/getdoc/8d9666b0-facd-47c2-83cb-8f4d014cab3d/2016_Nathalie-Voser_Angelina-M-Petti_Distinction-m.aspx (last visited: 26 August 2016).

A then commenced proceedings before the sole arbitrator and filed a request to order B to pay an amount in excess of a certain sum. B filed a brief submission, but failed to take part in the proceedings thereafter. On 10 June 2015, the arbitrator rendered an award in favor of A. B then filed a motion to the Supreme Court to set aside the award.

B argued *inter alia* that the arbitration agreement was invalid and that the sole arbitrator lacked jurisdiction to hear the case according to Article 190(2)(b) PILA, as the subject-matter of the dispute was not sufficiently determined according to the powers of attorney and the arbitration agreement signed by the parties.

Decision: The Supreme Court rejected the challenge based on Article 190(2)(b) PILA referring to its long-standing practice that according to Article 186(2) PILA, a jurisdictional challenge must be raised before any argument is entered on the merits. In the case at hand, the appellant B filed a brief submission at the beginning of the arbitral proceedings, but failed to take part in the proceedings until the final award was issued.

In this respect, the Supreme Court stated that B failed to sufficiently raise his challenge in the arbitration proceedings. As a consequence, the Supreme Court held that he was barred from invoking this argument in support of a motion to set aside the award.

Comment: This decision serves as a reminder that a party who does not raise procedural or jurisdictional objections during the arbitration proceedings is generally precluded from raising those arguments before the Supreme Court.[33]

[33] For further analysis of this decision of the Supreme Court see VOSER/GEORGE, Swiss Supreme Court examines jurisdictional and public policy challenge, available at: http://www.swlegal.ch/getdoc/482fb47d-1003-4372-835b-52c986024926/2016_Nathalie-Voser_Anya-George_Swiss-Supreme.aspx (last

g) Decision No. 4A_428/2015 of 1 February 2016

Facts: Seller (A) and purchaser (B) concluded a share purchase agreement (SPA) providing for ICC arbitration in Zurich. As to the purchase price, the SPA contained a clause providing for a price adjustment mechanism setting out a framework according to which the buyer had to prepare certain documents and hand them over to the seller. According to this mechanism, the seller was then required to submit a "Notice of Objection" within a certain period of time in the event that it wished to object to the documents prepared by the buyer. If such Notice of Objection was submitted, the price had to be assessed by a neutral auditor whose determination would be binding.

Since the parties could not agree on the price adjustment, an auditor was appointed. In his expert opinion, he assessed the adjustment amount to be paid by the purchaser to the seller at EUR 2'473'613.--. However, B rejected this assessment.

In February 2014, A initiated arbitration proceedings. B argued that A had failed to submit a "Notice of Objection" meeting the requirements set out in the SPA and that the previously set purchase price had become binding regardless of the expert opinion. It opposed the purchase price claim and submitted a counterclaim requesting A to pay EUR 1'354'000.-- plus interest.

The arbitral tribunal held that A did not submit a "Notice of Objection" corresponding to the requirements of the SPA and that the documents prepared by B – including the "Adjusted Purchase Price Determination Certificate" – were final and binding upon the parties. As a consequence, it upheld the counterclaim and ordered A to pay a certain amount.

visited: 26 August 2016); SCHERER, Introduction to the case law section, in: ASA Bull. 2/2016, p. 389.

A challenged the award before the Supreme Court arguing that the arbitral tribunal had violated the provisions concerning jurisdiction pursuant to Article 190(2)(b) PILA. A asserted that the arbitral tribunal did not have jurisdiction according to the SPA to disregard the expert opinion because the requirements for a "Notice of Objection" were not fulfilled.

Decision: The Supreme Court dismissed the motion to set aside the award.

According to the Supreme Court, a party wishing to challenge an arbitrator, or object to the jurisdiction of an arbitral tribunal, forfeits its claims if it does not raise them in a timely manner in the arbitration and if it does not undertake all reasonable efforts to remedy the error to the extent possible. The Supreme Court also underlined that it is contrary to good faith to raise a procedural error only in the framework of an appeal when it would have been possible to do so in the arbitration, thus giving the arbitral tribunal the possibility to correct the alleged error. In the same way, a party acts contrary to good faith and in an abusive manner when it holds the grievance in reserve only to raise it in case the arbitration takes an unfavorable turn and a loss appears foreseeable. The Supreme Court maintained that when a party participates in an arbitration without challenging the jurisdiction of the arbitral tribunal or the arbitrator, even though it has the opportunity of resolving the matter before the award is issued, it cannot raise the corresponding argument in the appeal proceedings because they were forfeited.

As to the arbitral tribunal's jurisdiction, the Supreme Court held that A's opinion cannot be followed when it claims to have already raised the alleged lack of jurisdiction in the arbitral proceedings. The Supreme Court stated that A itself appeared before the arbitral tribunal in order to claim the amount against B determined by the auditor. In doing so, the Supreme Court underlined that A stated that, in its view, the expert opinion was not an enforceable legal title having *res judicata*

effect, but that a decision of the arbitral tribunal was needed in this respect. Accordingly, A did not challenge the jurisdiction of the arbitral tribunal to assess the validity of the expert opinion issued or the contractual requirements regarding the "Notice of Objection" according to the SPA. In contrast, during the arbitration proceedings, A signed the Terms of Reference which specified that whether the "Notice of Objection" met the requirements of the SPA was an issue to be determined by the arbitral tribunal.

Comment: The Supreme Court reiterated its case law, according to which in the event that an arbitral tribunal is challenged or if its jurisdiction is disputed, an objection must be raised immediately in the arbitration proceedings.[34] If there is a procedural error, it too must be raised at once so that the arbitral tribunal has an opportunity to correct it. A party that does not challenge the jurisdiction of the tribunal in the arbitration proceedings but instead brings a claim itself and addresses the merits without any reservation, forfeits the right to argue a lack of jurisdiction of the arbitral tribunal before the Supreme Court. This is well-established case law and nothing new.

h) ATF 142 III 239 (Decision No. 4A_84/2015 of 18 February 2016)

Facts: The case at hand involved the relationship between an Iranian company (X) and a Cypriot company (Z) with regard to the sale of steel products by Z to X. In spring 2012, a couple of transactions were concluded, including a sales contract,

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[34] For further analysis of this decision of the Supreme Court see PONCET, Objections not raised in the arbitration are forfeited, available at: http://www.swissarbitrationdecisions.com/objections-not-raised-arbitration-are-forfeited (last visited: 26 August 2016); VEIT, 4A_428/2015: Beteiligt sich eine Partei an einem Schiedsverfahren, ohne die Zuständigkeit des Schiedsgerichts in Frage zu stellen, ist sie mit der entsprechenden Rüge vor Bundesgericht wegen Verwirkung ausgeschlossen, available at: http://www.swissblawg.ch/2016/02/4a4282015-beteiligt-sich-eine-partei.html (last visited: 26 August 2016).

whereupon Z sent X pro forma invoices. With the exception of an advance payment, X did not pay the invoices.

Along with the sales contract, a draft Framework Contract was sent to X containing provisions regarding the implementation of the sale of steel products in the framework of a long-term commercial relationship. It contained an arbitration clause providing for arbitration in Lugano according to the Swiss Rules. Starting in May 2012, a chain of correspondence began between the representatives of X and Z. In addition, various drafts of the Framework Contract were exchanged between them. During this process, the Framework Contract was never signed, no goods were delivered and no payments were made. However, it must be noted that the wording of the arbitration clause remained undisputed in the later exchanges of the various drafts.

In August 2013, a dispute arose between X and Z. Z initiated arbitration proceedings in Lugano pursuant to the unsigned Framework Contract. Z claimed payment of the outstanding invoices. X replied by claiming lack of jurisdiction. The appointed sole arbitrator finally issued an award on jurisdiction rejecting the defenses raised and upholding his jurisdiction. He held that despite the fact that the Framework Contract containing the arbitration clause was never signed by the parties, they had nevertheless agreed on the arbitration clause. Relying primarily on Article 178(3) PILA, the sole arbitrator concluded that the arbitration clause was binding. During the arbitration proceedings, X also alleged that the representatives involved in 2012 actually lacked the necessary authority to bind it. The sole arbitrator found that – based on the principles of good faith representation and subsequent ratification – the acts of the representative were authorized.

In February 2015, an appeal was made to the Supreme Court on the basis of Article 190(2)(b) PILA.

First, X argued that the principle of the autonomy of the arbitration clause was not applicable because the lack of agreement of the parties regarding the Framework Contract also had an impact on the arbitration clause. Second, X argued that the arbitration agreement was not valid as it was not signed and therefore was not in conformity with Article 16 of the CO. Third, X alleged that the representatives acting for X were in fact not properly authorized. Furthermore, X claimed that the dispute arising under the sales contract did not fall within the scope of the arbitration clause of the Framework Contract.

Decision: The Supreme Court rejected the motion to set aside the award.

The Supreme Court confirmed its long-held view that the arbitration agreement is independent from the main contract. According to the Supreme Court, the doctrine of separability of the arbitration clause "*means that the mere allegation of the non-existence of the main contract is not sufficient to put an end to the arbitrator's jurisdiction. However, if he finds that the main contract does not exist and that the cause for such non-existence also impacts the arbitration agreement, he must deny jurisdiction*". The Supreme Court confirmed the basic principle that when a party does not consent to the main contract, the lack of consent will in principle also extend to the arbitration agreement contained therein. Nevertheless, the Supreme Court maintained that exceptions to this general rule are possible under particular circumstances. For instance, if the parties have concluded previous contracts including the same arbitration clause; or if the parties have an objective interest in choosing arbitration, such as the neutrality of the forum, the choice of an international language, confidentiality etc.; or if the draft contracts exchanged show that the parties agreed to conclude an arbitration agreement irrespective of the outcome of the main agreement. In this respect, the Supreme Court pointed out that in the present case the

parties, after they had discussed the arbitration clause during the first exchange of the draft Framework Agreement, left the apparently agreed clause unchanged in later drafts.

As to the requirements of form, the Supreme Court considered that the Framework Contract was in writing pursuant to Article 178(1) PILA. In this respect, it pointed out that Article 178(1) PILA is mandatory in the sense that the parties cannot agree to a less stringent requirement as to form. It did not finally decide the questions of whether the parties may agree on more stringent requirements or whether a clause containing stricter requirements as to form in the main contract also extends to the arbitration agreement. However, the Supreme Court indicated that it would support the principle of freedom of contract and thus the parties' liberty to agree on stricter form requirements, because any such agreement would serve the aim of Article 178(1) PILA to ascertain the clear will of the parties to submit to arbitration. In the case at hand, the Supreme Court stated that the sole arbitrator did not find in his award that the parties waived the simple written form foreseen in Article 178(1) PILA in favor of a stricter form requiring the signatures of all parties for a valid arbitration agreement. Based on these facts the Supreme Court rejected the argument of X of an alleged violation of Article 16 CO. The Supreme Court held that pursuant to Article 178(1) PILA a simplified written form is sufficient for an arbitration agreement. It must be in writing, but it does not need to be signed.

With respect to the authorization of the party representatives, the Supreme Court held that the challenge was inadmissible given that the sole arbitrator had relied on good faith representation and ratification to find that X's representatives were authorized.

The Supreme Court further confirmed that the substantive validity of the arbitration agreement had to be assessed under Swiss law (Article 178(2) PILA). According to the sole

arbitrator, there was a common subjective intent of the parties to submit their disputes to arbitration. As this constituted a finding of fact, the Supreme Court was bound by it.

Moreover, the Supreme Court rejected the argument that the dispute did not fall within the scope of the arbitration clause as it was connected to the previously concluded sales contract. In this context, the Supreme Court referred to the group of contracts theory stating that it may be presumed that the parties agreed to arbitration where there is a material connection between a group of contracts, even though only one of them contains an arbitration clause. According to the Supreme Court, the Framework Contract and the sales contract were directly interconnected.

Comment: This is an interesting and important case.[35] It is yet another example of the Supreme Court confirming its traditionally liberal and arbitration-friendly approach when interpreting arbitration clauses and with respect to the requirements to submit to arbitration in general.

This decision also addresses the important issue of whether parties have agreed to arbitrate when exchanging drafts of a contract. The Supreme Court states that in general, parties do not conclude an arbitration agreement when exchanging drafts. However, this is possible under exceptional circumstances. In fact, it appears that the present case is not that exceptional, as parties often exchange draft contracts in

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[35] For further analysis of this decision of the Supreme Court see PONCET, Unsigned arbitration clause upheld, available at: http://www.swissarbitration decisions.com/unsigned-arbitration-clause-upheld (last visited: 26 August 2016); VOSER/MENZ, Can parties be bound to arbitration before signing a contract?, available at: http://www.swlegal.ch/getdoc/e6d2cf14-4eec-4306-ab28-a61e3702a933/2016_Nathalie-Voser_James-Menz_Can-parties-be-boun.aspx (last visited: 26 August 2016); VEIT, 4A_84/2015: Zuständigkeit des Schiedsgerichts auf der Grundlage einer Schiedsklausel in einem nicht unterzeichneten Hauptvertrag (amtl. Publ.), available at: http:// www.swissblawg.ch/2016/03/4a842015-zustandigkeit-des.html (last visited: 26 August 2016).

which they reach consensus on some elements but not on the final deal. In this respect, the Supreme Court states that international parties are often in the position in which they would objectively favor arbitration due to its neutral form, choice of international language and confidentiality. It is interesting to note that the Supreme Court has held twice within a short period of time that international arbitration has become the default dispute resolution mechanism for international commercial transactions.[36]

This decision further confirms that Article 178(1) PILA constitutes a mandatory provision setting out minimum requirements from which the parties cannot derogate. The question of whether parties can agree on stricter requirements was officially left open. However, it appears that the Supreme Court favors allowing parties to agree on stricter form requirements based on the principle of party autonomy.

In general, the Supreme Court notes that it will be in the interest of parties to international contracts to have pre-contractual claims adjudicated by an arbitral tribunal if a dispute arises and the main contract has not yet been finalized. Therefore, if the parties do not want to refer their pre-contractual or related disputes to arbitration, it is advisable to insert an explicit reservation in the draft contracts.

i) ATF 142 III 296 (Decision No. 4A_628/2015 of 16 March 2016)

Facts: X and Y signed a total of four contracts relating to the search and exploitation of oil deposits. All four contracts included or referred to the same dispute resolution clause providing for arbitration in Geneva according to the UNCITRAL Arbitration Rules. However, this clause also contained a mandatory requirement that conciliation pursuant to the ICC

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[36] See decision no. 4A_136/2015 of 15 September 2015 above at p. 128 et seq.

ADR Rules in force as from 1 July 2001 should be attempted first.

After differences arose between the parties, Y started conciliation proceedings with the ICC International Centre for ADR by submitting a demand for conciliation. The parties agreed that the ICC ADR Rules in force as of 1 July 2001 would apply to the conciliation and that a first meeting should take place by way of a conference call. However, this first meeting never took place as it appeared impossible to organize a conference call or a meeting with the parties, their representatives and the conciliator in a setting that both parties could agree on.

Y then initiated arbitration proceedings against X and informed the conciliator that the conciliation had failed due to the behavior of the other party. X contested the initiation of the arbitration proceedings by informing the conciliator that there was no reason to declare the conciliation proceedings closed. Thereupon, the conciliator informed the parties that she could not close the proceedings without having held a meeting as foreseen in Article 5(1) ADR Rules. Accordingly, she proposed new dates for a meeting. As Y continued to argue that the conciliation had ended, the conciliator then informed the parties and the ADR Centre that Y had withdrawn from the proceedings. Later on, the ADR Centre declared the proceedings as terminated due to Y having failed to pay its share of the advance payment.

Y pursued the initiated arbitration proceedings under the UNCITRAL Arbitration Rules. X participated in the composition of the arbitral tribunal but objected that the arbitral tribunal lacked jurisdiction *ratione temporis* since the mandatory pre-arbitration conciliation proceedings had not taken place. After a double exchange of briefs on the question of the tribunal's jurisdiction, the arbitral tribunal bifurcated the arbitration proceedings and rendered a preliminary award accepting jurisdiction.

X filed a motion to set aside the award arguing that the arbitral tribunal had wrongly accepted jurisdiction pursuant to Article 190(2)(b) PILA. X alleged that conciliation proceedings in accordance with the agreement did not take place. As a consequence, the arbitral tribunal should have declined its jurisdiction *ratione temporis* or stayed the arbitration proceedings in order to allow the holding of a meeting between the parties and the conciliator.

In contrast, Y argued that relying on the pre-arbitral dispute resolution mechanism constituted an abuse of rights, as Y itself had commenced the conciliation proceedings. According to Y, X had neither sought a suspension of the arbitration to attempt conciliation, nor otherwise acted in accordance with its alleged desire to seek an amicable solution. Furthermore, Y argued that the parties' contract merely required an attempt at conciliation, but no strict compliance with the ADR Rules. Moreover, Y maintained that the arbitral tribunal was not bound by the statements of the conciliator and the ICC ADR Center with regard to the termination of the ADR proceedings. It argued that an attempt at conciliation had been made and that the tribunal had properly held that the discussions according to Article 5(1) ADR Rules had taken place.

Decision: The Supreme Court granted X's application and set aside the jurisdictional award.

First, the Supreme Court analyzed the alternative dispute resolution mechanism that the parties had agreed on by applying the general principles of contract interpretation (subjective interpretation followed by objective interpretation). It found – in particular based on the clear wording of the clause – that the parties had wanted the recourse to arbitration to be conditional on the conduct of conciliation proceedings in compliance with the agreed ADR Rules.

Second, the Supreme Court assessed whether the parties conducted such a conciliation and held that such a conciliation had not been conducted. As to the procedure, the Supreme Court pointed out that Article 5(1) of the ADR Rules required a meeting, which does not have to be a physical one, before either party could unilaterally terminate the conciliation. The Supreme Court held that such a meeting never took place.

Consequently, the Supreme Court had to examine whether X's objection to the arbitral tribunal's jurisdiction was an abuse of right. It distinguished this case from its earlier case law on this subject[37] where the court held that a challenge to an award based on an alleged failure to have complied with the requirements of the pre-arbitration conciliation was an abuse of right. The Supreme Court stated that the present case was very different from the earlier one because the party challenging the award (X) had actively taken part in the conciliation and had immediately raised an objection to the jurisdiction of the arbitral tribunal after Y had initiated arbitration proceedings. The Supreme Court further rejected the allegation that a new conciliation would not have been successful and noted that X had not abused its rights by objecting to the jurisdiction of the arbitral tribunal.

In a next and final step, the Supreme Court had to decide on the consequences of a breach of a compulsory pre-arbitral ADR procedure.

First, the Supreme Court underlined that a breach had to be sanctioned. It then pointed out that such a breach should not entail a claim for damages for breach of contract as this would not be a satisfactory solution. Rather, such breach should entail procedural consequences. However, the Supreme Court maintained that it should not result in a declaration of inadmissibility or even a dismissal of the claim on the merits. In line with the majority view of Swiss scholars, the Supreme

[37] See Decision No. 4A_18/2007 of 6 June 2007, para. 4.3.3.1.

Court held that the appropriate sanction in such cases is to suspend the arbitration proceedings combined with the fixing of a deadline for the parties to conduct a conciliation.

As a result, the Supreme Court upheld the challenge, annulled the award and ordered the suspension of the arbitration proceedings until the pre-arbitral ADR procedure had been conducted. The Supreme Court left the further modalities of the suspension – namely the fixing of a time limit for the suspension – to the arbitral tribunal.

Comment: This published case is important and led to the annulment of the award, which only happens on rare occasions.[38]

The decision clarifies the issue of what the sanction should be in the event a party fails to comply with its obligation to mediate first before initiating arbitration proceedings. First, the Supreme Court rejected the possibility of awarding damages because it would be almost impossible to substantiate such damages. In addition, it rejected the option of dismissing the claim as the arbitral tribunal would then become *functus officio* and a new arbitral tribunal would have to be constituted in order to hear the case once the conciliation had been conducted. In the meantime, the claim might face the risk of being time-barred. As a result, the Supreme Court pragmatically concluded that when a party

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[38] For further analysis of this decision of the Supreme Court see STUTZER/BÖSCH/HOHLER, Don't jump to the gun! Lack of jurisdiction in case of failure to comply with pre-arbitration dispute resolution provisions, available at http://thouvenin.com/wp-content/uploads/2016/04/Arbitration-Newsletter-Switzerland.pdf (last visited: 26 August 2016); BOOG/MENZ, Failure to comply with mandatory pre-arbitral tier can result in stay of arbitration, available at: http://www.swlegal.ch/getdoc/db59faff-ea24-4a57-a530-07ebd1305801/2016_Christopher-Boog_James-Menz_Failure-to-comply.aspx (last visited: 26 August 2016); PONCET, Mandatory pre-arbitration procedure not complied with results in annulment of the award, available at: http://www.swissarbitrationdecisions.com/mandatory-pre-arbitration-procedure-not-complied-results-annulment-award?search=4A_628%2F2015 (last visited: 26 August 2016).

disregards a mandatory contractual pre-arbitration tier without a valid excuse, the arbitral tribunal must stay the arbitration until the pre-arbitral dispute resolution mechanism has been complied with. The Supreme Court found that this is the appropriate solution as it balances the interests of the parties appropriately.

Accordingly, this decision clarifies the necessary steps to be taken when dealing with multi-tiered dispute resolution clauses.

1) Decide whether the pre-arbitral clause is mandatory.

2) If it is mandatory, analyze whether the party seeking to rely on the non-compliance of the pre-arbitral clause acted in good faith.

3) If the party acted in bad faith, such party cannot rely on the non-compliance of the pre-arbitral clause, even if the latter is indeed mandatory.

4) If the party acted in good faith and the pre-arbitral clause is mandatory, the arbitral tribunal must stay the arbitral proceedings until the conciliation proceedings have been conducted.

j) Decision No. 4A_173/2016 of 20 June 2016

The Supreme Court confirmed that if the jurisdiction of the arbitral tribunal is disputed pursuant to Article 190(2)(b) PILA, a challenge must be immediately raised in the arbitration proceedings. A party holding back a procedural error or a challenge which it could have raised during the arbitration, acts in bad faith and forfeits the right to raise the argument before the Supreme Court.

In the case at hand[39], A did not raise the issue of lack of jurisdiction during the arbitration proceedings. The Supreme Court noted that A explicitly accepted the tribunal's jurisdiction regarding contractual claims in its statement of defense. Therefore, the Supreme Court dismissed the appellant's objection.

k) Decision No. 4A_132/2016 of 30 June 2016

In this case, the appellant asserted for the first time before the Supreme Court that the arbitration agreement was invalid and claimed a violation of Article 190(2)(b) PILA.[40] The Supreme Court held that the appellant A acted in bad faith by not raising this issue in the arbitration proceedings. Pursuant to Article 190(2)(b) PILA, a challenge must be immediately raised in the arbitration proceedings. A party holding in reserve a procedural error or a challenge that it could have raised in the arbitration proceedings forfeits the right to raise it before the Supreme Court. Accordingly, the respective objection was rejected.

3. Decision ruling beyond claims submitted or failing to adjudicate claims (Article 190(2)(c) PILA)

a) Decision No. 4A_218/2015 of 28 October 2015

Facts: Mr. Y died, leaving as heirs his wife (A), his daughter (X) and his three sons (B), (C) and (D). After Y's death, a dispute arose between X and the other heirs in relation to the estate. On 8 March 2011, the parties concluded a settlement agreement. The settlement agreement contained an arbitration clause providing for disputes to be submitted to an arbitral tribunal made up of three arbitrators and designated Geneva as the seat of arbitration. Pursuant to the settlement

[39] As to the facts of the case see above, p. 126 et seq.

[40] As to the facts of the case see below, p. 198 et seq.

agreement, a party who breached any of the provisions of the agreement or initiated arbitration proceedings against another party but was unsuccessful, was liable to pay contractual penalties to the other party.

In 2012, X partially voided the settlement agreement, whereupon A, B, C and D responded by declaring that the agreement was null and void. Subsequently, they initiated arbitration proceedings against X.

A, B, C and D *inter alia* demanded the arbitral tribunal to confirm the full, or alternatively, the partial invalidity of the settlement agreement, to order X to return certain assets to the estate and to make an individual payment of a specified amount to A, B, C and D each. X replied requesting the arbitral tribunal to confirm the partial voidance of the agreement and raised a counterclaim for contractual penalties.

The arbitral tribunal rejected A, B, C and D's claim in its entirety and ordered A, B, C and D to pay X contractual penalties in accordance with the settlement agreement.

A, B, C and D then challenged the award before the Supreme Court arguing first, that the arbitral tribunal had rendered an award *infra petita* within the meaning of Article 190(2)(c) PILA by not having addressed their alternative requests and second, that the arbitral tribunal had rendered an award *ultra petita* within the meaning of Article 190(2)(c) PILA by awarding X more than she had requested.

Decision: The Supreme Court rejected the application to set aside the award.

First, the Supreme Court dismissed the argument, that the arbitral tribunal had rendered an award *infra petita* within the meaning of Article 190(2)(c) PILA. As the arbitral tribunal had formally rejected all of the appellants' claims, it had also rejected their alternative requests. The Supreme Court pointed out that A, B, C and D were in fact criticizing the

arbitral tribunal for not having addressed an important argument of their claim when it rendered the award. According to the Supreme Court, this concerns the parties' right to be heard according to Article 190(2)(d) PILA and is not within the scope of Article 190(2)(c) PILA. Given that the arbitral tribunal had, in any case, addressed the relevant claim when reaching its decision and moreover, given that A, B, C and D had failed to invoke a violation of Article 190(2)(d) PILA, there was no reason for the Supreme Court to set the award aside.

Second, the Supreme Court rejected the argument that the arbitral tribunal had rendered an award *ultra or extra petita* within the meaning of Article 190(2)(c) PILA by awarding X more than she had requested. According to the Supreme Court, an award is only considered to be *ultra petita* in the event that the total amount awarded to a party is beyond the total amount claimed by that party. This also holds true if the arbitral tribunal construed certain claims differently or relied on different legal grounds. The principle of *iura novit curia* applies also in arbitration proceedings.

In the case at hand, the Supreme Court considered that the award was not *ultra petita*, given that the amount of contractual penalties awarded was not in excess of the total amount claimed by X.

Comment: The present case confirms that is very difficult to successfully challenge an arbitral award based on Article 190(2)(c) PILA.[41] The Supreme Court is only willing to set an award aside in clear-cut cases. This is not the case when the

[41] For further analysis of this decision of the Supreme Court see SCHERER, Introduction to the case law section, in: ASA Bull. 1/2016, p. 128; PETER, Der Grundsatz ne eat iudex ultra petita patrium, ius.focus, 11/2015 Heft 12; VOSER/GEORGE, Swiss Supreme Court rejects infra/ultra petita challenge to an award in an inheritance dispute, available at: http://www.swlegal.ch/getdoc/8f20d392-3663-470b-a2a9-6b5f217cb1bc/2015_Nathalie-Voser_Anya-George_Swiss-Supreme-Cour.aspx (last visited: 26 August 2016).

arbitral tribunal decides within the framework of the parties' claims.

b) Decision No. 4A_678/2015 of 22 March 2016

Facts: A Brazilian football player (B) and a Portuguese football club (A) concluded an employment contract for the term of 1 August 2009 until 30 June 2014. The contract provided for a gross monthly salary of EUR 16'670.--. Subsequently, B was lent by A to another football club until 30 June 2010.

After the end of the Portuguese football championship, B went on holiday to Brazil, but failed to return to Portugal for the beginning of the next season starting on 1 July 2010. A then terminated the contract with immediate effect stating that B had not returned in due time.

B filed a claim against A with FIFA's Dispute Resolution Chamber claiming damages in an amount of EUR 800'160.- due to unjustified termination. The Dispute Resolution Chamber partly accepted the claim and ordered A to pay EUR 550'000.- to B in damages for breach of contract.

Subsequently, both parties appealed the decision to the CAS. In an award of 16 September 2015, the CAS tribunal rejected A's appeal and accepted B's appeal in part by ordering A to pay EUR 550'000.- plus interest. All other motions were rejected.

Subsequently, A filed a motion to set aside the CAS award before the Supreme Court alleging *inter alia* a violation of Article 190(2)(c) PILA. A argued that the CAS panel did not rule on some of its prayers for relief, in particular (i) the motion to set the compensation at a maximum of EUR 229'725.- as well as (ii) the motion to declare that any compensation payable under the employment agreement was net.

Decision: In its decision dated 22 March 2016, the Supreme Court rejected the motion to set aside the award. According to the Supreme Court, the CAS panel did not rule *infra petita* given that A's motion to set the compensation at a maximum of EUR 229'725.- had essentially been addressed when it set the compensation at EUR 550'000.-. In addition, the Supreme Court also rejected A's motion alleging that the award was ambiguous as to whether the compensation calculated by the CAS panel was a gross or a net salary. The Supreme Court held that the compensation could – in good faith – only be understood as a net amount.

Comment: This case confirms the Supreme Court's prior case law as regards this ground for appeal. A motion to set aside an award based on Article 190(2)(c) PILA will only be granted under exceptional circumstances.[42]

c) Decision No. 4A_173/2016 of 20 June 2016

In this case, which was discussed in more detail above[43], the Supreme Court indicated that the appellant A was in fact criticizing the arbitral tribunal for not having taken into account an element of its claim pursuant to Article 190(2)(c) PILA when reaching its decision. According to the Supreme Court, an award may be set aside when the arbitral tribunal's decision goes beyond the claims submitted to it, or when it fails to decide one of the items of the claim. This requires the arbitral tribunal to not decide on a claim rendering the award

[42] For further analysis of this decision of the Supreme Court see MONNIER, Swiss Federal Supreme Court rejects motion to set aside CAS award in dispute between Portuguese football club and Brazilian football player, available at: http://www.lexology.com/library/detail.aspx?g=d9220781-f03a-4131-8b5b-01d60cd17d1d (last visited: 26 August 2016); VOSER/ESCHMENT, Swiss Supreme Court confirms CAS award in dispute between Brazilian soccer player and Portuguese football club, available at: http://www.swlegal.ch/getdoc/048ecff0-9dc6-495f-bb8b-1053c7238129/2016-Nathalie-Voser_Jorn-Eschment_-Swiss-Supreme-C.aspx (last visited: 26 August 2016).

[43] See above, p. 126 et seq.

incomplete as it fails to answer a question relevant for the outcome of the case. The Supreme Court found that this was not the case at hand, as the sole arbitrator clearly specified in the final award that while some requests were granted, all other requests of the parties were dismissed. Accordingly, the respective ground for appeal was rejected.

4) Violations of the principle of equal treatment or the right to be heard (Article 190(2)(d) PILA)

a) Decision No. 4A_678/2015 of 22 March 2016

In this case, which was discussed in more detail above[44], the Supreme Court rejected the allegation that the CAS panel had violated the appellant's right to be heard. In particular, the Supreme Court rejected the allegation that the compensation had not been correctly calculated by the CAS tribunal by using B's gross salary instead of his net salary. The Supreme Court explained that the right to be heard does not include a right to a substantively correct decision.

b) Decision No. 4A_378/2015 of 22 September 2015

Facts: On 19 June 2015, the appointed arbitral tribunal rendered an award in favor of C and D.

A and B then filed a motion to set aside the award pursuant to Article 190(2)(d) PILA. According to A and B, their right to be heard was violated because the arbitral tribunal wrongly assessed the testimony of the expert witnesses E, F and G. A and B alleged that false witness statements can constitute a ground of appeal.

Decision: The Supreme Court held that this appeal was inadmissible.

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[44] See above, p. 163 et seq.

According to the Supreme Court, A and B's allegations concerned the right to be heard. In any event, the Supreme Court stated that facts established by the arbitral tribunal are not subject to review by the Supreme Court.

In addition, the Supreme Court recalled that a party alleging a violation of the right to be heard must invoke it as soon as possible during the arbitration proceedings. If the party does not do so it forfeits its right. The Supreme Court further stated that it is contrary to good faith not to raise procedural objections in the course of the arbitration and to raise them only before the Supreme Court.

Comment: With this decision the Supreme Court reaffirms its established case law that a party may not challenge an award for an alleged violation of its right to be heard on the basis that the tribunal wrongly addressed an issue.

Furthermore, this decision also serves as a reminder that a party who fails to raise a violation of the right to be heard in the course of the arbitration is generally precluded from raising the argument before the Supreme Court.

c) Decision No. 4A_172/2015 of 29 September 2015

In this decision that was discussed in more detail above,[45] the appellant also claimed a violation of its right to be heard as the sole arbitrator disregarded two of its factual allegations. The Supreme Court dismissed the appellant's allegation as the sole arbitrator did address these issues in his award but did not consider them to be relevant.

In addition, the Supreme Court explained that the right to be heard according to Article 190(2)(d) PILA imposes on the arbitrator a minimal duty to examine and address all relevant issues that are material to the outcome of the case. This duty is only violated if, by inadvertence or misunderstanding, the

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[45] See above, p. 134 et seq.

arbitrator does not take into consideration submissions, allegations, arguments or evidence that had been presented or offered by a party and that were of importance to the outcome of the decision to be rendered.

d) ATF 141 III 495 (Decision No. 4A_34/2015 of 6 October 2015)

In this decision discussed previously above,[46] Hungary as the appellant also asserted a violation of equal treatment and the right to be heard according to Article 190(2)(d) PILA.

In connection with the damages suffered by B, Hungary claimed that the calculations made by B's quantum experts were based on an indemnification system to which Hungary had not been given access. However, the Supreme Court maintained that B itself had not had access to the data either as this data was owned by a third party. Therefore, the principle of equal treatment was not violated.

With respect to the right to be heard, the Supreme Court held that Hungary did not sufficiently call into question the reliability of the expert evidence relied upon by B during the arbitration proceedings. As a consequence, Hungary could not in good faith complain of the impossibility of access to the underlying data in the setting aside proceedings. Nevertheless, the Supreme Court pointed out that the arbitral tribunal did in fact take into account Hungary's argument and gave a reduced weight to B's expert evidence. In addition, the Supreme Court confirmed that in setting aside proceedings, it will not review the weighing of the evidence conducted by the arbitral tribunal. The Supreme Court thus also found no violation of the right to be heard.

[46] See above, p. 137 et seq.

e) Decision No. 4A_69/2015 of 26 October 2015

Facts: By contract of 17 September 2008, an Austrian company (A) appointed a Singapore company (B) as its exclusive distributor of watches and jewelry products of brand X in Singapore and other Asian countries. The contract contained an arbitration clause providing for disputes to be resolved by a sole arbitrator seated in Geneva in accordance with the rules of the ICC.

In 2012, A sold 100 special edition watches of X to another Singapore company (C), a company owned by D. Later in 2012, A terminated the contract with B and concluded a similar distribution agreement with the company Y, represented by D.

In 2013, B initiated arbitration proceedings against A for breach of contract. Thereupon, A requested the rejection of B's claim and formulated a counterclaim for payment of open invoices.

The sole arbitrator decided in its award that A violated the exclusivity clause by selling 100 special edition watches to C. The sole arbitrator condemned A to pay an amount for unjustified termination of the contract, to pay damages for A's initiation of court proceedings in Singapore in violation of the arbitration agreement and also admitted A's counterclaim.

In 2015, A filed a motion before the Supreme Court to set aside the award. A argued a violation of the right to be heard according to Article 190(2)(d) PILA. In particular, A alleged that the sole arbitrator had omitted to address the argument that B's claim as regards the violation of the exclusivity clause constituted an abuse of right. In addition, A argued that the sole arbitrator should have calculated B's losses in a different way.

Decision: The Swiss Supreme Court rejected the application to set aside the award.

The Supreme Court stated that the sole arbitrator took into consideration A's explanations but did not agree with them. Accordingly, the sole arbitrator – at least implicitly – rejected the argument of an abuse of right by B.

Moreover, the Supreme Court held that the sole arbitrator had considered A's arguments regarding the calculation of losses and damages, but either explicitly or implicitly rejected them.

Furthermore, the Supreme Court indicated that A was trying to have the merits of the case reassessed under the cover of a violation of its right to be heard. This is not permitted in setting aside proceedings in Switzerland.

Comment: This case demonstrates that according to established principles of the Supreme Court, a party cannot have the merits of the case reassessed by the Supreme Court, under the cover of a violation of its right to be heard and on the false pretense that the arbitral tribunal did not consider arguments duly raised in the arbitration proceedings.[47] As long as the arbitral tribunal addressed all relevant arguments invoked by the parties, the Supreme Court does not assess the merits of the arbitral tribunal's award.

f) Decision No. 4A_568/2015 of 10 December 2015

In this case, which will be discussed in detail below[48], the appellant A argued *inter alia* that the CAS panel had ignored several of its express requests for B and C to prove and substantiate certain allegations and asserted that the case file showed that certain allegations by B and C were clearly

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[47] For further analysis of this decision of the Supreme Court see GROZ/TRABALDO-DE MESTRAL, Parties cannot have tribunal's assessment on merits reviewed through a challenge based on alleged violation of right to be heard (Swiss Supreme Court), available at: http://www.swlegal.ch/getdoc/6feb72a4-a190-4977-9fdf-96b2266092a5/2015_Philipp-Groz_Elena-Trabaldo-de-Mestral_Partie.aspx (last visited: 26 August 2016).

[48] See below, p. 192 et seq.

wrong. A also argued that the CAS panel had ignored its actual motives for terminating the contract.

The Supreme Court rejected the application to set aside the award based on a violation of Article 190(2)(d) PILA. It confirmed that it is not for the Supreme Court to review whether an arbitral tribunal properly considered all documents of the case file. According to the Supreme Court, A failed to demonstrate how the CAS panel violated his right to be heard, i.e. how it prevented him from pleading his case during the arbitration proceedings.

g) Decision No. 4A_520/2015 of 16 December 2015

Facts: Two banks (A) and (B) entered into a share purchase agreement (SPA) for the sale of the totality of the shares B held in one of its subsidiaries (X). As a condition of the overall transaction, the institutions (Y and Z) required a recapitalization of X by B in the amount of EUR 3 billion, which B eventually complied with. The SPA included an adjustment mechanism in favor of B in clause 4.4, in the event that prior to a specific date Y set the ratio between X's own capital and its risk-weighted assets below 10%.

Prior to that date, the banking institution Y lowered the requirement from the anticipated 10% to 9%, but A refused to pay B the amount resulting from the adjustment mechanism.

Based on the arbitration clause, B then initiated arbitration proceedings against A seeking payment of almost EUR 161 million plus interest. A opposed the claim based on two main arguments: first, that the clause was not applicable under the specific circumstances of the case as adjustment in favor of B was provided for only if Y reduced X's own capital requirements, which it did not; and second, that the clause in the SPA was not valid with respect to the applicable mandatory rules (*lois de police*) and the rules of public policy.

On 31 August 2015, the arbitral tribunal rendered an award granting in full B's claim. According to the arbitral tribunal, clause 4.4 of the SPA was clear and needed no interpretation. As to the question of the validity of the clause with respect to the *lois de police* and the rules of public policy, the arbitral tribunal ruled that the question was "irrelevant" insofar as Z and Y (as well as other institutions) had approved the transaction.

On 24 September 2015, A challenged the award before the Supreme Court for violation of its right to be heard pursuant to Article 190(2)(d) PILA. A argued that the tribunal did not address the issue of the validity of the applicable adjustment clause under the *lois de police* or public policy provisions. According to A, the tribunal "sidestepped" this issue by wrongly declaring it to be irrelevant.

Decision: The Supreme Court rejected the challenge of the award.

The Supreme Court restated that the right to be heard pursuant to Article 190(2)(d) PILA does not require the arbitral award to be reasoned. It however imposes on the arbitrators a minimal duty to examine and address all relevant issues that are material to the outcome of the case. According to the Supreme Court, this duty is violated if, by inadvertence or misunderstanding, the arbitrators do not take into consideration submissions, allegations, arguments or evidence that had been presented or offered by a party and that were of importance to the outcome of the decision to be rendered. In the event that material issues have been ignored in the award, it is up to the arbitral tribunal or the other party to evidence that these elements were not material to the outcome of the case, or that they were implicitly denied by the arbitral tribunal. However, the Supreme Court held that arbitral tribunals are under no obligation to respond to arguments which are inconclusive for the decision. The Supreme Court further stated that there is no violation of the

parties' right to be heard if the arbitral tribunal did not address, even implicitly, an issue invoked by the parties that is irrelevant. It moreover held that in accordance with Article 190(2)(d) PILA, the Supreme Court does not reassess the arbitral tribunal's ruling on the merits, as long as the tribunal addressed all relevant arguments.

In this context, the Supreme Court denied the appellant's contention that the court's recent case law was indicative of a willingness to extend the scope of review for alleged violation of the right to be heard based on a failure to address issues raised by the parties. The Supreme Court made it clear that this practice has not changed since the issuance of the Cañas decision in 2007.[49] It pointed out that a wider scope of review was not being considered, in particular because it regularly finds that the alleged violations of the party's right to be heard are just attempts to obtain a reassessment of the merits of the case. The Supreme Court underlined that it is not an appellate court and that the legislator consciously restrained its scope of review.

Comment: The Supreme Court made clear with this decision that it continues to rely on its long-standing practice regarding the right to be heard, which may be perceived as strict.[50] It is not willing to broaden its scope of review under Article 190(2)(d) PILA. Thus, a party's motion to set aside the award for a violation of its right to be heard based on the allegation that the tribunal did not address an issue will not be

[49] FTD 133 III 235.

[50] For further analysis of this decision of the Supreme Court see LEIMBACHER/VON SEGESSER, BGer – 4A_520/2015, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_520/2015, 16 December 2015, available at: http://www.kluwerarbitration.com/CommonUI/document.aspx?id=kli-ka-16-16-003 (last visited: 26 August 2016); VOSER, No violation of a party's right to be heard where a tribunal does not address arguments that it considers to be irrelevant (Swiss Supreme Court), available at: http://www.swlegal.ch/getdoc/82a51864-a69c-4495-9088-265a222787ed/2016_Nathalie-Voser_No-violation-of-a-party-s-righ.aspx, (last visited: 26 August 2016).

successful, if in fact the tribunal consciously disregarded this argument and limited itself to an analysis of the decisive arguments.

h) Decision No. 4A_572/2015 of 6 January 2016

Facts: In 2013, a Spanish company (X) and a French company (Y) concluded an investment agreement in order to create a joint company with an initial share capital of EUR 3 million. The parties agreed that each partner was to contribute half of the sum. The joint company was to purchase and operate a portfolio of parking spaces in Spain between 2013 and 2016 for a total amount of EUR 151 million. However, Y did not contribute its share of the capital and the investment could not be carried out.

X relied on the arbitration clause in the investment agreement and initiated arbitration proceedings in Geneva, claiming an amount of EUR 18 million for lost profits. For the calculation of the damages, X relied on the expert reports and expert testimony of E.

During the arbitration proceedings, Y did not deny that it had breached the investment agreement, but disagreed with the quantum of X's damages. Y filed a short expert report, which was then excluded from the arbitration file because the author of the report was not authorized by its employer to testify at the hearing.

The arbitral tribunal rendered an award in September 2015 ruling that Y had breached the investment agreement and had been grossly negligent. As a result, the arbitrators ordered Y to pay X around EUR 18 million for lost profits plus interest.

In the case at hand, the arbitral tribunal maintained that it could not disregard expert evidence simply because the other party asserts that the assessed lost profits are too optimistic. It held that the expert evidence provided by X was persuasive and the answers given by the experts E during their

examination at the hearing were convincing. The arbitrators noted that Y had chosen not to file any expert evidence to rebut the evidence given by X's experts and that thus its defense essentially relied on unsubstantiated allegations, hypotheses and other speculations. Further, the tribunal stated that none of Y's arguments was sufficiently convincing to contradict X's expert evidence on the quantum of damages sought and that Y's allegations did not serve to refute X's quantum valuation. A party challenging the expert's findings cannot merely make general objections but has to show in detail why it does not agree with the assessment of its opponent's expert. Based on these grounds, the arbitral tribunal ordered Y to pay the amount of lost profits calculated by X's expert.

Subsequently, Y filed a motion to set aside the award before the Supreme Court due to a violation of its right to be heard according to Article 190(2)(d) PILA. In particular, Y alleged that the arbitral tribunal ignored the arguments set forth in its written submissions on the sole ground that they were minor allegations and that they were insufficient to refute expert evidence. In this respect, Y argued that the arbitral tribunal had put Y in the same situation as if it had not been given the possibility of presenting its case. Y therefore concluded that the arbitral tribunal should have adopted a more critical view of the conclusions given by X's expert.

Decision: The Supreme Court rejected the application to set aside the award.

The Supreme Court questioned the admissibility of Y's challenge, because Y was simply referring to part of it written submissions during the arbitration proceedings, which was contrary to the requirement of substantiation.

In any event, the Supreme Court found *inter alia* that Y was only trying to call into question the assessment of evidence made by the arbitral tribunal under the cover of an alleged

violation of its right to be heard. The Supreme Court clearly pointed out that this is not admissible.

Comment: The Supreme Court confirmed that setting aside proceedings before the Supreme Court may not constitute an appeal on the merits.[51] The case at hand also demonstrates that the Supreme Court will not second-guess the arbitrators' assessment of evidence. The Supreme Court only accepts a "formal denial of justice" in the event that an award completely fails to address allegations of fact or legal submissions that were relevant for the resolution of the dispute and that were not implicitly rejected by the arbitral tribunal.

i) Decision No. 4A_342/2015 of 26 April 2016

Facts: By share purchase agreement (SPA), a group of Turkish companies (X) sold the shares of the company (X6) to a German company (Z). The SPA contained an obligation on Z to ensure that X6 would conclude a distributorship agreement (DA) with company A, a company of group X. Subsequently, A and X6 concluded the DA in 2003. In 2008, X6 terminated the DA. In 2011, X initiated ICC arbitration proceedings against Z claiming that the illegal termination of the DA triggered the rescission of the SPA as they were compound contracts. X requested that the shares in X6 be returned and that the dividends received from X6 be transferred to X. Z countered that the termination of the DA had no effect on the SPA. Ahead of the case management conference, Z suggested that the proceedings should be bifurcated; i.e. that the initial phase of the proceedings should

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[51] For further analysis of this decision of the Supreme Court see BÄRTSCH, Arbitrators' assessment of the evidence cannot be questioned under cover of alleged violation of right to be heard (Swiss Supreme Court), available at: http://www.swlegal.ch/getdoc/40872693-d337-4030-b317-22dd5ab91f75/2016_Philippe-Bartsch_Arbitrators-assessment-of-th.aspx (last visited: 26 August 2016); SCHERER, Introduction to the case law section, in: ASA Bull. 1/2016, p. 129 *et seq.*

be limited to the question of whether the termination of the DA triggered the rescission of the SPA. In addition, Z suggested that the arbitral tribunal should decide this question after the exchange of the first round of submissions. X accepted Z's proposal for bifurcation of the proceedings.

The parties and the arbitral tribunal held a case management conference where they agreed on the terms of reference, the procedural rules and the procedural timetable. The procedural timetable indicated that the parties were to file their statement of claim as well as their statement of defense together with witness statements and expert reports and that the arbitral tribunal would determine the next steps in consultation with the parties. In a cover letter to the parties enclosing the supplemental procedural rules and the procedural timetable, the arbitral tribunal stated: "*The parties agreed during the conference call that the Arbitral Tribunal should limit the initial stage of the proceedings to the question of the rescission of the SPA 2003 and the compound contract issue. They further agreed that the Arbitral Tribunal should, if appropriate, render a binding award thereon after the submission of the Statement of Defence.*" In addition, the terms of reference stated that the arbitral tribunal was "*to decide, after the submission of the Statement of Defence, in an arbitral award whether the Claimants have succeeded in establishing a legal basis for their claims.*"

The parties then filed the statement of claim (including an expert report and two witness statements) and the statement of defense (including three expert reports and seven witness statements). Afterwards, the arbitral tribunal informed the parties that the first stage of the proceedings was closed. On the following day, X wrote to the arbitral tribunal indicating that it wished to file rebuttal witness statements and a rebuttal expert opinion based on the elements of fact and law that had emerged out of the documents filed by Z. X argued that this would justify a second exchange of submissions. Z

opposed this request. The arbitral tribunal rejected X's request relying on the clear agreement that a preliminary decision on the rescission of the SPA was to be made after the first statement of claim and statement of defense, respectively. X's request for reconsideration was also denied. Subsequently, the arbitral tribunal confirmed the closure of the first stage of the proceedings.

By partial award of 27 May 2015, the arbitral tribunal decided that the termination of the DA had not triggered the rescission of the SPA and rejected X's prayers for relief.

X filed a motion to set aside the award *inter alia* based on a violation of its right to be heard and the principle of equal treatment pursuant to Article 190(2)(d) PILA. X alleged that the arbitral tribunal violated this provision by failing to take into account relevant allegations that it had pleaded and by not allowing X to file a reply as well as rebuttal evidence.

Decision: The Supreme Court rejected the application to set aside the award.

In a first step, the Supreme Court outlined the content of the right to be heard, the right to equal treatment and the principle of adversarial proceedings in the context of international arbitration proceedings seated in Switzerland.

As to the right to be heard, the Supreme Court held that each party has the right to state its views on the essential facts, to submit its legal allegations, to introduce evidence on pertinent facts as well as to attend the hearings. However, the Supreme Court underlined that this does not include a right to an oral argument. In the same way, the right to be heard does not require an award to be reasoned but instead imposes upon the arbitral tribunal the duty to consider and discuss the pertinent issues. It further stated that the arbitral tribunal violates its duty in the event that it did not take into account, inadvertently or due to a misunderstanding, arguments,

allegations, evidence and offers of evidence submitted by one of the parties and important for the decision to be rendered.

With respect to evidence, the right to introduce evidence must be exercised timely and in accordance with the applicable procedural rules. The right to be heard is not violated when an arbitral tribunal refuses to examine evidence because the fact to be proven is already established, or because the evidence is insufficient to convince the tribunal to modify its finding.

With respect to the right to equal treatment, the Supreme Court stated that it requires that each party has the same chances of presenting its case during the proceedings. The principle of adversarial proceedings requires that each party has the possibility of examining the opponent's evidence, stating its views on the opposing party's arguments and refuting them with its own evidence.

However, in the field of international arbitration, the Supreme Court also underlined that the right to be heard is subject to important restrictions. For instance, an award is not required to include reasons. In the same way, a party is not entitled to be informed of the prospective legal basis on which the award is to be based unless that legal argument was not pleaded and could not reasonably have been anticipated by the parties. Furthermore, the arbitral tribunal is not required to inform a party of the decisive character of a factual element on which it intends to rely in the award. Finally, the Supreme Court also mentioned that in an action for annulment before the Supreme Court in the field of international arbitration, a party cannot directly rely on the ECHR.

Parties to arbitration agreements are free to agree on the rules of the procedure – in particular by reference to institutional rules – as long as their equal treatment and their right to be heard in an adversarial procedure is protected. The strict case law of the Supreme Court regarding the quasi-

absolute right of a party to respond to any substantive pleading submitted in state court proceedings does not apply in the field of international arbitration. It is generally recognized that there is no absolute right to a second round of submissions in international arbitration proceedings as long as a party has had the opportunity to express itself on the other party's conclusions. It must also be noted that a party can partially waive its right *ex ante* provided that the party is fully aware of the consequences and that the waiver does not affect the very core of the right to be heard. This must be assessed based on the circumstances of each case.

In a second step, the Supreme Court examined the parties' arguments in light of these principles.

First, the Supreme Court held that the arbitral tribunal established the common subjective intent of the parties with respect to the limitation to one round of submissions in the first phase of proceedings. The Supreme Court held that a finding of fact by the tribunal, even regarding a procedural fact like in this case, is not subject to review by the Supreme Court. Therefore, X's argument that there was no such agreement was inadmissible.

Second, the Supreme Court held that there was no reason not to respect the parties' and the tribunal's agreement to limit the first stage of an arbitration procedure to a single exchange of submissions. When they agreed to this limitation, the parties knew the positions of the opponent and understood the consequences of this agreement. Even if X could not have known the content of Z's witness statements and legal opinions, X could anticipate that Z would submit witness evidence regarding the negotiation history of the contracts. Accordingly, X should have submitted all relevant evidence in this regard. For X to complain about the consequences of an agreement that it consciously and freely concluded is incompatible with the principle of good faith. Accordingly, the

Supreme Court held that X had validly waived its right to reply in the case at hand.

Third, the Supreme Court also rejected the alleged violation of the principles of adversarial proceedings and equal treatment. It based its decision on the fact that both parties were given the same opportunity to present their case in full in one written submission.

Comment: This leading decision contains an extensive outline of the Supreme Court's position on the right to be heard in international arbitration proceedings seated in Switzerland.[52] In fact, it is the first decision in which the Supreme Court confirmed that parties may waive certain aspects of their right to be heard as long as they are aware of the respective consequences and as long as the very core of that right remains untouched.

Furthermore, the Supreme Court quite rightly recognized the importance of party autonomy in the field of international arbitration. It pointed out that some of the strict due process principles developed for state court proceedings are not directly applicable in arbitration proceedings.

On the other hand, the Supreme Court also made clear that the arbitral tribunal and the parties are bound by any

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[52] For further analysis of this decision of the Supreme Court see BÄRTSCH, Enforcing parties' agreement to one round of written submissions does not violate right to be heard (Swiss Supreme Court), available at: http://www.swlegal.ch/getdoc/04114a6d-7c8f-446b-ac41-b89ecb977758/2016_Philippe-Bartsch_Enforcing-parties-agreement.aspx, (last visited: 26 August 2016); FEIT, 4A_342/2015: Schranken des Anspruchs auf rechtliches Gehör in der Schiedsgerichtsbarkeit: Kein zwingender Anspruch auf Durchführung eines zweiten Schriftenwechsels (amtl. Publ.), available at: http://www.swissblawg.ch/2016/06/4a3422015-schranken-des-anspruchs-auf.html (last visited: 26 August 2016); HIRSCH, Le droit à la réplique en arbitrage international (art. 182 al. 3 LDIP), available at: http://www.lawinside.ch/248/ (last visited: 26 August 2016); STUTZER/BÖSCH/HOHLER, Limits to the right to be heard: No absolute right to a double exchange of briefs and no absolute right to reply ("droit de réplique"), available at: http://thouvenin.com/wp-content/uploads/2016/06/Arbitration-Newsletter-of-8-June-2016.pdf (last visited: 26 August 2016).

procedural agreements made. Accordingly, parties should carefully evaluate the risks of agreeing to any such limitation.

j) Decision No. 4A_42/2016 of 3 May 2016

Facts: In 2003, BX as a subsidiary of X, and Y concluded an Investor Referral Agreement (IRA) by which Y was obliged to canvass potential investors in return for payment of a corresponding commission. Later in 2003, Z joined the contractual relationship on Y's side. A dispute arose between the parties at the end of 2005. AX, another subsidiary of X, then terminated the IRA in 2006 and took over all financial obligations of BX with regard to the respective agreement.

In 2007, Y and Z initiated arbitration proceedings against AX based on the arbitration clause in the IRA. A first sole arbitrator was appointed and the parties filed a Statement of Claim and a Statement of Defense respectively. The second sole arbitrator – who took over due to a conflict of interest arising with respect to the first arbitrator – then set up a procedure with the following steps. AX was required to deliver specific data regarding the potential investments falling within the scope of the contract and Y and Z were required to demonstrate which commissions they thought they were entitled to. After that, AX was to indicate which commissions it contested.

Y and Z then filed their First Submission on Quantum and Related Issues providing a calculation of the commissions they deemed that they were entitled to. Thereupon, AX filed its First Statement of Reply on Quantum and Related Issues whereby it contested Y and Z's claims in their entirety. A second round of submissions were filed in which both parties maintained their respective positions.

By letter dated 18 May 2015, AX requested that the sole arbitrator should render a preliminary decision as to the number of relevant investments, so that AX could calculate

the commissions based on that preliminary decision. AX informed the arbitral tribunal that it would claim a violation of its right to be heard without such a preliminary decision. Y and Z objected to this request. Subsequently, the sole arbitrator informed the parties that he was "*in the process of completing the award on Claimant's fees on direct investments...*" and asked AX to comment on the following questions:

"If the Sole Arbitrator were to find, upon review and consideration of the Parties' respective positions on the disputed investments and other disputed issues, that he is in a position to compute the amount of fees owned to Claimants without the need to revert to parties in order to arrive at a determined amount, would the Respondent have any objections not already raised in its submission of 18 May 2015 with respect to the issuance of an award setting out a determined figure?

If the answer to question (1) is "yes", what are those additional objections (if any)? Respondent is hereby directed to provide its answers, as succinctly as possible, by Friday, 11 December 2015, end of the day."

AX did not answer the questions and subsequently informed the sole arbitrator that it maintained its view expressed in the letter dated 18 May 2015.

On 21 January 2016, the sole arbitrator rendered a decision in favor of Y and Z.

A filed a motion to set aside the award alleging a violation of its right to be heard in adversarial proceedings pursuant to Article 190(2)(d) PILA.

Decision: The Supreme Court rejected the motion to set aside the award.

With regard to the right to be heard, the Supreme Court restated that each party has the right to state its views on the

essential facts, to submit its legal arguments, to introduce evidence on pertinent facts as well as to attend the hearings. The principle of adversarial proceedings requires that each party has the possibility of examining the opponent's evidence, to state its views on the opposing party's arguments and to refute it with its own evidence.

The Supreme Court made clear that a party is not entitled to unilaterally dictate to the arbitrator how to conduct the proceedings.

In this respect, the Supreme Court recalled that it is not its role to decide whether the tribunal should have found that the allegation, argument or evidence provided by the appellant was merited given its limited scope of review. The Supreme Court is bound by the arbitrator's finding of facts which also include procedural facts.

Regarding the right of equal treatment, the Supreme Court held that it was not violated given that both parties were given the same possibility of presenting their claims, i.e. the same number of submissions.

Comment: The Supreme Court restated its well-known case law regarding Article 190(2)(d) PILA and confirmed once again that setting aside proceedings before the Supreme Court may not constitute an appeal on the merits.[53] Furthermore, parties do not have a right to dictate the procedure. Rather, they must elaborate their case in full and are not entitled to insist that the arbitral tribunal relieve them of this burden e.g. by rendering preliminary awards which may narrow the scope of the dispute.

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[53] For further analysis of this decision of the Supreme Court see VOSER/GEORGE, Swiss Supreme Court finds that party cannot unilaterally dictate procedure, available at: http://www.swlegal.ch/getdoc/91562536-1086-44ca-812e-572eadb5d80a/2016_Nathalie-Voser_Anya-George_Swiss-Supreme.aspx (last visited: 26 August 2016).

k) Decision No. 4A_173/2016 of 20 June 2016

In this case,[54] the appellant A asserted *inter alia* that the sole arbitrator had violated his right to be heard as he did not take into consideration one of the arguments A presented. The Supreme Court restated that the right to be heard according to Article 190(2)(d) PILA is violated if, inadvertently or due to a misunderstanding, the arbitral tribunal failed to take into consideration allegations, arguments or evidence that had been put on the record by a party and that were material to the outcome of the case. However, arbitral tribunals have no obligation to respond to each and every irrelevant argument raised by the parties. In this respect, the Supreme Court rejected A's objection reiterating that it is not its role to decide whether the tribunal assessed an allegation, argument or evidence correctly. The right to be heard does not comprise a right to a materially correct decision.

l) Decision No. 4A_322/2015 of 27 June 2016

Facts: This is a historically, as well as politically interesting, and sensitive case. In 1968, Iran – through its national oil company – and Israel entered into an agreement for the construction of a pipeline between the cities of Eilat and Ashkelon. The deal provided for Iranian oil to be shipped to Europe via Israel through this pipeline without having to go through the Suez Canal. The implementation of the deal was effected through several companies that were set up.

Before the Shah of Iran was overthrown in 1979, significant amounts of Iranian oil were sold to Europe via Israel through oil contracts. In January 1978, the last oil contract was signed between an Iranian and an Israeli company regarding the delivery of almost 15 million tons of oil based on which oil was delivered. The Islamic revolution in Iran subsequently resulted

[54] As to the facts of the case see above, p. 126 et seq.

in a freezing of the relations between the countries. This left some of the delivered oil unpaid for.

In 1989, the Lichtenstein subsidiary (Y) of an Iranian entity (Z) started arbitration proceedings against a company (X). X was a Panama entity jointly established and owned by Israel and Z through subsidiaries. X then filed a counterclaim not only against Y, but also against Z and against a third party. After long arbitral proceedings, the arbitral tribunal finally obliged X to pay more than USD 1 billion to Y and Z.

X then filed a motion to set aside the award arguing that the arbitral tribunal had violated its right to be heard pursuant to Article 190(2)(d) PILA as regards two specific issues concerning damages and delivery dates. X accused the arbitral tribunal of having rendered a decision based on an unexpected reasoning.

Decision: The Supreme Court rejected the motion to set aside the award.

First, the Supreme Court recalled its well-established case law according to which the arbitral tribunal is in general not obliged to hear the parties with respect to the legal provisions that it intends to apply. However, in the event that the arbitral tribunal intends to base its award on a legal argument which was not put forward during the proceedings and the relevance of which was not foreseeable, the tribunal is obliged to invite the parties to comment on that legal provision or consideration in order to avoid surprises.

Further, the Supreme Court held that this principle only applies with respect to the legal issues and not the factual issues. The right to be heard does not require the arbitral tribunal to hear the parties on each submitted argument. In addition, the parties cannot limit the tribunal's autonomy with respect to the assessment of the evidence. The principle of free assessment of evidence constitutes a key principle of international arbitration.

In the case at hand, the Supreme Court denied a violation of the right to be heard. The Supreme Court held that the reasoning of the arbitral tribunal was not a surprise to the parties and was also based on the arguments brought forward by the appellant and one of the appellant's witnesses respectively. According to the Supreme Court, X could have expected such a reasoning which is why the Supreme Court denied that an element of surprise was present.

In addition, the Supreme Court also addressed the issue of dissenting opinions in awards. X frequently relied on the dissenting opinion that its own arbitrator issued. The Supreme Court then explained that a dissenting opinion is not part of the award itself, irrespective of whether it is integrated in the award or not. A dissenting opinion is an autonomous view which does not have any legal effects. Therefore, a dissenting opinion is not considered by the Supreme Court.

Comment: This dispute has been subject to a long history of proceedings and earlier Supreme Court decisions.[55] In this case, the Supreme Court confirmed two well established principles: (i) parties are not entitled to be informed about the prospective legal basis of the award unless that legal basis was not pleaded and could not reasonably have been anticipated by the parties; and (ii) dissenting opinions – which bear the risk of weakening the authority of an award – have no legal value and will not be considered by the Supreme Court. Furthermore, the Supreme Court pointed out that the principle of free assessment of evidence constitutes a key principle of international arbitration.

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[55] For further analysis of this decision of the Supreme Court see VOSER/GOTTLIEB, Right to be heard, change of procedural practices, dissenting opinions and tribunal submissions (Swiss Supreme Court), available at: http://www.swlegal.ch/getdoc/856be6b1-2375-4775-9929-302bd02a7221/2016-Nathalie-Voser_Benjamin-Gottlieb_Right-to-be.aspx (last visited: 26 August 2016).

m) Decision No. 4A_202/2016 of 3 August 2016

Facts: B was a professional cyclist. Company C which was held by B was the owner of B's image rights. Company A was a professional cycling team.

A and B concluded a contract named "Self-employed Agreement" (SEA) according to which B rendered services for A from 1 January 2011 to 31 December 2014 in exchange for remuneration.

On the same day, C and A concluded an "Agreement on Image Rights" (AIR) by which A was authorized to exploit B's image rights in exchange for remuneration for the same duration as the SEA.

On 14 July 2012, during the Tour de France, B tested positive for doping. Afterwards, B quit the Tour de France and did not participate in any other competitions for the rest of the season. However, B continued to practice with the professional cycle team of A.

On 30 January 2013, the disciplinary body of the Olympic Committee against doping suspended B for a period of one year as from 14 July 2012. Furthermore, it annulled B's individual results in the Tour de France 2012.

On 21 June 2013, A terminated the SEA and the AIR with retroactive effect as of 14 July 2012.

On 27 October 2014, B and C initiated arbitration proceedings before the CAS against A pursuant to the arbitration agreement signed by all the parties.

The CAS panel held *inter alia* based on equity that A had waived all rights allowing it to immediately terminate the agreements as it had waited too long after the positive doping test. Therefore, the CAS ordered A to make payments to B and C.

A then filed a motion to set aside the CAS award based on a violation of its right to be heard pursuant to Article 190(2)(d) PILA. A alleged that the arbitral tribunal wrongly applied Swiss law under the cover of the *ex aequo et bono*-clause even though all parties were domiciled in country X and chose to apply the law of X. Accordingly, the parties could not have foreseen the application of Swiss law. Furthermore, A argued that even if Swiss law were applicable, the tribunal wrongly applied the provisions regulating employment relationships to the AIR which is an agreement between two companies. In addition, A also claimed that the arbitral tribunal violated its right to be heard based on the fact that it did not address all relevant issues.

Decision: The Supreme Court rejected the motion to set aside the award.

The Supreme Court pointed out that the parties' right to be heard mainly relates to the finding of facts. The right of the parties to be heard on questions of law is very limited. According to the principle *iura novit curia,* which applies before state courts as well as before arbitral tribunals, the tribunal is free the assess the facts under the law and it may also apply different legal provisions than the ones invoked by the parties. As a consequence, if an arbitration clause does not limit the arbitral tribunal to deciding only on the legal basis pleaded by the parties, the tribunal is not obliged to hear the parties on the legal provisions it intends to apply. Only in the exceptional circumstance of an unforeseeable application of a legal provision or consideration is the tribunal required to hear the parties regarding such a legal provision or consideration. This is the case if the tribunal intends to base its decision on a legal provision which was not raised during the proceedings and of which the parties could not have anticipated the relevance.

The Supreme Court pointed out that the parties agreed to the following provision: "The parties authorise the Arbitral

Tribunal to assist them in reaching a settlement and, if it deems it appropriate, to decide ex aequo et bono. Applicable law should be X law; the Arbitral Tribunal can also apply any rule of law that it will consider appropriate." Accordingly, the Supreme Court held that the parties could not reasonably exclude that the arbitral tribunal would apply another law than the law of X. It also stated that the term "should" clearly allowed the application of another law.

Furthermore, the Supreme Court referred to clause 9 of the order of procedure which was signed by all parties and which stated the following: "*In view of the discretion granted to the Panel by the Parties of their written submissions and of the fact that they chose Swiss arbitrators, the Panel deems it appropriate to decide this case ex aequo et bono and to refer to Swiss law whenever it deems it appropriate.*" As A was clearly aware of the provision, A could not allege that it was a surprise that the arbitral tribunal applied Swiss law. Given the predictable nature of the application of Swiss law in the case at hand and given the interdependence of the two contracts, it was not inappropriate for the arbitral tribunal to apply the provisions governing employment law.

With regard to A's second allegation, i.e. that the arbitral tribunal did not address all relevant issues in its award, the Supreme Court restated that the right to be heard pursuant to Article 190(2)(d) PILA does not require the arbitral award to be reasoned. It however imposes on the arbitrators a minimal duty to examine and address all relevant issues that are material to the outcome of the case. According to the Supreme Court, this duty is violated if, by inadvertence or misunderstanding, the arbitrators do not take into consideration submissions, allegations, arguments or evidence that had been presented or offered by a party and that were of importance to the outcome of the decision to be rendered. In the event that material issues have been ignored in the award, it is up to the arbitral tribunal or the other party

to prove that these elements were not material to the outcome of the case, or that they were implicitly rejected by the arbitral tribunal. However, the Supreme Court held that arbitral tribunals are under no obligation to respond to arguments which are inconclusive for the decision. In the same way, the Supreme Court stated that there is no violation of the parties' right to be heard if the arbitral tribunal did not address, even implicitly, an issue invoked by the parties that is irrelevant. It further recalled that in accordance with Article 190(2)(d) PILA, the Supreme Court does not reassess the arbitral tribunal's ruling on the merits, as long as the tribunal addressed all relevant arguments.

Referring to its decision in No. 4A_520/2015 of 16 December 2015,[56] the Supreme Court confirmed that its scope of review in this regard remains very narrow. It pointed out that a wider scope of review was not being considered, in particular because it finds that the alleged violations of the party's right to be heard are frequently only attempts to obtain a reassessment of the merits of the case. The Supreme Court underlined that it is not an appellate court and that the legislator consciously restrained its scope of review. Based on this, the Supreme Court found no violation of the appellant's right to be heard.

Comment: This is another case showing an unsuccessful party's attempt to use the right to be heard as a vehicle for achieving a substantive review of the award. The Supreme Court confirmed its long-standing and strict case law regarding the right to be heard under Article 190(2)(d) PILA.

[56] See above, p. 170 et seq.

5. Incompatibility with public policy (Article 190(2)(e) PILA)

a) Decision No. 4A_172/2015 of 29 September 2015

In this case – the facts of which were presented in more detail above[57] – the appellant also claimed a violation of public policy according to Article 190(2)(e) PILA. The Supreme Court stated that an award only violates public policy if it disregards fundamental principles and is therefore inconsistent with the essential, widely recognized values of the Swiss legal system. Such fundamental principles include *pacta sunt servanda,* the prohibition of an abuse of rights and the principle of good faith. However, the Supreme Court held that the appellant did not establish a violation of such fundamental principles. The appellant just criticized the reasoning of the award. In addition, the alleged violation of Articles 106/107 CPC as regards the distribution of costs did not constitute a violation of public policy. Accordingly, the application was also rejected on this ground.

b) ATF 141 III 495 (Decision No. 4A_34/2015 of 6 October 2015)

In this decision, which was discussed in detail above,[58] Hungary as the appellant also asserted an incompatibility of the arbitral award with public policy according to Article 190(2)(e) PILA. Hungary argued that the tribunal's awarding of damages to B was not in compliance with the requirements under EU law for state aid and compensation of stranded costs, including the need to obtain prior approval from the European Commission. Accordingly, Hungary argued that the award ordered Hungary to breach its international obligations, e.g. under the Treaty on the Functioning of the EU (TFEU).

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[57] See above, p. 134 et seq.
[58] See above, p. 137 et seq.

This resulted in a violation of public policy pursuant to Article 190(2)(e) PILA.

With respect to the violation of public policy pursuant to Article 190(2)(e) PILA invoked by Hungary, the Supreme Court restated that an arbitral award is contrary to public policy if it disregards fundamental legal principles which, in accordance with the concepts prevailing in Switzerland, should constitute the basis of any legal system.

In the case at hand, the Supreme Court acknowledged that the principle of the supremacy of international law over domestic law is generally accepted. However, it does not follow that an award ordering a party to compensate the opponent fairly would necessarily violate the restrictive definition of substantive public policy, even though it might contradict an obligation under international law. In the end, the Supreme Court did not decide this issue as it found that there was no violation of public policy as the arbitral tribunal *inter alia* assessed and held that the awarding of damages to B did not violate EU law.

c) Decision No. 4A_568/2015 of 10 December 2015

Facts: An Argentinian football player (A) entered into a contract with two players' agents (B and C) in Argentina. According to the agreement, B and C brokered and negotiated contracts for A, in return for which A paid to B and C ten per cent of his annual income. In the event that A was to unilaterally terminate the contract, B and C would receive EUR 1 million in contractual penalty payments.

On 27 May 2014, A unilaterally terminated the contract.

B and C sued A before the CAS which had jurisdiction pursuant to the agreed arbitration clause. B and C requested a payment of EUR 3 million in contractual penalties. Subsequently, the CAS panel essentially upheld the claim, but ordered A to only

pay EUR 1 million instead of the EUR 3 million claimed by B and C.

A then filed a motion to set aside the award *inter alia* due to a violation of public policy. According to A, the award was incompatible with public policy for not taking into consideration A's legal reasoning regarding Article 404 CO, Articles 158 *et seq.* CO and Article 27 Swiss Constitution (SC).

Decision: The Supreme Court rejected the application to set aside the award.

With respect to A's allegation of the potential violation of public policy, the Supreme Court pointed out that A had merely criticized the legal reasoning of the CAS panel relating to Articles 158 *et seq.* and 404 CO. It held that criticizing the CAS panel's finding regarding the validity of the penalty clause as wrong, illegal and simply untenable shows no violation of public policy. As to the invoked constitutional guarantee of economic freedom found at Article 27 SC, the Supreme Court held that the appellant cannot deduce from such a right an entitlement to the termination of a contract at any time by claiming a violation of public policy. The Supreme Court pointed out that A had again failed to show that the payment of the penalty pursuant to the contract would qualify as a manifest and grave violation of his personal rights capable of rendering the award incompatible with public policy.

Comment: A's attempt to rely on Article 404 CO and/or Article 27 SC with the objective of establishing the right to terminate fixed-term contracts at will as part of public policy was not successful.[59] This was to be expected. The case at

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[59] For further analysis of this decision of the Supreme Court see PONCET, Another hopeless sport-related appeal…, available at: http://www.swissarbitrationdecisions.com/another-hopeless-sport-related-appeal%E2%80%A6?search=4A_568%2F2015 (last visited: 26 August 2016); SCHERER, Introduction to the case law section, in: ASA Bull. 1/2016, p. 130; PETER, Art. 404 OR im Lichte des Ordre public nach Art. 190 Abs. 2 lit. e IPRG, ius.focus, 02/2016 Heft 2; VOSER/ESCHMENT, Swiss Supreme Court confirms CAS award in dispute over

hand may however bring some additional legal certainty with respect to the validity of penalty clauses sanctioning player's untimely or immediate termination of a fixed-term agency contract.

d) Decision No. 4A_392/2015 of 10 December 2015

The facts of this case have already been summarized above.[60] In addition to the jurisdictional objection, B also raised a public policy objection, alleging that the arbitral tribunal not only issued procedural rules that were not "usual for international arbitration" but also failed to apply these rules.

The Supreme Court maintained that the issuing of procedural rules or failing to comply with rules agreed on by the parties can only amount to a breach of procedural public policy in the event that the rules in question were essential for ensuring fair proceedings. The Supreme Court pointed out that B had failed to establish that this had occurred in the case at hand and thus confirmed that public policy objections are not accepted lightly.

e) Decision No. 4A_319/2015 of 5 January 2016

Facts: A and B concluded a contract regarding the construction of a highway. The contract contained an arbitration clause. B terminated the contract. Only two weeks later, A terminated the contract as well. Subsequently, a dispute arose as to the validity of the respective terminations.

B then filed a request for arbitration and claimed payment of a certain amount from A based on several grounds. A rejected B's claim and filed a counterclaim for penalty payments.

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penalty payments for sports agents, available at: http://www.swlegal.ch/getdoc/43d35bb7-d0f7-4252-95b4-42556aa66d51/2016_Nathalie-Voser_Jorn-Eschment_Swiss-Supreme-Co.aspx (last visited: 26 August 2016).

60 See above, p. 145 et seq.

In its award, a majority of the arbitral panel rejected A's counterclaim.

A filed a motion to set aside the award arguing that there had been a violation of *pacta sunt servanda* and a violation of public policy pursuant to Article 190(2)(e) PILA. A based its claim on mandatory provisions of public law which allegedly provided for a penalty payment against B. The majority of the arbitral tribunal held that the prerequisites of the public law provisions were basically met. However, the majority of the tribunal also stated that there were other provisions in the applicable law which justified a dismissal of the claim. Conversely, the dissenting opinion relied on the mandatory provisions of public law. A relied on the dissenting opinion and claimed before the Supreme Court that the majority of the arbitral tribunal had refused to apply mandatory provisions of public law.

Decision: The Supreme Court rejected the motion to set aside the award.

The Supreme Court restated that an award only violates public policy if it disregards fundamental principles and is therefore inconsistent with the essential, widely recognized values of the Swiss legal system. One of these fundamental principles is *pacta sunt servanda*. The Supreme Court explained that the principle of *pacta sunt servanda* is violated according to Article 190(2)(e) PILA in two situations: first, if the tribunal refuses to apply a contractual provision despite having recognized that the parties are bound by it; second, if the arbitral tribunal orders the parties to comply with a provision which the tribunal did not recognize as binding. Accordingly, the principle of *pacta sunt servanda* is breached whenever a tribunal applies a provision of a contract (or refuses to apply it) and, in doing so, contradicts its own interpretation of the respective clause. However, it must be noted that the principle does not encompass the tribunal's contract interpretation or

the legal conclusions that the tribunal drew from such interpretation.

In the case at hand, the Supreme Court did not find a violation of public policy or the principle of *pacta sunt servanda*. In particular, it clarified that A could not rely on the dissenting opinion. A dissenting opinion represents an autonomous opinion which does not produce any legal effects. The Supreme Court stated that a dissenting opinion is not part of the award, irrespective of whether it is integrated in the award or issued separately. Thus, A did not establish the mandatory character of the respective public law provision by simply referring to the analysis in the dissenting opinion. Even if A could establish the mandatory character of this provision it would not have been successful as Article 190(2)(e) PILA does not comprise the failure to apply or the incorrect application of the relevant foreign law.

Thus, the Supreme Court rejected the motion to set aside the award.

Comment: This case confirms the narrow scope of Article 190(2)(e) PILA.[61] The Supreme Court confirmed that dissenting opinions – which bear the risk of weakening the authority of an award – have no legal value.

f) Decision No. 4A_510/2015 of 8 March 2016

In this case – the facts of which were presented in detail above[62] – the appellant also claimed a violation of procedural and substantive public policy according to Article 190(2)(e) PILA due to a breach of confidentiality by the arbitral tribunal

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[61] For further analysis of this decision of the Supreme Court see PETER, Die Dissenting Opinion in internationalen Schiedsverfahren, ius.focus, 02/2016 Heft 2.

[62] See above, p. 124 et seq.

and due to the failure to reduce the excessive contractual penalty.

The Supreme Court rejected X's alleged violation of procedural public policy as it was based on the same facts and arguments as the alleged, but rejected, violation of impartiality and independence of the arbitral tribunal (Article 190(2)(a) PILA).

As to the alleged failure to reduce the contractual penalty in violation of substantive public policy, the Supreme Court confirmed that Article 163(3) CO is a mandatory provision under Swiss law. However, the Supreme Court held that this provision (which permits a reduction of excessive penalties) does not necessarily fall within the narrow scope of substantive public policy pursuant to Article 190(2)(e) PILA. As the Supreme Court found that the CAS panel did in fact reduce the contractually agreed penalty by taking into account all the circumstances, it also rejected the allegation of a violation of substantive public policy.

g) Decision No. 4A_342/2015 of 26 April 2016

In the above-discussed case,[63] X alternatively argued that the arbitral tribunal had violated procedural public policy by refusing to allow the filing of a second round of submissions and rebuttal evidence.

The Supreme Court noted that the arbitral tribunal had found that there was no need for additional evidence given that it had already sufficient elements at its disposal in order to render an award (anticipated assessment of evidence). As this constitutes a finding of fact, it can only be reviewed by the Supreme Court to the extent that it violates procedural public policy. The Supreme Court then stated that X failed to establish such a violation of procedural public policy and

[63] See above, p. 175 et seq.

further held, that there was no violation of substantive public policy either.

h) Decision No. 4A_132/2016 of 30 June 2016

Facts: A was a French football player. Football club B was a member of the Cyprus Football Association which in turn was a member of the Fédération Internationale de Football Association (FIFA).

On 22 June 2011, A and B signed a fixed-term employment agreement. On 23 June 2011, the parties signed an addendum to the employment agreement with the same fixed-term which provided for additional remuneration for the football player.

After having played for B at the beginning of the season 2011/2012, A got injured. Subsequently, disputes arose between the parties with respect to the remuneration due under the said agreements. On 25 January 2013, A informed B that it was in default with regard to several payments due and terminated the contract with just cause based on Articles 14 and 17 of the FIFA Regulations on the Status and Transfer of Players.

On 25 January 2013, A filed a claim against B for a total payment of EUR 113'670.- with the FIFA Dispute Resolution Chamber. In its decision of 6 November 2014, the FIFA Dispute Resolution Chamber awarded A an amount of EUR 26'520.-. Subsequently, A appealed this decision to the CAS and the CAS finally awarded A an amount of EUR 53'753.-.

A then filed a motion to set aside the CAS award alleging *inter alia* a violation of substantive public policy pursuant to Article 190(2)(e) PILA. A argued *inter alia* that by failing to apply mandatory provisions of Swiss and French law regard the maturity of salary payments, the CAS violated substantive public policy.

Decision: The Supreme Court rejected the motion to set aside the award.

The Supreme Court confirmed that an award only violates public policy if it disregards those essential and broadly recognized values which, according to the prevailing values in Switzerland, should be the foundations of any legal order. Amongst such principles are contractual fidelity (*pacta sunt servanda*), the respect for the rules of good faith, the prohibition of an abuse of rights, the prohibition of discriminatory or confiscatory measures, the protection of incapable persons as well as the prohibition of excessive restrictions (Article 27 CC) which amount to an obvious and serious violation of personal rights.

The Supreme Court held that mandatory provisions as such do not necessarily fall within the narrow scope of substantive public policy pursuant to Article 190(2)(e) PILA and thus dismissed A's respective arguments. In addition, the Supreme Court held that A failed to establish a violation of such a fundamental principle. Furthermore, the fact that the CAS panel did not agree with the appellant's interpretation regarding an automatic right of termination in case of a delayed salary payment did in no way amount to an abuse of rights by the arbitral tribunal.

Comment: This case confirms that the scope of Article 190(2)(e) PILA is very narrow. It serves as a reminder that a violation of mandatory legal provisions does not automatically result in a violation of substantive public policy.

C. Consequences of a successful challenge

ATF 142 III 296 (Decision No. 4A_628/2015 of 16 March 2016)

In the above-discussed decision the Supreme Court annulled the jurisdictional award of the arbitral tribunal as claimant

failed to mediate first before initiating arbitration proceedings.[64] This case is interesting as the Supreme Court also addressed in detail the issue of the appropriate sanction. The Supreme Court very pragmatically found, based on a balancing of the interests involved, that when a party disregards a mandatory contractual pre-arbitral clause without a valid excuse, the arbitral tribunal must stay the arbitration until the pre-arbitral clause has been complied with.

It rejected other possible consequences such as (i) an award of damages (which are almost impossible to substantiate) and (ii) the rejection of the claim (which would mean that the appointed arbitral tribunal would become *functus officio*) as inappropriate in such a situation.

III. Decisions on the enforcement of arbitral awards

Decision No. 5A_441/2015 of 4 February 2016

Facts: A and B, a company domiciled in Switzerland, concluded a contract for the sale of wheat through a broker. The contract contained a clause providing for Grain and Feed Trade Association (GAFTA) arbitration in London, which provides for a two-tier arbitral procedure. Neither A nor B actually signed the contract; only the broker did.

After a dispute arose between the parties, A initiated arbitration proceedings against B. During the arbitration proceedings, B did not raise any objection to the jurisdiction of the arbitral tribunal on the ground that the arbitration agreement did not meet the requirements of Article II of the New York Convention.

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[64] See above, p. 154 et seq.

Finally, the second-tier GAFTA appeal panel rendered an award in London ordering B to make a payment to A. Thereupon, A served B in Switzerland with a payment summons through the debt collection authorities to which B objected. B argued *inter alia* that the arbitration agreement did not comply with the requirements of Article II of the New York Convention. Subsequently, A commenced judicial proceedings in Switzerland requesting the Swiss courts to reject B's objection as well as to enforce the foreign arbitral award. The Swiss courts of first and second instance both decided in favor of A.

Consequently, B filed an appeal before the Supreme Court.

Decision: The Supreme Court rejected B's appeal *inter alia* on the following grounds.

The Swiss Supreme Court held regarding the formal requirements of Article IV(1)(b) of the New York Convention that these were not met, as the arbitration agreement provided by A was not duly certified. However, as B had admitted during the arbitration proceedings that it was bound by the arbitration clause contained in the contract and that the clause provided for GAFTA arbitration, it followed that, *prima facie*, the arbitration agreement was authentic and binding on the parties.

The Supreme Court also rejected the appellant's argument that A failed to produce a complete certified translation of the arbitral award, arbitration agreement, or the contract by pointing out that Article IV(2) of the New York Convention is not mandatory, especially if the relevant documents are in English.

Furthermore, the Supreme Court stated that the arbitration clause was neither signed by the parties, nor confirmed by letters exchanged at a later stage. As a result, the sales contract containing the arbitration clause was not in "writing" as required under Article II(2) of the New York Convention.

The substantive validity of the arbitration clause pursuant to Article V(1)(a) of the New York Convention was governed by English Law. According to Section 5(5) of the English Arbitration Act 1996, "*an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged*". Based on the written submissions exchanged by the parties in the arbitration in which B actually referred to the arbitration agreement and confirmed that the contract was subject to GAFTA arbitration, the arbitration agreement constituted a written arbitration agreement between the parties within the meaning of Section 5(5) of the English Arbitration Act 1996. As a consequence, there was no ground for refusing the enforcement under Article V(1)(a) of the New York Convention.

The Supreme Court confirmed that B committed an abuse of right pursuant to Article 2 CC by claiming for the first time in the enforcement proceedings that the arbitration clause did not comply with the written requirement pursuant to Article II(2) of the New York Convention. In this respect, the Supreme Court highlighted that the duty to act in good faith and the prohibition regarding an abuse of rights also apply in recognition and enforcement proceedings. It pointed out that a party's conduct can cure formal shortcomings of the arbitration agreement under Article II(2) of the New York Convention. As the formal validity of an arbitration clause is one of the conditions for the arbitral tribunal's jurisdiction, it is contrary to good faith to challenge it for the first time during the enforcement of the final award.

Comment: This case confirms the arbitration-friendly position of the Swiss courts, in particular the Supreme Court.[65] One may take away at least two reminders from this decision: (i) the Supreme Court takes a lenient approach with respect to the requirements of Article IV of the New York Convention; (ii) based on the principle of good faith, a party may be precluded from relying on a ground for the refusal of the recognition and enforcement of an award if it failed to raise such a ground in the arbitration proceedings.

IV. Costs of federal proceedings

Decision No. 4A_572/2015 of 6 January 2016

The above-discussed decision also included an application for security for costs.[66] After the appellant Y filed an application with the Supreme Court requesting the setting-aside of the arbitral award to which X replied, Y informed the Supreme Court that it was now in liquidation. X then filed an application with the Supreme Court requesting security for the costs of the Supreme Court proceedings based on Article 62(2) SSCA.

As this application came after X filed its answer on the merits and as X was not allowed to file a rejoinder, the Supreme Court found that it was no longer entitled to security for costs. Security can only be claimed for costs that are not yet incurred. It stated that X should have followed the financial situation of Y more closely. If the financial status is unknown or if there are doubts as to the liquidity of the appellant, the

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[65] For further analysis of this decision of the Supreme Court see SCHERER, Introduction to the case law section, in: ASA Bull. 2/2016, p. 391 *et seq.*; VOSER/CREMADES, Lack of valid arbitration agreement cannot be raised for first time in enforcement proceedings (Swiss Supreme Court), available at: http://www.swlegal.ch/getdoc/ce180cd5-316f-42d6-a647-00707bf7dadd/2016_Nathalie-Voser_Anne-Carole-Cremades_Lack-of-v.aspx (last visited: 26 August 2016).

[66] See above at p. 173 et seq.

defendant should formulate a request for security as a precaution before filing an answer. Thus, counsel must make sure that any application for security for costs with the Supreme Court is filed before addressing the merits.

V. Conclusion

While the period under review has not produced a "landmark decision" in international arbitration, this review of the case law has nevertheless shown that the Supreme Court has seized the opportunity to develop and clarify its case law, in particular regarding jurisdictional challenges (Article 190(2)(b) PILA) as well as regarding the principle of equal treatment and the right to be heard (Article 190(2)(d) PILA).

The following key decisions and developments are of interest with regard to jurisdictional challenges (Article 190(2)(b) PILA):

In 4A_136/2015 of 15 September 2015 and ATF 142 III 239 (4A_84/2015 of 18 February 2016) the Supreme Court held twice that arbitration has become the preferred means of dispute resolution in the context of international commerce. It stated that international parties are often in a position in which they objectively favor arbitration over state court proceedings due to its neutral forum, choice of an international language and confidentiality. Time will tell if, with these decisions, the Supreme Court has indeed departed from its long standing practice of taking a restrictive approach when determining whether or not the parties concluded an agreement to arbitrate.

ATF 142 III 239 (4A_84/2015 of 18 February 2016) also addressed the important question of whether parties have agreed to arbitration when exchanging drafts of a contract. The Supreme Court held that in general, parties do not conclude an arbitration agreement when exchanging drafts.

However, this is possible under exceptional circumstances which was the case here. In fact, the circumstances of the case were not that exceptional, as parties often exchange draft contracts in which they reach consensus on some elements – like the dispute resolution clause – but not on the final deal. Thus, it might be advisable to insert a respective reservation in the next draft contract.

With ATF 141 III 495 (4A_34/2015 of 6 October 2015), the Supreme Court issued its first fully-fledged decision on investment treaty arbitration. The Supreme Court made clear that it also intends to apply an arbitration-friendly approach, developed with regard to commercial arbitration, to investment treaty arbitration.

ATF 142 III 296 (4A_628/2015 of 16 March 2016) was the only decision in the period under review that resulted in the annulment of an arbitral tribunal's award. In this decision, the Supreme Court addressed the steps to be taken when dealing with multi-tiered dispute resolution clauses, in particular conciliation attempts prior to commencing an arbitration. The Supreme Court held that if the pre-arbitral clause is mandatory and the party seeking to enforce such clause did not act in bad faith, the conciliation must be conducted. More importantly, the Supreme Court also decided the open question of what sanction should apply if a party fails to adhere to its obligation to mediate. It pragmatically concluded that when a party disregards a mandatory contractual pre-arbitral clause without a valid excuse, the arbitral tribunal must stay the arbitration until the pre-arbitral clause has been complied with. The modalities of the stay should be decided on by the arbitral tribunal.

The following key decisions and developments are of interest with regard to the principle of equal treatment and the right to be heard (Article 190(2)(d) PILA):

In 4A_342/2015 of 26 April 2016, the Supreme Court confirmed for the first time that parties may waive certain aspects of their right to be heard as long as they are aware of the respective consequences and as long as the very core of that right remains untouched. In the case at hand, the parties agreed on just one round of written submissions. The Supreme Court recognized the importance of party autonomy in the field of international arbitration and pointed out that some of the strict principles developed by state courts with respect to due process are not necessarily applicable in arbitration. On the other hand, the Supreme Court correctly made it clear that the arbitral tribunal and the parties are bound by any procedural agreements made.

Furthermore, the Supreme Court confirmed in 4A_202/2016 of 3 August 2016 that its scope of review with regard to the right to be heard remains very narrow. It pointed out that a wider scope of review was not being considered, in particular because it often finds that the alleged violations of the party's right to be heard are actually attempts to obtain a reassessment of the merits of the case. The Supreme Court underlined that it is not an appellate level court and that the legislator consciously restrained its scope of review.

Otherwise, the case law shows that the Supreme Court continues to reject a large number of appeals, simply recalling and applying the well-established principles in its case law. The standard of review in international arbitration matters remains very strict and arbitration-friendly, which is confirmed by the fact that in the period of review only one award was annulled by the Supreme Court.

VI. Table of cases

A. Setting aside proceedings

1. Admissibility of applications to set aside

4A_342/2015 of 26 April 2016	As international arbitral awards can only be challenged based on the limited grounds listed in Article 190(2) PILA, a party cannot directly rely on a violation of the European Convention on Human Rights (ECHR) in order to have the award set aside. However, the principles in the ECHR may serve as a benchmark for the interpretation of the grounds listed in Article 190(2) PILA.
4A_136/2015 of 15 September 2015 **4A_342/2015 of 26 April 2016**	A finding of fact by the arbitral tribunal is not subject to review by the Supreme Court. This includes procedural facts, such as the common intent of the parties to have only one round of submissions.
4A_568/2015 of 10 December 2015	A simple choice of law clause cannot result in a waiver of the applicability of the PILA in favor of Article 353 *et seq.* CPC according to Article 176(2) PILA.

4A_222/2015 of 28 January 2016	An arbitral tribunal may implicitly accept jurisdiction only on a provisional basis, reserving a reasoned decision on that point for the final award. While such conduct does not comply with the general rule in Article 186(3) PILA, it is not prohibited. There are no sanctions for breaches of Article 186(3) PILA, except in case of a clear abuse.
4A_596/2015 of 9 December 2015	Submissions to the Supreme Court must be made in an official language of Switzerland pursuant to Article 42(1) SSCA. If a submission is submitted in a foreign language, the Supreme Court generally allows a correction of this mistake. However, it will not accept repeated failures to comply with such a formal requirement.

2. Irregular constitution of the arbitral tribunal (Article 190(2)(a) PILA)

4A_510/2015 of 8 March 2016	A breach of confidentiality by the arbitral tribunal will, in general, not result in the setting aside of the award. However, if the breach of confidentiality results in an uneven distribution of information between the parties, this might result in a violation of the principle of equal treatment (Article 190(2)(d) PILA).
4A_173/2016 of 20 June 2016	An irregular constitution of the arbitral tribunal must be challenged immediately during the proceedings. A party holding a challenge in reserve, which it could have raised during the arbitration, acts in bad faith and forfeits the right to raise the argument before the Supreme Court.

3. Incorrect decision on jurisdiction (Article 190(2)(b) PILA)

4A_136/2015 of 15 September 2015 **ATF 142 III 239 (4A_84/2015 of 18 February 2016)**	A poorly drafted dispute resolution clause may still constitute a valid arbitration agreement. Arbitration has become the preferred means of dispute resolution in the context of international commerce. International parties are often in a position in which they would objectively favor arbitration over state courts due to its neutral forum, choice of international language and confidentiality.
4A_172/2015 of 29 September 2015 **4A_392/2015 of 10 December 2015** **4A_173/2016 of 20 June 2016** **4A_132/2016 of 30 June 2016**	A plea of lack of jurisdiction must be raised prior to any defense on the merits. If a party comments on the merits of the case without raising a plea of lack of jurisdiction, it accepts the tribunal's jurisdiction and loses its right to raise a jurisdictional objection at a later stage. This also holds true for jurisdictional objections which arise only in case an alternative line of arguments is pursued.

ATF 141 III 495 (4A_34/2015 of 6 October 2015)	A jurisdictional challenge raised in the context of an investment treaty arbitration is assessed according to the same restrictive and arbitration-friendly principles that the Supreme Court developed for challenges in commercial arbitrations.
4A_176/2015 of 9 November 2015	Where the arbitrator has declared that he has jurisdiction to hear the case based on questions of fact, it is very difficult to successfully challenge his jurisdiction under the Swiss *lex arbitri*.
4A_562/2015 of 9 December 2015	Issues of substantive law must be clearly separated from those pertaining to jurisdiction. A party's standing to sue or to be sued is a matter of substantive law which does not concern the jurisdiction of the arbitral tribunal.

ATF 142 III 239 (4A_84/2015 of 18 February 2016)	In principle, parties do not conclude an arbitration agreement when exchanging drafts of a contract. However, this is possible under exceptional circumstances such as (i) where there are previous contracts including the same arbitration clause, (ii) when the parties have an objective interest in choosing arbitration; and/or (iii) when the draft contracts show that parties agreed to conclude an arbitration agreement irrespective of the outcome of the main agreement.
ATF 142 III 296 (4A_628/2015 of 16 March 2016	When a party disregards a mandatory contractual pre-arbitral clause and the opposing party has not acted in bad faith, the arbitral tribunal must stay the arbitration proceedings until the pre-arbitral clause has been complied with.

4. Decision ruling beyond claims submitted or failing to adjudicate claims (Article 190(2)(c) PILA)

4A_218/2015 of 28 October 2015	An award is only considered to be *ultra petita* in the event that the total amount awarded to a party is beyond the total amount claimed by that party. This also holds true if the arbitral tribunal construed certain claims differently or relied

	on different legal grounds. The principle of *iura novit curia* applies in arbitration proceedings.

5. Violations of the principle of equal treatment or the right to be heard (Article 190(2)(d) PILA)

4A_378/2015 of 22 September 2015	A party alleging a violation of the right to be heard must invoke it as soon as possible during the arbitration proceedings. If a party fails to do so, it forfeits its right. It is contrary to good faith not to raise procedural objections in the course of the arbitration and to only invoke them before the Supreme Court. A party may not challenge an award for an alleged violation of its right to be heard on the basis that the tribunal wrongly addressed an issue, when in reality the tribunal deliberately took into account and disregarded the issue.

4A_172/2015 of 29 September 2015	An arbitrator has a minimal duty to examine and address all relevant issues that are material to the outcome of the case. This duty is only violated if, by inadvertence or misunderstanding, the arbitrator does not take into consideration submissions, allegations, arguments or evidence of importance to the outcome of the case that were presented by a party.
4A_69/2015 of 26 October 2015 **4A_572/2015 of 6 January 2016**	A party cannot have the merits of the case or evidence reassessed under the cover of a challenge based on Art. 190 (2)(d) PILA and on the false pretense that the sole arbitrator did not consider arguments duly raised in the arbitration proceedings.
4A_520/2015 of 16 December 2015 **4A_202/2016 of 3 August 2016**	The scope of review by the Supreme Court with regard to the right to be heard remains very narrow. A wider scope of review is not being considered, as the legislator consciously restrained the scope of review.

4A_510/2015 of 8 March 2016	If a breach of confidentiality by the arbitral tribunal results in an uneven distribution of information between the parties, this might give rise to a violation of the principle of equal treatment.
4A_342/2015 of 26 April 2016	Parties may waive certain aspects of their right to be heard – e.g. by limiting the number of rounds of submissions – as long as they are aware of the respective consequences and as long as the very core of that right remains untouched. If these requirements are fulfilled, the arbitral tribunal and the parties are bound by such procedural agreements. Party autonomy is a cornerstone of international arbitration and some of the strict principles developed by state courts with regard to due process are not necessarily applicable in arbitration.
4A_42/2016 of 3 May 2016	A party is not entitled – neither based on the right to be heard nor on the principle of adversarial proceedings – to unilaterally dictate to the arbitrator how to conduct the proceedings.

4A_173/2016 of 20 June 2016 **4A_202/2016 of 3 August 2016**	A party may not challenge an award for an alleged violation of its right to be heard on the basis that the tribunal failed to address an issue, when the tribunal deliberately disregarded the issue. There is no violation of the parties' right to be heard if the arbitral tribunal did not address, even implicitly, an issue invoked by the parties that is irrelevant.
4A_322/2015 of 27 June 2016	Dissenting opinions are not part of the award itself, irrespective of whether they are integrated in the award or not. They have no legal value and will not be considered by the Supreme Court. The principle of free assessment of evidence constitutes a key principle of international arbitration.
4A_202/2016 of 3 August 2016	Parties are not entitled to be informed about the legal ground on which the award will be based unless such legal ground was not pleaded and could not reasonably have been anticipated by the parties.

6. Incompatibility with public policy (Article 190(2)(e) PILA)

ATF 141 III 495 **4A_34/2015 of 6 October 2015**	An arbitral award is contrary to public policy if it disregards fundamental legal principles which, in accordance with the concepts prevailing in Switzerland, should constitute the basis of any legal system. The Supreme Court left the question open of whether an award that obliges a party to violate obligations resulting from international law would be contrary to public policy.
4A_319/2015 of 5 January 2016	The principle of *pacta sunt servanda* – which forms part of public policy – is violated in two situations: first, if the tribunal refuses to apply a contractual provision despite having recognized that the parties are bound by it; second, if the arbitral tribunal orders the parties to comply with a provision which the tribunal did not recognize as binding.
4A_510/2015 of 8 March 2016 **4A_132/2016 of 30 June 2016**	A violation of a mandatory provision according to Swiss law does not necessarily mean that it falls within the narrow scope of substantive public policy pursuant to Article 190(2)(e) PILA.

B. Enforcement of arbitral awards

5A_441/2015 of 4 February 2016	The duty to act in good faith also applies in recognition and enforcement proceedings. A party may be precluded from relying on a ground for the refusal of the recognition and enforcement of an award if it failed to raise such a ground in the arbitration proceedings.

The German Federal Court on Treacherous Ice – A final point in the Pechstein case

ULRICH HAAS

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I. Introduction

On 7 June 2016, the German Federal Court (hereinafter the "GFC") rendered its decision in the Pechstein saga.[1] The decision constitutes "a final point"[2] in a dispute between the German speed skater Claudia Pechstein and the International Skating Union (hereinafter the "ISU").[3] The origins of their dispute date back to July 2009. Since then, the matter has been in the spotlight both before Swiss and German courts and has become a major object of debate among legal commentators.[4] The main facts of the dispute may be summarized as follows:

On 2 January 2009, Ms Pechstein signed a registration form provided by the ISU to participate in the speed skating world championships in Hamar (Norway) on 7 and 8 February 2009. Without signing this registration form, Ms Pechstein would not have been permitted to compete. By signing the form, Ms Pechstein undertook – *inter alia* – to comply with the ISU anti-doping regulations. Furthermore, she also signed an arbitration agreement that provided that any disputes should be brought before the Court of Arbitration for Sport

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[1] GFT (BGH) SchiedsVZ 2016, 218; the decision is commented by PRÜTTING SpuRt 2016, 143 et seq.; EICHEL IPRax 2016, 305 et seq.; HEERMANN NJW 2016, 224 et seq.; HAUS NZKart 2016, 366 et seq.; MAVROMATI, in CAS Bulletin 1/2016, p. 27 et seq.

[2] Ms Pechstein has declared that she is going to file an appeal against the GFT decision before the German Constitutional Court. Furthermore, it is to be noted that Ms Pechstein has initiated proceedings against Switzerland before the European Court of Human Rights (case ref. 67474/10 Pechstein v. Switzerland).

[3] Cf. for an overview of the previous stages of the dispute, FAVRE-BULLE, in: Mueller/Rigozzi (Ed.) New Developments in International Commercial Arbitration 2015. p. 315 et seq.

[4] Cf. HANDSCHIN/SCHÜTZ SpuRt 2014, 179; DUVE/RÖSCH SchiedsVZ 2014, 216; MURESAN/KORFF Causa Sport 3/2014, 199; SCHULZE SpuRt 2014, 139; HERRMANN SchiedsVZ 2014, 66; PFEIFFER SchiedsVZ 2014, 161; MONHEIM SpuRt 2014, 90; HORVATH Kluwer Arbitration Blog 12 March 2014; HAAS ASA Bull. 2014, 707; ROMBACH SchiedsVZ 2015, 105; BRANDNER/KLÄGER SchiedsVZ 2015, 112; SCHERRER/MURESAN/LUDWIG SchiedsVZ 2015, 161; DUVE/RÖSCH SchiedsVZ 2015, 69; ADOLPHSEN SPuRt 2016, 46.

(hereinafter, the "CAS") in Lausanne and that the jurisdiction of the ordinary courts of law should be excluded.

During the World Championships in Hamar, blood samples were taken from Ms Pechstein. The analysis of the samples showed elevated reticulocyte counts. The ISU considered this to be evidence of blood doping. Its disciplinary commission decided on 1 July 2009 to ban Ms Pechstein from competition for two years, with retroactive effect as of 7 February 2009.

Ms Pechstein appealed against the ISU decision to the CAS. In an award dated 25 November 2009, the CAS dismissed Ms Pechstein's appeal. She then filed an appeal against the CAS award to the Swiss Federal Tribunal which, however, dismissed the appeal by judgment dated 10 February 2010. A further appeal (Revision [i.e.: based on alleged new facts]) filed by Ms Pechstein with the Swiss Federal Tribunal was dismissed by a judgment dated 28 September 2010.

In the ensuing proceedings before the German courts, Ms Pechstein requested a declaratory judgement stating that the ISU ban imposed on her was unlawful, a decision ordering the ISU to pay compensation for the material damage suffered by her, and compensation for her pain and suffering. The District Court (Landgericht - LG) dismissed the complaint (District Court [LG] Munich I, SchiedsVZ 2014, 100). Ms Pechstein then appealed the decision of the District Court to the Higher Regional Court (OLG). The latter issued a partial final and partial interim decision (Higher Regional Court [OLG] Munich, SchiedsVZ 2015, 40), finding – *inter alia* – that the claim for damages before the state court was not barred by the arbitration agreement in favor of the CAS signed by the parties. The ISU in turn appealed against this decision (on points of law only) to the GFT.

At the heart of the GFT decision are – basically – two questions, both of which are of significant importance for sports arbitration, i.e. (i) whether the CAS is sufficiently

independent and neutral to constitute a "true" arbitral tribunal and (ii) whether in a situation of unequal bargaining power the CAS can be imposed on athletes as a prerequisite for participation in organised sport, thereby denying them access to justice before state courts.

II. Prerequisites for a "True" Arbitral Tribunal

Arbitral awards are the result of a specific decision-making process that is based on an agreement of the parties. In German law (just like in Swiss law) a distinction is traditionally made between arbitral awards and decisions of so-called internal association tribunals ("*Vereinsgerichte*").[5] The latter are an expression of the association's autonomy, whereby associations are not only allowed to govern themselves via statutes, rules and regulations, but also to implement and enforce such rules unilaterally with the aid of disciplinary measures (for example expulsion from the club, withdrawal, or temporary suspension of all membership rights or certain membership rights, imposition of fines, etc.). Such measures are often decided upon (or reviewed) by internal association tribunals, in judicially structured proceedings. Under German law, however, decisions by internal association tribunals do not qualify as arbitral awards.[6] Contrary to arbitral awards, the decisions of internal association tribunals can be reviewed in fact and in law by state courts.

With regard to whether a panel qualifies as an internal association tribunal or as an arbitral tribunal, the designation

[5] See in relation to this GFT (BGH) NJW 1995, 583, 587; NJW 2004, 2226, 2227; Higher Regional Court (OLG) Munich BeckRS 2010, 28877; STEIN/JONAS/SCHLOSSER, ZPO, 23rd ed. 2014, before Sec. 1025 No. 11.

[6] GFT (BGH) NJW 2004, 2226, 2227; see also Higher Regional Court (OLG) Munich BeckRS 2010, 28877; cf. also HAAS ZVglRWiss 2015, 516, 517.

chosen by the parties is irrelevant.[7] Instead, the determining factor – apart from the parties' wish (expressed with the requisite lack of ambiguity) for the panel to rule on the dispute instead of the state courts –[8] is that the panel in question must act as an "*independent and neutral instance*".[9] In the case at hand Ms Pechstein had argued that the CAS was not organized as an independent and impartial instance and that, consequently, the CAS cannot be qualified as a "true" arbitral tribunal.

A. Overview of the Jurisprudence and Legal Literature

Whether or not the CAS has the status of a "true" arbitral tribunal has been addressed by German courts before. In a first decision, dating back to the year 2000, the Regional Court (LG) Munich expressed the view – "*en passant*" – that procedures before the CAS do not constitute "true" arbitration proceedings.[10] This decision, however, was overturned on appeal by the Higher Regional Court (OLG) Munich.[11] Since then the overwhelming opinion in Germany has held that the CAS is a "true" arbitral tribunal.[12] Only in the context of the

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[7] See GFT (BGH) NJW 2004, 2226, 2227; Higher Regional Court (OLG) Munich SchiedsVZ 2015, 40, 41; Higher Regional Court (OLG) Munich BeckRS 2010, 28877; STEIN/JONAS/SCHLOSSER, ZPO, 23rd ed. 2014, before Sec 1025 No. 11.

[8] GFT (BGH) NJW 1995, 583, 587; NZG 2013, 713, 715; Higher Regional Court (OLG) Munich SchiedsVZ 2015, 40, 41; see also Higher Regional Court (OLG) Munich BeckRS 2015, 10943; Higher Regional Court (OLG) Munich BeckRS 2010, 28877; Higher Regional Court (OLG) Düsseldorf NJW-RR 2003, 142.

[9] GFT (BGH) NJW 1995, 583, 587; NJW 2004, 2226, 2227; see also Higher Regional Court (OLG) Munich BeckRS 2010, 28877; STEIN/JONAS/SCHLOSSER, ZPO, 23rd ed. 2014, Sec. 1025 No. 28.

[10] SpuRt 2000, 155, 156.

[11] NJW-RR 2001, 711: "*Dass es sich bei dem CAS um ein Schiedsgerichts im Sinne der §§ 1025 ff. ZPO handelt, zieht auch der Antragsteller nicht in Zweifel*".

[12] HAAS/MARTENS, Sportrecht – Eine Einführung in die Praxis, 2011, p. 128 et seq.; ADOLPHSEN/NOLTE/LEHNER/GERLINGER, Sportrecht in der Praxis, 2012, No. 1074; ADOLPHSEN SchiedsVZ 2004, 169, 172; PHB-SportR/PFISTER, 3rd ed. 2014, 6. Teil No. 154; cf. also District Court (LG) Munich (20.12.2001) 7 O 2030/01; Higher

"Pechstein case" did doubts surface anew as to the true nature of the CAS. The Higher Regional Court (OLG) Munich, which acted as the court of 2nd instance in the "Pechstein" case, left the question explicitly open.[13] This gave rise to uncertainty and also affected other court proceedings in sports-related matters involving the CAS.[14] The GFT has now put an end to this uncertainty by qualifying the CAS as a "true" arbitral tribunal. In doing so the GFT has come to the same conclusion as – previously – the Swiss Federal Tribunal (hereinafter, "SFT").[15]

B. The reasoning of the GFT

The GFT in a first step reiterates its long-standing jurisprudence dealing with the distinction between arbitral tribunals and internal association tribunals according to which "*a 'true' arbitral tribunal by which access to a state court can be effectively excluded can only exist where the arbitral tribunal called upon to decide the particular case represents an independent and neutral instance*"[16]. In the case at hand the GFT is of the view that the CAS is sufficiently independent and neutral in order to be qualified as a "true" arbitral tribunal. In its analysis, the GFT both refers to the organisational structure of the CAS (see below 1) and to the principle of

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Regional Court (OLG) Munich BeckRS 2002 30470727; Higher Regional Court (OLG) Bremen SpuRt 2015, 74 et seq.; District Court (LG) Bremen NJOZ 2014, 1342; District Court (LG) Köln BeckRS 2007, 09783.

[13] SchiedsVZ 2015, 40, 41: „*Dabei kann offen bleiben, ob der in der Schiedsvereinbarung benannte CAS als echtes Schiedsgericht angesehen werden könnte, obwohl die Streitbeteiligten nicht paritätisch Einfluss auf dessen Besetzung nehmen können ..., denn die Schiedsvereinbarung wäre auch in diesem Fall unwirksam.*"

[14] Higher Regional Court (OLG) Koblenz SpuRt 2015, 29, 30: the question of the nature of CAS is left undecided with clear reference to the "Pechstein case"; cf. also District Court (LG) Dortmund (14.5.2014) 8 O 46/13.

[15] Decisions of the Swiss Federal Tribunal ("DFT") 119 II 271, E. 3b; DFT 129 III 445, E. 3.3.3.2.

[16] GFT (BGH) SchiedsVZ 2016, 218 No. 24.

"equality of arms" in determining the members of a CAS panel (see below 2).

1. Organisational Independence

With respect to the organisational structure, the GFT notes that the CAS "unlike a federation or association tribunal … is not incorporated into any particular federation or association" and that the CAS "as an institution … is independent of the sports federations and Olympic Committees that support it". In addition, the GFT simply refers to the findings in the decision of the Swiss Federal Tribunal (hereinafter "SFT") in the case Danilova and Latzutina.[17] In this decision the SFT has found – inter alia – that:

> "*Force est, en outre, de souligner que le TAS, lorsqu'il fonctionne comme instance d'appel extérieure aux fédérations internationales, n'est pas comparable à un tribunal arbitral permanent d'une association, chargé de régler en dernier ressort des différends internes. Revoyant les faits et le droit avec plein pouvoir d'examen et disposant d'une entière liberté pour rendre une nouvelle décision en lieu et place de l'instance qui a statué préalablement …, il s'apparente davantage à une autorité judiciaire indépendante des parties.*"

2. Equality of Arms when appointing the Arbitral Tribunal

Structural independence and neutrality is not only lacking if a tribunal is incorporated into the organization of one of the parties to the dispute and, thus, is its organ. Instead, structural independence is also missing where the panel is otherwise dependent on one of the parties to the dispute. This must be assumed where there is no equality of arms of the parties regarding the composition of the tribunal, in other

[17] DFT 129 III 445.

words, when the parties do not have equal influence in appointing the members of the tribunal.[18] Consequently, if (in disputes between an association and its member) the panel members are solely or predominantly appointed by the association, the panel cannot be qualified as a "true" arbitral tribunal.[19]

In the case at hand the GFT concludes that there was no such predominant influence of the ISU with regard to the appointment of the arbitrators in the CAS proceeding between the ISU and Ms Pechstein. In coming to this conclusion, the GFT notes as a starting point that the ISU and Ms Pechstein were entitled according to the applicable procedural rules (CAS Code) to choose one arbitrator each. However, the GFT does not stop its examination at this purely formal perspective. Instead, it also examines whether or not the CAS Code (in force at the time) in its entirety grants an undue advantage to the ISU with regard to the composition of the CAS panel.

a) No undue advantange with regard to the pool of arbitrators to choose from

It is one of the most frequently criticized[20] particularities of CAS arbitration that the parties have to appoint an arbitrator from a "closed" list of arbitrators, which is drawn up by an organ of the CAS, the ICAS.[21] Ms Pechstein had submitted in the proceedings before the GFT that this restriction in nominating an arbitrator grants an undue advantage to the ISU. The GFT notes that a closed "*list of arbitrators as such is unobjectionable as long as is not used to institutionalize the predominant influence of one party or the body exercising a*

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18 GFT (BGH) NZG 2013, 713, 715.

19 GFT (BGH) NJW 1995, 583, 587; see also GFT (BGH) NJW 2004, 2226, 2227 et seq.; Higher Regional Court (OLG) Düsseldorf NJW-RR 2003, 142.

20 Cf. also references cited in DFT 129 III 445. E. 3.3.3.2.

21 Cf. Articles S13 et seq. of the CAS Code.

decisive influence on the drawing up of the list of arbitrators is closer to one party than to the other, i.e. belonging to a specific 'camp'."[22]

The GFT acknowledges that the ISU has an "indirect influence" over the content of the list of CAS arbitrators. However, such indirect influence does not reach the threshold of "predominant influence". The ISU is – according to the GFT – "*one of the international sports federations entitled to appoint four members of the ICAS. Furthermore, one fifth of the arbitrators should be appointed from among the persons named by international sport federations. This means that an international sports federation such as …* [the ISU] *does have a certain influence on the composition of the list of arbitrators. However, its scope is not sufficient to permit the …* [ISU] *to exercise a decisive influence on the composition of the list of arbitrators. No indications have been found … to suggest that the list of arbitrators … does not contain a sufficient number of neutral persons independent of the …* [ISU]."[23]

In addition, the GFT finds that the ICAS, which draws up the list of CAS arbitrators, is not a body belonging to the "camp" of the ISU. In this regard, the GFT notes that all federations taken together wield a significant influence in the drawing up of the list of arbitrators according to the CAS Code, but that federations and athletes cannot be "*seen as two 'camps' confronting each other [that are] motivated by opposing interests, as may be the case in other areas, e.g. in disputes involving employers and employees … It is true that, in the present case, a federation … and an athlete … were facing each other before the CAS as opposing parties; yet this does not mean that it is possible to place all the other sports federations automatically in the same camp as the …* [ISU]. *Generally speaking, the sports federations and the Olympic*

[22] Cf. marg. No. 30.
[23] Cf. marg. No. 31.

Committee are competing units with very different individual interests … As far as the obligation of implementing the WADC [World Anti-Doping Code][24] *is concerned, they may very well represent parallel interests in doping cases. However, these interests are usually identical with the interests of the athletes in ensuring that sport remains free from doping. Furthermore, beyond the common goal of ensuring doping-free sports competitions, there will frequently be quite different interests on the part of the various federations and the athletes …* [Consequently] *this does not justify an assumption of homogenous 'camps', consisting of the 'the federations' and 'the athletes', which would permit individual sports federations such as the …* [ISU] *to be automatically lumped with all the other federations so as to construe a predominance of an individual party to the proceedings with respect to the composition of the arbitral tribunal."*[25]

b) No undue advantage for other reasons

Finally, the GFT examines whether or not the ISU for other (practical or procedural) reasons has an undue advantage in relation to the composition of the CAS panel. In this respect, the GFT notes that – according to German law – the threshold for disqualifying a panel from being an arbitral tribunal must not be set too high, since in most instances a lack of independence and impartiality on the side of the arbitrators can be adequately dealt with by challenging the individual arbitrator. Only in exceptional cases does a panel lack the capacity to act as an arbitral tribunal. The GFT refers in this respect to sec. 1034 para. 2 of the German Code of Civil Procedure (hereinafter the "CCP"), which forms part of sections 1025 et seq. CCP, regulating the law of arbitration. Sec. 1034 CCP provides as follows:

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[24] Added for better understanding.
[25] Cf. marg. No. 32 seq.

> "If the arbitration agreement grants predominant rights to one party with regards to the composition of the arbitral tribunal which place the other party at a disadvantage, that other party may request the court to appoint the arbitrator or arbitrators in deviation from the nomination made, or from the agreed nomination procedure …".

The GFT deduces from this provision that "not all impairments of the independence and neutrality of the arbitral panel will exclude the applicability of sections 1025 et seq. of the Code of Civil Procedure. Rather, the application of sections 1025 et seq. will only be waived if the panel is no longer organised as an independent and impartial body according to its own statutes or if the 'arbitral proceedings' boil down to no more than a decision on the part of the association or federation itself to safeguard its own interests, i.e. if a mere representation of the interests of the association or federation in question is to be expected."[26]

That the impairment in question must be significant in order for a panel to be disqualified as an arbitral tribunal also follows, according to the GFT, from its previous jurisprudence.[27] The GFT refers in this respect to the matter in NJW 1986, 3027. This case dealt with the recognition and enforcement of an English award in Germany. The applicable arbitration rules provided that in case a respondent failed to nominate "his" arbitrator within the deadlines prescribed, the arbitrator nominated by the other party should act as sole arbitrator. The GFT acknowledged that – as a result of the failure of the respondent to nominate an arbitrator in the case at stake – there was a predominant influence of the other party (the applicant) on the constitution of the panel. However, the GFT went on to find that such influence was not

[26] Cf. marg. No. 35.
[27] Cf. marg. No. 36.

contrary to Germany's public order, since the rules concerning the composition of the panel as such did not grant one of the parties a predominant influence from the outset, i.e. did not provide for a panel acting as a mere agent implementing the intentions of one of the parties. Consequently, the GFT found that there was no reason to disqualify the panel as such.

Applying the aforementioned criteria to the "Pechstein case", the GFT found that there were no circumstances allowing it to disqualify the CAS panel as such and that the CAS Code, with its rules relating to the duty of disclosure and the opportunity to challenge arbitrators, ensures sufficient "*individual independence and neutrality on the part of the arbitrators*". The fact that "*a federation has, as a rule, more often the opportunity to nominate an arbitrator than an individual athlete is in the nature of things …* [and] *does not imply that the arbitrator nominated by the federation can be considered as its agent*."[28] In addition, the right of the "*Secretary General of the CAS to point out fundamental issues of principle does not, basically, put into question the independence of the arbitral tribunal, either. Rather, this right of suggestion serves to guarantee a uniform jurisprudence*."[29]

C. Comment

1. Independence of Double Relevance

The question of independence and impartiality is – according to German law – doubly relevant. It is of significance with respect to whether the panel qualifies as an arbitral tribunal (or merely as an internal association tribunal) and with respect to whether or not the individual arbitrator may be challenged. In this respect the legal situation in Germany does

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28 Cf. marg. No. 38.
29 Cf. marg. No. 39.

not fundamentally differ from Swiss law.[30] The SFT, as well, differentiates clearly between the impartiality and independence of the panel as such and that of the individual arbitrators. In a decision dated 26 February 2015, the SFT found as follows:[31]

> "*Quoi qu'il en soit, pour être qualifiée de sentence arbitrale, une décision d'origine privée doit être comparable à celle d'un tribunal étatique (Poudret/Besson, op. cit., ibid. et les exemples cités au n. 878). Selon la jurisprudence du Tribunal fédéral, une véritable sentence, assimilable au jugement d'un tribunal étatique, suppose que le tribunal qui la rend offre des garanties suffisantes d'impartialité et d'indépendance. A cet égard, la décision prise par l'organe d'une association sportive ayant qualité de partie au procès, cet organe fût-il dénommé tribunal arbitral, ne constitue qu'une simple manifestation de volonté émise par l'association intéressée; il s'agit d'un acte relevant de la gestion et non d'un acte judiciaire.*"

If such minimum requirements are not met, the deciding body cannot qualify as an arbitral tribunal. However, it is to be noted that this differentiation between independence of the arbitral tribunal as such and the independence of the individual arbitrators is unknown to many other jurisdictions. Thus, for example, the English High Court, in a disciplinary dispute between the International Association of Athletics Federations (IAAF) and an athlete, accorded to a jurisdictional body labelled "IAAF Arbitration Panel" the status of an arbitral tribunal even though it was incorporated into the internal

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[30] GIRSBERGER/VOSER, International Arbitration, 3rd ed. 2016, No. 1896; RIGOZZI/HASLER/NOTH, in Arroyo (Ed.), Arbitration in Switzerland, 2013, chapter 5 Part I No. 4 et seq.; HAAS, in Gilles/Pfeiffer (Eds.), Neue Tendenzen im Prozessrecht, 2008, p. 9, p. 33 et seq.

[31] SFT (26.2.2015) 4A_374/2014, E. 4.3.2.1; cf. also DFT 119 II 271, E. 3b; 107 Ia 155, E. 2b.

structure of the IAAF and all the panel members were appointed by the IAAF.[32] Likewise, the US District Court, Southern District of Ohio arrived at the same result with regard to the IAAF's "Arbitration Panel" in the case of the 400-metre runner Harry Reynolds.[33] By contrast, the same jurisdictional body has been qualified by German[34] and Swiss[35] courts as a mere internal association tribunal whose decisions are, in principle, subject to an unrestricted review both in fact and in law.[36]

2. The Minimum Threshold

The GFT rightly points out that not all impairments of the independence and neutrality of the arbitral panel result in the non-applicability of the provisions on arbitration. Instead, only impairments reaching a certain minimum threshold disqualify the deciding body as an arbitral tribunal. The dividing line is transgressed if, from the outset, the judicial body appears to be an agent of one of the parties to the dispute. This is true if the judicial body is incorporated into the internal organization of one of the parties to the dispute or if the members of the panel are solely (or predominantly) appointed by one of the parties.

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[32] High Court (15.6.1988) No. Ch-88-g-2191 *Sandra Gasser vs. Henry Hunter Stinson and John Byron Holt*, p. 32 et seq.; see also High Court (21.3.2013) No. 2013-Folio-329 *England and Wales Cricket Board Ltd vs. Kaneria*, where an organ of the England and Wales Cricket Board Ltd nominated Cricket Disciplinary Commission was qualified as an arbitral tribunal within the meaning of the English Arbitration Act 1997.

[33] Yearbook of Commercial Arbitration (YCA) 1996, 715, 717 et seq.

[34] District Court (LG) of Stuttgart BeckRS 2002, 12114.

[35] Richteramt III Bern SJZ 1988, 85, 88: "*Weiter ändert auch der Umstand nichts, dass der Gesuchsteller offenbar der Weg an das Schiedsgericht der IAAF offensteht … Zum einen genügt nämlich das … Schiedsgericht in keiner Weise den Anforderungen, die das schweizerische Recht an ein unabhängiges Schiedsgericht stellt, werden doch die Mitglieder des Schiedsgerichts vom IAAF-Kongress gewählt, also von einem Organ desjenigen Verbandes, der die Sanktion erlassen hat …*".

[36] GIRSBERGER/VOSER, International Arbitration, 3rd ed. 2016, No. 1896.

In the dispute at hand the ISU did not have a predominant influence on the composition of the panel. The GFT rightly points out that the merely indirect influence of the ISU with respect to the drawing up of the list of arbitrators[37] "*indicates no structural imbalance impairing the independence and neutrality of the CAS to such an extent that its position as a 'true' court of arbitration could be called into question*."[38] In particular, the GFT correctly rejected the "camp theory" endorsed by the previous instance (Higher Regional Court of Munich) according to which sports federations as a whole are assumed to have similar interests and, therefore, to "act in concert".[39]

This notion of closed ranks in sports disputes is – as the GFT rightly points out – fictitious.[40] Such "block mentality" is out of touch with reality already in abstract terms, since the various sports federations are – in keeping with antitrust jargon – very stiff competitors in the market for sports services and patronage by sponsors or spectators.[41] With regard to the fight against doping in particular, only little, if any, "block mentality" can be observed among the sports organizations. This is impressively evidenced by the incidents surrounding the 2016 Rio Olympic Games and the 2016 Rio Paralympic Games. On 18 July 2016, i.e. shortly before the commencement of the Games, the World Anti-Doping Agency (WADA) published the findings of Prof. Richard McLaren (the so-called McLaren Report)[42] on state-sponsored and state-controlled doping in Russia. The report provoked a myriad of

[37] The ISU is one of many international federations entitled to jointly nominate four out of 20 members to the ICAS, which in turn is responsible for redacting the closed list of arbitrators.

[38] Cf. marg. No. 26.

[39] Higher Regional Court (OLG) Munich SchiedsVZ 2015, 40, 44.

[40] Cf. HAAS ZVglRWiss 2015, 516, 528 et seq.

[41] HAAS ZVglRWiss 2015, 516, 529.

[42] https://www.wada-ama.org/en/media/news/2016-07/wada-publishes-independent-mclaren-investigations-report.

very different responses throughout the sports spectrum, which goes to show how very little "parallel interest" exists among the various sports federations and national Olympic Committees in the handling of "*one of the biggest doping scandals in history*"[43]. The purported "camp mentality" is also disproved when looking into the particularities of the "Pechstein case". In the proceeding before the CAS[44] the sanction imposed by the ISU was not only appealed by Ms Pechstein, but also by the German Skating Union (*Deutsche Eissschnelllauf Gemeinschaft eV*). Thus, no parallel interests existed between the national and the international federation from the very outset. It is further noteworthy that Ms Pechstein received considerable backing from the German National Olympic Committee (DOSB). The latter, in October 2014, i.e. long after the CAS proceedings and at a time when the dispute between the ISU and Ms Pechstein before the German courts was pending, installed a commission mandated to investigate whether or not the blood findings of Ms Pechstein in 2009 were due to doping or rather to a blood anomaly.[45] The DOSB commission published its respective report in January 2015,[46] backing Ms Pechstein's position that the blood parameters found in her sample did not result from blood doping, but were due to a blood anomaly. This course of action of the DOSB seems hard to reconcile with the idea of "parallel interests" between all sports organizations. Admittedly, however, the National Olympic Committees, just like the international federations are entitled to jointly nominate four out of the 20 ICAS members mandated with drawing up the list of CAS arbitrators.

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[43] CAS [5.8.2016] OG 16/09, *Russian Weightlifting Federation vs. International Weightlifting Federation*, no. 7.12.

[44] CAS [25.11.2009] 2009/A/1912 & 1913.

[45] http://www.faz.net/aktuell/sport/sportpolitik/dosb-gutachten-indirekter-freispruch-fuer-pechstein-13199379.html.

[46] http://www.spiegel.de/sport/wintersport/doping-dosb-spricht-sich-fuer-claudia-pechstein-aus-a-1015601.html.

3. The minimum threshold in an international context

In the "Pechstein case" the GFT applied German law to the question of whether or not the CAS is to be qualified as an arbitral tribunal.[47] This – at least at first sight – is surprising, since the CAS is an arbitral tribunal having its seat in Switzerland. Consequently, the question arises what law determines the nature of the dispute resolution mechanism in an international context.

The question of the relevant law for qualifying a "decision" or a "judicial body" chiefly arises in the context of recognition and enforcement of foreign arbitral awards (or, respectively, in connection with the recognition of a foreign arbitration agreement). The answer to this question must, thus, be derived primarily from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (NYC), to which Germany is a party. The NYC does not explicitly define the requirements that a judicial body must fulfil in order for its decisions to qualify as arbitral awards.[48] According to the prevailing opinion, however, the term "arbitral award" should be construed autonomously and functionally in light of the goals and the purpose of the NYC.[49] According to this opinion the prerequisite is that, on the one hand, the decision should be the result of judicially structured

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[47] Cf. also District Court (LG) Stuttgart BeckRS 2002, 12114.

[48] See MÜKOZPO/ADOLPHSEN, 4th ed. 2013, Annex Sec. 1061 Art. 1 NYC No. 3; EHLE, in Wolf (Ed.) New York Convention, 2012, Article I margin No. 12 et seq.; HAAS, in Weigand (Ed.) Practitioner's Handbook on International Commercial Arbitration, 2002, Part 3 Art. I No. 46; SOLOMON, in Balthasar (Ed.) International Commercial Arbitration, 2016, § 2 No. 39.

[49] KAUFMANN-KOHLER/RIGOZZI, International Arbitration, 2015, No. 8.241; STEIN/JONAS/SCHLOSSER, ZPO, 23rd ed. 2014, Annex to Sec. 1061 margin No. 16; HAAS, in WEIGAND, Practitioner's Handbook on International Commercial Arbitration, 2002, Part 3 Article I No. 46 et seq.; RIGOZZI, L'arbitrage en matière de sport, 2005, No. 610; EHLE, in Wolff (Ed.) New York Convention, 2012, Article I No. 19; BSK-IPRG/*Patocchi/Jermini*, 3rd ed. 2013, Art. 194 No. 2 seq.; see also GFT (BGH) NJW 1982, 1224, 1225.

proceedings and that, on the other hand, it should be comparable to a court judgment, in terms of the external course of the proceedings as well as in terms of its legal effects in the country in which it is issued. After all, the spirit and purpose of the NYC was, and is, precisely to ensure the viability of decisions on private disputes (in the form of arbitral awards) *abroad*.[50]

Whether or not the decision in question fulfils these autonomous criteria is first and foremost decided according to the law governing the arbitration, i.e. the law at the seat of the arbitration (*lex arbitri*).[51] To what extent the law of the state where recognition and enforcement is sought can be taken into account additionally, is open to debate.[52] In any event, it does not follow from the above that the contracting state where recognition and enforcement is sought is obliged to apply the NYC to any decision that is qualified in the "home state" as an arbitral award. Ultimately, the state where recognition and enforcement is sought may refuse the application of the NYC to such "decisions" that are deemed incompatible from the outset with its internal public order. This is the case, for instance, where the decision-making body as such does not comply with minimum requirements of independence and neutrality. This appears to be the reason why the GFT in the "Pechstein case" referred to German law when assessing whether or not the "foreign decision" within the meaning of the NYC was an arbitral award or merely the decision of an internal association tribunal. In any event, the

[50] HAAS ZEuP 1999, 355, 356; see also EHLE, in Wolff (Ed) New York Convention, 2012, Article I margin No. 19.

[51] HAAS, in Weigand (Ed.) Practitioner's Handbook on International Commercial Arbitration, 2002, Part 3 Art. I No. 46; SOLOMON, in Balthasar (Ed.) International Commercial Arbitration, 2016, § 2 No. 39.

[52] See e.g. BSK-IPRG/*Patocchi/Jermini*, 3rd ed. 2013, Art. 194 No. 2 seq.

SFT also applies a similar approach, as is evidenced by the following excerpt of a recent decision:[53]

> "*La CNY ne définit pas ce qu'il faut entendre par sentence arbitrale (Kaufmann-Kohler/Rigozzi, op. cit., n. 874). Tout au plus assimile-t-elle expressément l'arbitrage institutionnel à l'arbitrage ad hoc sous ce rapport (art. I ch. 2 CNY; Andreas Bucher, in Commentaire romand, Loi sur le droit international privé - Convention de Lugano, 2011, n° 20 ad art. 194 LDIP). Pour le reste, savoir si la qualification de sentence arbitrale, au sens de la CNY, dépend du droit de l'Etat d'origine de la décision, du droit de l'Etat requis ou d'une définition autonome propre à la Convention est une question disputée (à ce sujet, cf., parmi d'autres: Bernd Ehle, in New York Convention Commentary, Reinmar Wolff [éd.], 2012, nos 12 ss ad art. I CNY), même si la dernière approche semble avoir la préférence au sein de la doctrine (Kaufmann-Kohler/Rigozzi, op. cit., n. 877). Quoi qu'il en soit, pour être qualifiée de sentence arbitrale, une décision d'origine privée doit être comparable à celle d'un tribunal étatique (Poudret/Besson, op. cit., ibid. et les exemples cités au n. 878). Selon la jurisprudence du Tribunal fédéral, une véritable sentence, assimilable au jugement d'un tribunal étatique, suppose que le tribunal qui la rend offre des garanties suffisantes d'impartialité et d'indépendance.*"

4. The Rules governing the "Closed" List

The ICAS has revised the rules pertaining to the "closed" list of arbitrators repeatedly since 2009. The CAS Code in force at the time the arbitration agreement between Ms Pechstein and

[53] SFT (26.2.2015) 4A_374/2014, E. 4.3.2.1.

the ISU was concluded provided in relation to the composition of the ICAS as follows:

> *S4 The ICAS is composed of twenty members, namely high-level jurists appointed in the following manner:*
>
> *a. four members are appointed by the International Sports Federations ("IFs"), three by the Summer Olympic IFs (ASOIF) and one by the Winter Olympic IFs ("AIWF"), chosen from within or from outside their membership;*
>
> *b. four members are appointed by the Association of the National Olympic Committees ("ANOC"), chosen from within or from outside its membership;*
>
> *c. four members are appointed by the International Olympic Committee ("IOC"), chosen from within or from outside its membership;*
>
> *d. four members are appointed by the twelve members of the ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes;*
>
> *e. four members are appointed by the sixteen members of the ICAS listed above and chosen from among personalities independent of the bodies designating the other members of the ICAS.*

With respect to the "closed" list of arbitrators the CAS Code (in the version applicable in 2009) read – *inter alia* – as follows:

> *S14 In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one*

> *CAS working language. In addition, the ICAS shall respect, in principle, the following distribution :*
>
> *1/5th of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or from outside;*
>
> *1/5th of the arbitrators selected from among the persons proposed by the IFs, chosen from within their membership or outside;*
>
> *1/5th of the arbitrators selected from among the persons proposed by the NOCs, chosen from within their membership or outside;*
>
> *1/5th of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes;*
>
> *1/5th of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article.*

In 2012,[54] Article S14 was completely modified. The new provision read as follows:

> *In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of the ICAS, including by the IOC, the IFs and the NOCs.*

In 2013,[55] Article S14 was again revised, however only slightly:

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[54] In force as of 1 January 2012.
[55] In force as of 1 March 2013.

> *In establishing the list of CAS arbitrators, ICAS shall call upon personalities with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs and the NOCs. ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes. (emphasis added)*.

The version of Article S14 in force as of 2016[56] states as follows:

> *The ICAS shall appoint personalities to the list of CAS arbitrators with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs, and the NOCs and by the athletes' commissions of the IOC, IFs and NOCs. ICAS may identify the arbitrators having a specific expertise to deal with certain types of disputes*. (emphasis added)

When examining whether the CAS may be qualified as an arbitral tribunal, the GFT makes express reference to the rules of the CAS Code in force at the time of the conclusion of the arbitration agreement, i.e. the version of the CAS Code in force in 2009. These provisions not only provided for a certain representation of the sports organizations in the ICAS (cf. Article S4) but, in addition, ensured that their proposals were also reflected in the distribution of the CAS arbitrators on the list (Article S14). Compared to the rules in force in 2009, the "fingerprint" of the sports organizations on the list of

[56] In force as of 1 January 2016.

arbitrators has decreased significantly. The question is whether the GFT, when assessing whether or not the CAS constituted an arbitral tribunal, should have referred to the new provisions of the CAS Code, i.e. the ones in force at the time Ms Pechstein filed her claim for damages before the District Court (LG) Munich.[57] Generally, and absent any indications to the contrary, references in arbitration agreements to the procedural rules of an arbitral institution are interpreted dynamically, i.e. as referring to the rules applicable at the time of the filing of the dispute and not at the time of execution of the arbitration agreement.[58] Since the dispute concerning the claims for damages was filed after the 2012 amendment of the CAS Code, the GFT probably ought to have examined the (new) rules in force at that time. But, be that as it may, it is to be noted that this aspect does not change the outcome of the assessment made by the GFT.

[57] The Pechstein case is not about recognition of a CAS award, but about the recognition of an arbitration agreement.

[58] GFT (BGH) NJW 1994, 1008 et seq. : „*Vereinbaren die Parteien die Zuständigkeit eines ständigen Schiedsgerichts und unterwerfen sie sich stillschweigend der Verfahrensordnung dieses Gerichts, so rechnen sie regelmäßig damit, dass die Verfahrensordnung angesichts von Entwicklungen im kaufmännischem Verkehr, von Änderungen der Gesetzeslage oder der Rechtsprechung überarbeitet und geändert wird. Sie billigen damit spätere Änderungen der Verfahrensordnung schon bei Abschluss des Schiedsvertrages, soweit diese nicht unter Berücksichtigung von Treu und Glauben gegen ihre anerkennenswerten Interessen verstoßen. Eine derartige Auslegung wäre allenfalls dann nicht statthaft, wenn die Parteien bei Abschluss der Schiedsvertrages auf eine bestimmte Fassung der Verfahrensordnung des Schiedsgerichts Bezug genommen hätten.*"; see also DIS-Schiedsgerichtsverfahren SchiedsVZ 2010, 229. 230.

III. The Protection of the Principle of Voluntariness in Arbitration

Organized sport is characterised by its monopolistic organizational structure.[59] Accordingly, each type of sport in a given territory is solely represented by a single association. At the national level, this is the relevant national sports association and at the international level, it is the relevant international federation. The legal relationships between the various levels of the federations and associations are established through membership or "licence agreements".[60] Decision-making in these pyramids of federations and associations works on a top-down basis. In effect, participation in organized sports is not possible without belonging to the relevant family of associations. Since at the global level, a branch of sport is generally represented by a single international federation, the only choice an individual sportsman or club has in relation to their sport is to either accept the relevant set of rules and regulations, or else to refrain from participation in organized sport altogether. As a general rule, these sets of rules and regulations include an arbitration clause, which provide for the jurisdiction of the CAS as the court of last instance for sports-related disputes. Ms Pechstein had submitted in the proceedings before the GFT that such "forced arbitration" clauses in favor of the CAS are invalid.

A. The Regulatory Background

The German point of view in relation to "forced arbitration agreements" has long been ambivalent. Before the reform of the German arbitration law in 1998, the chapter on arbitration

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59 DFT 133 III 235, E. 4.3.2.2; HAAS, in Gilles/Pfeiffer (Eds.), Neue Tendenzen im Prozessrecht, 2008, p. 9, p. 50 et seq.; HAAS/MARTENS, Sportrecht – Eine Einführung in die Praxis, 2011, p. 37 et seq., p. 44 et seq.

60 HAAS/MARTENS, Sportrecht – Eine Einführung in die Praxis, 2011, p. 66 et seq.

in the CCP included a provision in sec. 1025 para. 2, pursuant to which an arbitration agreement was invalid if a party employed its social or economic predominance in order to (unduly) force the arbitration agreement on the other party. The true scope of this provision, however, was in dispute. In particular, different views were held as to when the use of superior bargaining power was to be qualified as "undue", i.e. to what extent the provision actually protected the free and autonomous formation of a party's will to enter into an arbitration agreement.[61] The GFT never had the chance to clarify this issue. In 1998, in the course of the reform of the German law on arbitration, the German legislator deleted sec. 1025 para. 2 of the German Code of Civil procedure and justified this as follows:

> *"Der Abschluß der Schiedsvereinbarung als solcher stellt unter der Prämisse einer Gleichbehandlung der Parteien sowohl bei der Zusammensetzung des Schiedsgerichts als auch bei der Durchführung des schiedsrichterlichen Verfahrens keine Benachteiligung einer Partei dar. Die in § 1025 Abs. 2 erste Alternative ZPO vorgesehene Rechtsfolge der Nichtigkeit des Schiedsvertrages für den Fall, daß eine Partei ihre wirtschaftliche und soziale Überlegenheit dazu ausgenutzt hat, die andere Partei zum Abschluß der Schiedsvereinbarung zu nötigen, erscheint angesichts der Tatsache, daß die Schiedsgerichtsbarkeit einen der staatlichen Gerichtsbarkeit grundsätzlich gleichwertigen Rechtsschutz bietet, zu weitgehend."*
>
> *[free translation: The execution of an arbitration agreement as such is not detrimental to a party provided that the principle of equal treatment is*

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[61] HAASZGR 2001, 325, 328 et seq.; SCHLOSSER, in FS Zeuner, 1994, pp. 467, 481; H.P. WESTERMANN, Die Verbandsstrafgewalt und das allgemeine Recht, 1972, p. 110 ff.; NICKLISCH BB 1972, 1285, 1288 et seq.; see also Higher Regional Court (OLG) Hamburg RIW 1989, 574, 575.

> *observed both when constituting the arbitral tribunal and conducting the arbitration procedure. The consequence provided for in sec 1025 (2) first alternative, i.e. the nullity of the arbitration agreement in case a party takes advantage of its economic or social supreme bargaining power in order to force the arbitration agreement on the other party appears to be exaggerated considering that arbitration provides, in principle, comparable access to justice just like court proceedings.]*

However, it cannot be inferred from either the deletion of sec. 1025 para. 2 CCP or from the reasoning of the German legislator that the new law of arbitration no longer offers any protection whatsoever of the free will of a party to enter into an arbitration agreement.[62] Instead, the legal protection is henceforth anchored in general provisions, in particular in general principles of contract law (applied *mutatis mutandis* to arbitration agreements), such as the duty to observe public morals and common decency (sec. 138 and sec. 242 of the German Civil Code).[63]

The starting point under the new German arbitration law, thus, is very similar to Swiss law, according to which provisions of general contract law such as articles 20 seq. and article 27 of the Swiss Civil Code, are applied by analogy to arbitration agreements.[64] Irrespective, though, of the (re-

[62] OSCHÜTZ, Sportschiedsgerichtsbarkeit, 2005, p. 234 seq.; SCHWAB/WALTER, Schiedsgerichtsbarkeit, 7. Aufl. 2005, Kap. 4 Rn 15; HAAS ZGR 2001, 325, 327 et seq.; SONNAUER, Die Kontrolle der Schiedsgerichte durch staatliche Gerichte, 1992, p. 25 et seq.

[63] STEIN/JONAS/SCHLOSSER, ZPO, 23rd ed. 2014, Sec. 1029 No. 6, 45; K.SCHMIDT ZHR 162 (1998) 265, 281 f.; HAAS ZGR 2001, 325, 328 et seq.; HOLLA, Der Einsatz von Schiedsgerichten im organisierten Sport, 2006, p. 117, p. 126 et seq. EBBING NZG 1998, 281, 288.

[64] MUELLER, in Arroyo (Ed.) Arbitration in Switzerland, 2013, Chapt. 2 Part. II, Art. 178 No. 46; KAUFMANN-KOHLER/Rigozzi, International Arbitration, 2015, No. 3.82; BERGER/KELLERHALS, International Domestic Arbitration in Switzerland,

defined) rationale for the protection of a party's free will to enter into an arbitration agreement, one fundamental question has remained unresolved under the new German arbitration law, namely, to what extent a forced waiver of the right to access to state courts is compatible with statutory law. In the controversial debate among legal scholars,[65] it has been pointed out that sec. 138 and sec. 242 of the German Civil Code are not the only provisions that aim to protect parties with inferior bargaining power; the same purpose is also served, for instance, in the form of statutory provisions on general terms and conditions,[66] and by principles derived from constitutional law,[67] competition law[68] as well as Article 6 of the European Convention on Human Rights (hereinafter, "ECHR")[69].

B. Overview of the Jurisprudence

In view of the above-described regulatory background, it is not surprising that the German jurisprudence on this issue of "forced arbitration agreements" in sports-related contexts is rather inconsistent. The two key stances at either end of the

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3rd ed. 2015, No. 408; HAAS BullASA 2014, 707, 708 et seq.; RIGOZZI, L'arbitrage international en matière de sport, 2005,No. 475 et seq.

65 STEIN/JONAS/SCHLOSSER, ZPO, 23rd ed. 2014, Sec. 1029 No. 45; HEERMANN SchiedsVZ 2014, 66 et seq.; MONHEIM SpuRt 2014, 90 et seq.; ADOLPHSEN, Internationale Dopingstrafen, 2003, p. 561 et seq.; EBBING, Private Zivilgerichte, 2003, p. 134 et seq.; OSCHÜTZ, Sportschiedsgerichtsbarkeit, 2005, p. 220 et seq.; HOLLA, Der Einsatz von Schiedsgerichten im organisierten Sport, 2006, p. 112 et seq.

66 Cf. OSCHÜTZ, Sportschiedsgerichtsbarkeit, 2005, p. 235 et seq.; HOLLA, Der Einsatz von Schiedsgerichten im organisierten Sport, 2006, p. 117, p. 124 et seq.; HAAS/HAUPTMANN SchiedsVZ 2004, 175 et seq.; STEIN/JONAS/SCHLOSSER, ZPO, 23rd ed. 2014, Sec. 1029 No. 45.

67 HEERMANN SchiedsVZ 2014, 66, 70 seq.; OSCHÜTZ, Sportschiedsgerichtsbarkeit, 2005, p. 220 et seq.

68 STANCKE SpuRt 2015, 46 et seq.

69 HEERMANN SchiedsVZ 2014, 66, 67 et seq.; BYRNES, in Haas/Healey (Eds.) Doping in Sport and the Law, 2016, p. 81 et seq.; HAAS SchiedsVZ 2009, 73 et seq.; ID. ASA Bull. 2014, 707, 716 et seq.

spectrum are reflected on the one hand in a decision by the District Court (LG) Cologne and on the other hand in the first-instance decision in the "Pechstein case" issued by the District Court (LG) Munich I. While the District Court (LG) Cologne – in spite of the constraining situation in which, in particular, a professional sportsman finds himself when concluding a contract [with a sporting association] – explicitly deemed the arbitration agreement to be valid,[70] the District Court (LG) Munich I took the exactly opposite view:[71] It held that the right to have recourse to a court is "*fundamental for the functioning of a democratic rule of law. Renouncing the state judicial system in favor of a private legal remedy, such as arbitration, is possible. In view of the associated waiver of the right to have recourse to a state court, however, such a waiver is only valid if it occurs on a private, autonomous basis and if the right is reserved for the State to verify that no unfairness is involved … Since at the time of the signing of the arbitration agreement the association was in a very predominant position, the waiver of the right of access to the state courts contained in the arbitration agreement does not constitute self-determination by the sportsman*."[72] An arbitration agreement with the hierarchically subordinate sportsman can – according to the District Court (LG) Munich I – "*only be valid if he has a genuine right to choose whether an ordinary court or a sports arbitral tribunal should rule on disputes involving him*."[73] The District Court (LG) based its finding on constitutional law as well as on Article 6 para. 1 ECHR.

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[70] See District Court (LG) Cologne BeckRS 2007, 09783.

[71] District Court (LG) Munich SchiedsVZ 2014, 100, 104 et seq.; the decision was criticized by HANDSCHIN/SCHÜTZ SpuRt 2014, 179 et seq.; PFEIFFER SchiedsVZ 2014 161 et seq; DUVE/RÖSCH SchiedsVZ 2014, 216 et seq., but backed – e.g. – by SCHULZE SpuRt 2014, 139 et seq.; HEERMANN SchiedsVZ 2014 66 et seq.

[72] District Court (LG) Munich SchiedsVZ 2014, 100, 105.

[73] District Court (LG) Munich SchiedsVZ 2014, 100, 105; for a similar view, see HEERMANN SchiedsVZ 2015, 78, 80.

In the wake of this decision, several other German courts have meanwhile examined the issue of where to locate the threshold for establishing constraint as the exclusion of voluntariness. In the opinion of the Higher Regional Court (OLG) Koblenz, for instance, this threshold was not exceeded in the case of a player's agent who, by applying for a licence, submitted himself to the FIFA Rules (and thus to the respective arbitration clause in favor of the CAS). The court held that acting as a player's agent does not presuppose a FIFA licence, even though under the association's rules players and associations are forbidden to use the services of a non-licensed player's agent.[74] In practice, at any rate, according to the Higher Regional Court (OLG) Koblenz "*well over 50% of the individuals who are acting as players' agents do not [have] a licence*".[75] Since, accordingly, the player's agent "*was not dependent upon the granting of the FIFA licence in order to exercise his activity, he was not under constraint when he submitted to the exclusive jurisdiction of the association by applying for the FIFA licence, which excluded recourse to the ordinary courts*."[76] By contrast, the District Court (LG) Kempten assumed that the position of an athlete concluding an arbitration agreement is characterized by structural imbalance (establishing an inadmissible constraint) if the sportsman would otherwise have to forego taking part in international competitions and sports promotion.[77] In view of all this legal uncertainty, the decision of the GFT in the "Pechstein case" is most welcome, because it has clarified once and for all that forced arbitration agreements in general and, in particular, forced arbitration agreements in favor of the CAS are basically compatible with

[74] Higher Regional Court (OLG) Koblenz SpuRt 2015, 29, 30 et seq.
[75] Higher Regional Court (OLG) Koblenz SpuRt 2015, 29, 31.
[76] Higher Regional Court (OLG) Koblenz SpuRt 2015, 29, 31.
[77] District Court (LG) Kempten SpuRt 2015, 35.

(national and European) competition law as well as with article 6 para. 1 ECHR.

C. The Reasoning of the GFT

1. The Law Applicable to the Arbitration Agreement

In a first step, the GFT determines the law applicable to the arbitration agreement concluded between Ms Pechstein and the ISU (signed in January 2009). Based on the fact that the validity of "*an arbitration agreement must be evaluated in accordance with the rules of German International Private Law*"[78] (hereinafter, "GPIL"), the GFT examines the substantive validity of the arbitration agreement "*in accordance with Art. 27 et seq. … [GPIL, applicable until 17 December 2009]. Since the parties failed to include an express choice of law clause, the agreement, pursuant to Art. 28 para. 1 sentence 1 … [GPIL], is subject to the law of the state to which it is most closely connected … With arbitration agreements in general, the place of arbitration is seen as a major connecting link for determining the state with which the agreement has the closest connection.*"[79] Consequently, the GFT applied Swiss law in order to assess the substantive validity of the arbitration agreement.

The GFT examines whether under Swiss law an arbitration agreement concluded between an athlete and the respective federation is valid or not. Contrary to the first instance decision of the District Court (LG) Munich,[80] the GFT bears in mind that in the context of such examination "*foreign law must be applied by German courts in the same way as the courts of the foreign country in question interpret and apply*

[78] Cf. marg. No. 44.
[79] Cf. marg. No. 68.
[80] Cf. HAAS, Der Court of Arbitration for Sport im Spiegel der deutschen Rechtsprechung, ASA Bull. 2014, 707, 713 et seq.

it."[81] Thus, in light of the "Canas decision" of the SFT,[82] the GFT draws the conclusion that an arbitration agreement in favour of the CAS, even if it is "forced" on the athlete by an international federation, is valid under Swiss law.[83]

2. German Public Order

The GFT infers from Article 34 GPIL (as amended at the time) that in addition to Swiss law, "*those provisions of German law* [must be applied to the substantive validity of the arbitration agreement] *that cannot be contractually modified and that are mandatorily applicable internationally … without regard to the law governing the contract itself.*"[84] Article 34 GPIL is comparable to Art. 17 of the Swiss Private International Law Act (SPIL). According to the GFT, the provisions referenced by Article 34 GPIL include German competition law (hereinafter "GWB"), European competition law (hereinafter "TFEU") and also Article 6 para. 1 ECHR.

3. Forced Arbitration Agreements in light of German Competition Law

At the centre of the GFT's legal analysis of the validity of the arbitration agreement in favor of the CAS is sec. 19 para. 1 GWB (as amended at the time). This provision, which applies whenever a restraint of competition has an impact within the scope of applicability of the GWB, reads as follows:

> *Die missbräuchliche Ausnutzung einer marktbeherrschenden Stellung durch ein oder mehrere Unternehmen ist verboten.*
>
> *[free translation: The abuse of a market-dominating position by one or several undertakings is forbidden.]*

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[81] Cf. marg. No. 70.
[82] DFT 133 III 235.
[83] Cf. marg. No. 70.
[84] Cf. marg. No. 44.

a) ISU is an Addressee of sec. 19 GWB

According to the GFT, the ISU is an "undertaking" within the meaning of the GWB because it engages in the organization of sporting events, i.e. in a commercial activity. Furthermore, "*in view of the one place principle…* [the ISU] *occupies a monopoly position in the relevant market of the organization of speed skating world championships.*"[85] Hence, the GFT argues, the ISU is an addressee of sec. 19 GWB.

b) The Balancing of Interest

Whether or not ISU has abused a dominant market position within the meaning of sec. 19 para. 1 GWB by forcing Ms Pechstein to sign an arbitration agreement must be determined based on a balancing of interests. In the context of this assessment, the GFT first and foremost examines the interests of both parties in a fair dispute resolution mechanism and in "*fair competition … in accordance with uniform standards … and … equal treatment for all athletes from different countries*".[86] In order to ensure fair competition – according to the GFT – "*the fight against doping is of paramount and global importance … Against this backdrop, a uniform system of arbitration is a necessity when it comes to enforcing the WADC anti-doping rules effectively and translating them into uniform case law. If this task were left to the courts of the individual states, this goal … would be seriously jeopardized*".[87] The GFT notes that the dispute resolution mechanism has "*deficiencies in connection with the appointment of independent arbitrators and the proceedings in general*", due to the "*influence exercised by the international sports federations and the Olympic Committees*". However, despite these deficiencies, the GFT finds that the

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[85] Cf. marg. No. 45.
[86] Cf. para. 49.
[87] Cf. para. 50.

CAS system provides for a fair dispute resolution mechanism in which the various interests of the parties are balanced against one another in an "*acceptable*" manner.[88]

The GFT also refers to Ms Pechstein's fundamental right of access to justice. According to the GFT, this right is not absolute, but can be waived "*as long as the parties have submitted voluntarily to the arbitration agreement*".[89] A voluntary waiver is excluded in cases "*where physical or psychological coercion have been used, e.g. by threatening considerable disadvantages …, where the party waiving its right was misled, or was not aware of the significance and scope of his/her declaration …, or where a respective (conscious) declaration of intent was never even made*."[90] However, the GFT notes that if an agreement has been entered into "*it will be generally assumed that the parties entered into the contract voluntarily*"[91] and that Ms Pechstein had "*neither established nor alleged that she was forced* [to enter into the arbitration agreement] *by unlawful threat or misrepresentation or by physical coercion.*"[92]

Nevertheless, even if a party has made a voluntary waiver, it is not wholly deprived of legal protection. The GFT clearly states that where "*one of the parties is in a position of such power that it is able to determine the terms of the contract more or less unilaterally … the rules and regulations of the respective state have to come into action*"[93] so as to protect the weaker party and to ensure that the content of the contract is the result of an objective balancing of the respective interests. Rules serving this purpose, i.e. calling for a fair balancing of party interests, are to be found in contract

[88] Cf. para. 50.
[89] Cf. para. 52.
[90] Cf. para. 54.
[91] Cf. para. 54.
[92] Cf. para. 55.
[93] Cf. marg. No. 55.

law (e.g. sec. 138, 242 or the provisions on general terms and conditions) and in sec. 19 GWB.

On Ms Pechstein's side of the balance, the GFT takes into account "*in addition to her claim to access to the courts, her fundamental right of exercising her profession freely*."[94] On the ISU's side, the GFT considers its "autonomy as an association" as enshrined in the German constitution. This fundamental right protects the ISU's right to create "*the prerequisite conditions for organized sports*". To this end "*it is of fundamental importance to ensure that the rules apply to all athletes and are implemented everywhere in accordance with uniform standards. … arbitration agreements determining the jurisdiction of a particular court of arbitration are required to ensure a uniform procedure with regard to the implementation of the rules of sports law. Particularly in the area of doping, a uniform application of the anti-doping rules of the federations and of the WADC is indispensable …*".[95] As further balancing factors the GFT takes into account that in accordance with the WADC the federations are obliged to insist on arbitration agreements, that Germany has ratified the International Convention against Doping in Sport on 19 October 2005, which supports the principles of the WADC, and that the International Olympic Committee makes its recognition of international sports federation subject to their compliance with the rules enshrined in the WADC.

According to the GFT, the arbitration agreement between the ISU and Ms Pechstein reflects an objective balancing of both their interests and, thus, does not constitute an abuse of a dominant market position within the meaning of sec. 19 para. 1 GWB. The GFT holds that not only the federations, but "*more particularly, the athletes benefit from the aforementioned advantages of sports arbitration, since these depend on fair*

[94] Cf. marg. No. 58.
[95] Cf. marg. No. 59.

conditions during competition, in order to be able to exercise their sport."[96] These advantages of sports arbitration can only be guaranteed "*at present … by the CAS as a globally recognized court of sports arbitration."*[97] The GFT also considers that the guarantees of independence and neutrality which the CAS offers are adequate to protect Ms Pechstein's "*fundamental right of access to justice and free exercise of her profession … to the greatest possible extent …[since] the list of CAS arbitrators basically contains a sufficient number of independent and neutral persons [and because the ISU] as the opposing party in these proceedings, does not have institutional supremacy in the process of drawing up the list of arbitrators and the composition of the arbitral tribunal. Moreover … the Procedural Rules of the CAS contain suitable regulations in case of conflict of interest [and] there is also the option … of having the arbitral awards of the CAS reviewed by the federal court of Switzerland to a certain extent. … Further than this there is no right for a decision to be issued specifically by a German state court."*[98]

c) Other Concurrent Legal Standards

Finally, the GFT notes that the balancing of interest made in the context of sec. 19 para. 1 GWB does not differ from the one provided in European competition law (Article 102 TFEU)[99] and that the question whether the right of access to state courts has been waived "voluntarily" cannot be answered differently depending on the application of either German law or Art. 6 para. 1 ECHR[100].

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[96] Cf. marg. No. 62.
[97] Cf. marg. No. 62.
[98] Cf. marg. No. 62.
[99] Cf. marg. No. 66.
[100] Cf. marg. No. 65.

D. Comment

1. The relevant Conflict-of-Law Rules

The GFT's viewpoint in respect of the applicable law can only be followed as regards the result. The reasoning, however, must be rejected. The conflict-of-law provisions enshrined in the GPIL (as amended at the time) are not applicable in the case at hand. Instead, they are superseded by the respective provisions in the NYC. The NYC not only deals with the recognition and enforcement of (foreign) awards, but also with the recognition of (foreign) arbitration agreements (cf. Art. II para. 3 NYC).[101] An arbitration agreement is considered to be "foreign" if the seat it provides for (future) arbitration is not in the country where recognition and enforcement is sought.[102] In the case at hand, the arbitration agreement on which the ISU relied before the German courts provided for arbitration in Switzerland (cf. Art. R28 CAS Code)[103]. Consequently, the NYC is applicable and the conflict-of-law rules contained therein take precedence over any provisions of national law (within the limits of the so-called most-favorable-law provision contained at Art. VII NYC).

According to the – nearly unanimous – view in legal literature, Art. V para. 1 lit. a NYC must be applied by analogy when

[101] Cf. STAUDINGER/HAUSMANN, 2002, Anhang II zu Art. 27–37 EGBGB no. 303; MÜKOZPO/ADOLPHSEN, 4th ed. 2013, Annex sec. 1061 Art. II NYC No. 26; HAAS, in Weigand (Ed.) Practitioner's Handbook on International Arbitration, 2002, Part III, Art. II No. 6; WILSKE/FOX, in Wolff (Ed.) New York Convention, Art. II No. 204 ff.

[102] SCHRAMM/GEISINGER/PINSOLLE, in Kronke/Nacimiento/Otto/Port (Eds.) Recognition and Enforcement of Foreign Arbitral Awards, 2010, Art. II p. 41 et seq.; HAAS, in Weigand (Ed.) Practitioner's Handbook on International Arbitration, Part 3 Art. II No. 5 et seq.

[103] The provision reads as follows: "*The seat of CAS and of each Arbitration Panel ("Panel") is Lausanne, Switzerland. However, should circumstances so warrant, and after consultation with all parties, the President of the Panel may decide to hold a hearing in another place and may issue the appropriate directions related to such hearing.*"

dealing with the recognition of a foreign arbitration agreement.[104] Thus, the substantive validity of such an arbitration agreement must be examined in accordance with the law chosen by the parties or, in the absence of such a choice (as in the case at hand), in accordance with the law of the country where the award was (or would be) issued. Art. V para. 1 lit. a NYC, consequently, clearly prescribes the applicability of Swiss law with respect to the substantive validity of the arbitration agreement.

According to Art. II para. 3 NYC, a court may refuse to recognize the arbitration agreement – *inter alia* – if the latter is "null and void". This may be the case if the content of the arbitration agreement is in violation of core principles of the state where recognition and enforcement is sought.[105] The predominant view holds that Art. V para. 2 lit. b NYC must be applied by analogy.[106] It provides that recognition and enforcement may be refused "*if the recognition or enforcement of the award would be contrary to the public policy of that country*." Therefore, recognition of the arbitration agreement in favor of the CAS can be denied if the arbitration agreement violates German public policy.

2. The Public Policy Exception

The public policy exception under German law must be construed narrowly. Only in exceptional circumstances may a court refuse recognition of a foreign arbitration agreement based on Art. V para. 2 lit. b NYC. The threshold is not met if the arbitration agreement would be invalid according to

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[104] HAAS, in Weigand (Ed.) Practitioner's Handbook on International Arbitration, 2002, Part III, Art. II No. 59 et seq.; WOLFF, in Wolff (Ed.) New York Convention, 2012, Art. II No. 42 seq., 164 et seq., 227 et seq.; BERGER/KELLERHALS, International Domestic Arbitration in Switzerland, 3rd ed. 2015, No. 328.

[105] WILSKE/FOX, in Wolff (Ed.) New York Convention, 2012, Art. II No. 307.

[106] SOLOMON, in Balthasar (Ed.) International Commercial Arbitration, 2016, § 2 No. 131.

German (mandatory) law. It is only met where the recognition of the (foreign) arbitration agreement would manifestly violate basic notions of German law, such as the fundamental freedoms enshrined in the German constitution.[107] The public policy exception covers both substantive and procedural provisions.[108] According to long-standing jurisprudence, national and European competition law[109] (as well as the right of access to justice according to the ECHR[110] and the German Constitution) form part of the public policy exception under German law.

3. The Type of Legal Protection Granted to the Athlete

The GFT clearly differentiates in its decision between an "involuntary" waiver of access to state courts (which is invalid *per se*) and a situation of unequal bargaining power ("heteronomy"). Whereas in the latter case the validity of the arbitration agreement must be assessed based on a balance of the contracting parties' interests, an involuntary waiver, according to the GFT, covers cases "*where physical or psychological coercion have been used, where the party waiving its rights was misled, or was not aware of the significance and scope of his/her declaration or where a respective declaration of intent was never even made, at least not consciously*."[111] The GFT – in other words – adopts a rather restrictive conception of the term "involuntary waiver". Cases

[107] GFT (BGH) NZG 2014, 789, 790; NAGEL/GOTTWALD, Internationales Zivilprozessrecht, 7th ed. 2013, § 18 No. 218.

[108] NAGEL/GOTTWALD, Internationales Zivilprozessrecht, 7th ed. 2013, § 18 No. 218.

[109] MüKoGWB/Säcker, 2nd ed. 2015, sec. 1 No. 46; Haus NZKart 2016, 366, 367, ROMBACH SchiedsVZ 2015, 105, 110; ADOLPHSEN SPuRt 2016, 46, 50; HAAS, in Mueller/Rigozzi (Eds.) New Developments in International Commercial Arbitration 2012, 2012, p. 47 et seq.

[110] BECKOK-ZPO/WILSKE/MARKERT, Stand 15.3.2014, Sec. 1061 No. 49; KODEK, in Liebscher/Oberhammer/Rechberger (Ed.) Schiedsverfahrensrecht, Bd. I, 2012, No. 1/71 f.; HAAS SchiedsVZ 2009, 73, 77 seq.; RUZIK, in Tietje/Kraft/Sethe (Ed.) Beiträge zum Transnationalen Wirtschaftsrecht, 2003, pp. 3, 25.

[111] Marg. No. 54.

of unequal bargaining power – contrary to what the first instance court in the "Pechstein case" held –[112] do not fall into this category.

Despite criticism expressed in legal literature,[113] the approach taken by the GFT is perfectly in line with general contract law. Contracts that are characterized by unequal bargaining power are a frequent and commonplace occurrence. However, these contracts are not – as a matter of principle – invalid for the mere reason that one of the parties has supreme bargaining power. There is nothing to be said against the execution of such contracts as long as they provide for an objective balancing of interests. This approach of the GFT is also in line with the jurisprudence of the organs of the ECHR with respect to Art. 6 para. 1 ECHR.[114] "*There is no doubt that a voluntary waiver of court proceedings in favour of arbitration is, in principle, acceptable from the point of view of Art. 6* [para. 1 ECHR]*.*"[115] The organs of the ECHR have denied the qualification of voluntariness within the above meaning in cases where a waiver was given under "duress" or "constraint".[116] However, the mere existence of unequal bargaining power between the parties or one party's economic dependency on the other party does not in itself constitute

[112] District Court (LG) Munich SchiedsVZ 2014, 100, 105: "*Eine Schiedsvereinbarung mit dem strukturell unterlegenen Sportler kann daher nur wirksam sein, wenn ihm ein echtes Wahlrecht dahingehend zusteht, ob über ihn betreffende Streitigkeiten ein ordentliches Gericht oder die Sportschiedsgerichtsbarkeit befinden soll.*"

[113] See e.g. PRÜTTING SpuRt 2016, 143, 147; contra ADOLPHSEN Spurt 2016, 46, 48; ROMBACH SchiedsVZ 2015, 105, 109.

[114] HAAS ASA Bull. 2014, 707 et seq.

[115] ECtHR (23 February 1999) *Suovaniemi and others v. Finland* (Application No. 31737/96); see also ECtHR (27. February 1980), *Deweer v. Belgium* (Application No. 6903/75), No. 49.

[116] EComHR (27 November 1996) *Nordström-Janzon & Nordström-Lehtinen v. Netherlands* (Application No. 2810/95) ; EComHR (4. March 1987) *R v. Switzerland* (Application No. 10881/84); EComMR (5 March 1962) *X v. République Fédérale de l'Allemagne* (Application No. 1197/61) ; EComMR (22. October 1996) *Molin v. Turqie* (Application No. 23173/94).

"duress" or "constraint" invalidating the arbitration agreement.[117]

The fact that the GFT does not protect the athlete's free will to enter into an arbitration agreement does not deprive an athlete of all legal protection. On the contrary, the GFT makes it clear that in such cases of "heteronomy" the legal protection is to be accorded through a balancing-of-interests test, because the "stronger party" may have good and valid reasons to demand the conclusion of a certain contract. Thus, only a balancing of interests ensures that the legal positions of *both parties* are adequately taken into account.[118] The situation under German law does not differ from Swiss law. In situations of unequal bargaining power in a sports-related context, the SFT clearly differentiates between "forced" agreements to arbitrate, which are valid, and "forced" waivers of the right of appeal according to Art. 192 PILA, which are invalid.[119] Drawing this differentiation in the case at hand requires a balancing of interests as the only viable basis.[120] Its result is that an arbitration agreement in favor of the CAS is valid, because a speedy resolution of the sports-related disputes by a specialized and independent arbitral tribunal complies with the legitimate interests of all parties involved. A forced waiver of the right to appeal according to Art. 192 SPIL, by contrast, is not in the legitimate interest of the weaker party and, thus, cannot be accepted in situations of unequal bargaining power. The nuanced approach taken by the GFT in balancing the various interests of the parties is,

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117 EComHR (13 July 1990) *Axelsson and Others v/ Sweden* (Application No. 11960/86); EComHR (5 March 1962) *X v/ République Fédérale de l'Allemagne* (Application No. 1197/61);

118 SCHLOSSER SchiedsVZ 2015, 257, 263.

119 DFT 133 III 235, E. 4.3.3.

120 Cf. HAAS ASA Bull. 2014, 707, 713; RIGOZZI/ROBERT-TISSOT 2014, ASA Special Series No. 41, p. 59, p. 66 seq.; HANDSCHIN/SCHÜTZ SpuRt 2014, 179; NETZLE in ASA Special Series N. 11, 1988, 45, 54.

finally, also in line with the constant jurisprudence of the CAS.[121]

4. The Legal Foundation for the Balancing of Interests

The main part of the decision of the GFT centers on whether or not arbitration agreements in favor of the CAS pass the balance-of-interest test enshrined in sec. 19 para. 1 GWB. However, it appears questionable whether the scope of German competition law (or European competition law) is sufficiently wide to make it the appropriate legal foundation for performing such a test. The addressees of German (and, likewise, European) competition law are "undertakings", i.e. entities that engage in economic activity.[122] It is beyond doubt that international sporting federations, when engaging in ticketing, selling of TV rights or comparable economic activities, act as undertakings and must be submitted to competition law as far as these activities are concerned.[123] Whether the same applies when implementing and enforcing anti-doping rules comprising an arbitration clause vis-à-vis its athletes, is open to question. At least at first sight it seems debatable whether providing for dispute resolution in doping-

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[121] See in this respect also the jurisprudence of the CAS, CAS 2010/A/2311&2312, *Stichting Anti-Doping Autoriteit Nederland (NADO) & the Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB) v. W*, No. 7.6; CAS 2006/A/1119, *UCI v. Iñigo Landaluce Intxaurraga & Real Federación Española de Ciclismo (RFEC)*, No. 20; CAS 2012/A/3031, *Katusha Management SA v. UCI, No. 68*; CAS 2012/A/2943, *Bulgarian Chess Federation v. FIDE*, No. 8.41 et seq.; CAS 2008/A/1705, *Grasshopper v. Alianza Lima*, No. 8.2.8; CAS 2011/A/2479, *Antonio Urso & Marino Ercolani Casadei v. IOC*, No. 84; CAS 2013/A/3274, *Mads Glasner v.FINA*, No. 65.

[122] Cf. for a definition of this term, BECHTOLD/BOSCH, GWB, 8th ed. 2015, sec. 1 No. 7; ZIMMER, in Immenga/Mestmäcker (Ed.), Wettbewerbsrecht, 5th ed. 2014, sec. 1 GWB No. 23 et seq.

[123] ZIMMER, in Immenga/Mestmäcker (Ed.), Wettbewerbsrecht, 5th ed. 2014, sec. 1 GWB No. 60; SCHLOSSER SchiedsVZ 2015, 257, 258.

related matters may be equaled to an exchange of goods or services on a market.[124]

In addition, the very purpose of competition law, i.e. to foster or at least protect competition among undertakings in a market, seems at odds with the activity of sports federations that try to implement a level playing field among the competitors by enacting sporting rules.[125] This conflict becomes apparent when looking at the previous instance decision, in which the Higher Regional Court (OLG) Munich justified the (alleged) breach of sec. 19 para. 1 GWB (abuse of a dominant market position) by stating that: "*it can be assumed that … if free competition prevailed on the market for the organization of international competitions … an arbitration clause in favor of the CAS would not be agreed upon under normal circumstances.*"[126] However, uniform application of anti-doping rules to all athletes can only be ensured by a single, centralized supreme arbitration instance, i.e. a monopolistic player on the "market" for dispute resolution. Competition in the market for sport dispute resolution, thus, is detrimental and ought to be avoided in the endeavor of installing and securing a level playing field for all competitors.[127] This is even acknowledged by the Higher Regional Court (OLG) Munich in the same decision, when it states that "*in fact, sound and weighty arguments speak in favor of avoiding to leave to the many potentially competent national courts the duty to deal with disputes arising between athletes and International federations in the framework of international competitions, and instead to refer them to a single sports tribunal. In particular, a uniform jurisdiction and procedure can preclude that similar cases be decided*

[124] SCHLOSSER SchiedsVZ 2015, 257, 258 seq.
[125] SCHLOSSER SchiedsVZ 2015, 257, 259; ADOLPHSEN SPuRt 2016, 46, 49.
[126] SchiedsVZ 2015, 40 marg. No. 94.
[127] ADOLPHSEN SPuRt 2016, 46, 49.

differently, and therefore safeguard the equal opportunities of athletes during the competitions."[128]

It appears from the above that competition law is not perfectly suited to direct and regulate the full bandwidth of a sport federation's activities. What conclusions are to be derived, however, is a matter of much debate.[129] Some scholars favor a wide interpretation of the term "undertaking", thereby submitting the totality of a federation's activities to competition law.[130] This broad application of competition law is compensated by a respective proportionality test when it comes to assessing the various sporting activities of the federation.[131] The opposing view holds that the term "undertaking" allows for a sectorial approach, i.e. one that acknowledges that an entity with a variety of activities can qualify as an undertaking for some fields of activity, because they are essentially economic, but not for others that are not economic but genuinely sportive.[132]

The GFT has left this question as to the scope of applicability of competition law undecided in the "Pechstein case". It states explicitly that "[t]*he question whether the applicability of the prohibition of abuse under antitrust law is excluded because the …* [ISU] *was not acting as an undertaking when entering into the arbitration agreement, but rather in accordance with its obligation to provide exclusive jurisdiction of CAS for legal remedies against decisions in anti-doping proceedings resulting from the participation in an international sporting event, or in cases involving international top athletes (Art. 13.2.1 in conjunction with Art. 23.2.2 WADC), may be left unanswered. In any case, the behavior of the …* [ISU] –

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[128] SchiedsVZ 2015, 40 marg. No. 89.

[129] See ADOLPHSEN SPuRt 2016, 46, 49; undecided ZIMMER, in Immenga/Mestmäcker (Ed.), Wettbewerbsrecht, 5th ed. 2014, sec. 1 GWB No. 60.

[130] HAUS NZKart 2016, 366 369.

[131] ADOLPHSEN SPuRt 2016, 46, 49.

[132] SUBIOTTO [2010] E.C.L.R Issue 8, 323.

following a comprehensive evaluation of the interests of both parties, taking into account the aim of the Act against Restraints of Competition of safeguarding the freedom of competition – does not constitute any abuse of its dominant position in the market."

Interestingly, the term "undertaking" within the meaning of the GWB is, in principle, to be construed in accordance with the respective term in European competition law (Art. 101 seq. TFEU).[133] On a European level, however, it appears that the ECJ follows a broad approach with respect to the term "undertaking". In the "case Meca-Medina" the ECJ[134] has argued as follows: "… *the Court of First Instance held that the fact that purely sporting rules may have nothing to do with economic activity, with the result that they do not fall within the scope of Articles 39 EC and 49 EC, means, also, that they have nothing to do with the economic relationships of competition, with the result that they also do not fall within the scope of Articles 81 EC and 82 EC … the Court of First Instance made an error of law.*" However, it must be acknowledged that the ECJ's reasoning in this decision is somewhat contradictory[135] and that in other decisions it has advocated a sectorial approach with respect to the term "undertaking".[136]

5. Judicial Restraint

The outcome of the balance-of-interest test is – according to the GFT – identical, irrespective of the legal foundation

[133] BECHTOLD/BOSCH, GWB, 8th ed. 2015, sec. 1 No. 8 seq.

[134] ECJ (18 July 2006) *David Meca-Medina and Igor Macjen vs. Commission of the European Communities*, C-519/04 P.; cf. for an analysis of this jurisprudence SUBIOTTO [2010] E.C.L.R Issue 8, 323 et seq.

[135] SCHLOSSER SchiedsVZ 2015, 257, 259 seq.; cf. ADOLPHSEN SPuRt 2016, 46, 49; also ZIMMER, in Immenga/Mestmäcker (Ed.), Wettbewerbsrecht, 5th ed. 2014, sec. 1 GWB No. 60.

[136] See in detail SUBIOTTO [2010] E.C.L.R Issue 8, 323, 327 seq.; SCHLOSSER SchiedsVZ 2015, 257, 259 seq.

(general contract law, competition law, constitutional rights, Art. 6 ECHR, etc.) on which it is based. This is hardly surprising, given that the interests of the parties to be taken into account do not differ depending on which legal concept is used for the balancing test.

The interests to be pondered in this test have been correctly addressed by the GFT; they comprise, on the one hand, Ms Pechstein's right of access to state courts as well as her constitutionally protected right to exercise her sporting profession and, on the other hand the federation's "*right to promote sports … by creating the prerequisites for organized sport*".[137] Furthermore, the GFT takes into account the specificities and the international character of the industry by stating that it is "*generally recognized, particularly in the area of sport, that arbitration is required to ensure a uniform procedure with regard to the implementation of the rules of sports law …* [and] *that a uniform court of arbitration for sport can contribute to the development of international sports law*".[138] In addition, the GFT acknowledges the relevant legal framework in which this industry operates, i.e. the WADC, the UNESCO Convention against Doping in Sport (to which Germany is a contracting state), the Olympic Charter and the revised law on German arbitration, all of which accept the valid conclusion of an arbitration agreement in the present circumstances.

When balancing these interests the GFT rightly finds that Ms Pechstein was not exposed to any prejudice,[139] since sports arbitration as such is in the objective interests of all parties involved and because the CAS dispute resolution system, in particular, did not put her at a disadvantage. According to the GFT, the "*list of CAS arbitrators basically contains a sufficient*

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137 Cf. marg. No. 59.

138 Cf. marg. No. 59; see also ROMBACH SchiedsVZ 2015, 105, 108; ADOLPHSEN SPuRt 2016, 46, 47; contra HAUS NZKart 2016, 366, 368.

139 Contra HAUS NZKart 2016, 366, 367 seq.

number of independent and neutral persons"[140] and the CAS Code as well as Swiss arbitration law, under which the CAS Code operates, provide for sufficient legal protection with regard to the impartiality and neutrality of the arbitral tribunal.

Fortunately, and unlike the Higher Regional Court (OLG) Munich[141], the GFT, when looking through the lens of competition law, resisted any temptation to apply a particularly strict standard with respect to the independence and impartiality of the arbitral tribunal.[142] The threshold of what is an acceptable degree of independence and impartiality under German public policy must be assessed according to a uniform standard. Thus, the GFT correctly refers to, and applies its general practice in the area of recognition and enforcement of foreign judgments and foreign arbitral awards.[143] This general standard of procedural independence is both adequate and characterized by judicial restraint. Therefore, it should not depend on what (randomly chosen) lens the court in question is using (competition law, ECHR, general contract law) when performing its public policy analysis with respect to independence and impartiality.

As for the general accepted standard under German public policy, reference is made to a GFT decision concerning an arbitral award issued by the permanent court of arbitration of the (former) Chamber of Commerce of an Eastern European country. The defeated party in that case had objected to the recognition of the arbitral award in Germany on the grounds that the Yugoslavian arbitrators all "*belonged to, or had close*

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[140] Cf. marg. No. 62.

[141] Cf. ROMBACH SchiedsVZ 2015, 105, 109: Higher Regional Court (OLG) Munich tries to enforce what it deems to be the "right result".

[142] See the criticism in this respect in HAAS ZVglRWiss 2015, 516, 526 seq.; cf. also ADOLPHSEN SPuRt 2016, 46, 50.

[143] Cf. marg. No. 62; for an overview of (comparable) cases cf. SCHLOSSER SchiedsVZ 2015, 257, 261 seq.

links to, a Yugoslavian state organisation" and that consequently arbitral tribunals formed in East European countries, where the economy is controlled by public institutions (e.g. Chambers of Commerce), are neither independent nor unbiased. Such arbitral tribunals – so the losing party alleged – were not committed to administering justice in a non-partisan, equitable manner. On the contrary, it alleged, they were government bodies whose task was to ensure that the economic interest of their country was served.[144] The GFT deemed such general "speculations" to be insufficient and pointed out that in order to assume a violation of public policy there would have to be *"relevant facts in the individual case"* that speak against the independence and impartiality of the arbitral tribunal. Since, however, the party in the case in question had not submitted any arguments in this regard, the GFT saw no reason for refusing the recognition of the award on the grounds of a violation of public policy.[145]

It is in light of this (general) standard that the GFT concludes that the CAS system may possibly be improved in relation to certain aspects,[146] but that "*the statutes of the CAS, as they currently stand, contain procedural rules for the appointment of arbitrators which can be considered as acceptable*".[147] This conclusion of the GFT is also in line with Swiss jurisprudence, considering that the SFT has stated that "*the CAS in its present form is beyond doubt an institution that leaves room for improvement*."[148]

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[144] GFT (BGH) NJW 1969, 2093, 2094; cf. in relation to such cases see OTTO/ELWAN, in Kronke/Nacimiento/Otto/Port, Recognition and Enforcement of Foreign Arbitral Awards, 2010, p. 370 et seq.
[145] GFT (BGH) NJW 1969, 2093, 2095.
[146] Cf. also SCHLOSSER SchiedsVZ 2015, 257, 262.
[147] Cf. marg. No. 50.
[148] DFT 129 III 445, E. 3.3.3.3.